

## Written evidence submitted by News Media Association

### The News Media Association's response to the Digital, Culture, Media and Sport Sub-committee on Online Harms and Disinformation's [Inquiry](#): Online safety and online harms

#### 1. Background

- 1.1. The News Media Association (“**NMA**”) is the voice of UK national, regional and local newspapers in all their print and digital forms - a £4 billion sector read by 49.2 million adults every month in print and online. Our members publish over 900 news media titles - from The Times, The Guardian, the Daily Mail and the Daily Mirror to the Yorkshire Post, Kent Messenger, and the Monmouthshire Beacon. Our membership spans the industry - from the largest groups to small, independent, family-owned companies publishing one or two local titles. Collectively these publishers are by far the biggest investors in news, accounting for 58 per cent of the total spend on news provision in the UK.
- 1.2. The NMA welcomes the inquiry on online safety and online harms (the “**Inquiry**”) led by the Digital, Culture, Media and Sport Sub-Committee on Online Harms and Disinformation (the “**Committee**”), which, as stated by Julian Knight MP, the Committee Chair, seeks “*evidence on what the Bill doesn't currently address and how improvements can be made to better serve users now and in the future*”.
- 1.3. We are pleased that the Government is seeking to create mechanisms in the Online Safety Bill (the “**Bill**”) with the intention to exempt news publishers (and their content) from the scope of the Bill. We welcome Clause 40, which provides a comprehensive definition, and we are pleased that recognised news publisher content falls outside of ‘regulated content’. By extension, we are pleased that news publisher content also falls outside the ‘legal but harmful’ risk assessment duties on platforms (Clauses 45 and 46).
- 1.4. However, despite the Government's clear intention to protect news publisher content, the Bill's current drafting does not yet satisfy the Government's aim to ensure that news publishers remain out of scope.

*“1.10 Freedom of expression is at the heart of the regulatory framework and there will be strong safeguards to ensure that media freedom is upheld. **Content and articles produced and published by news services on their own sites do not constitute user-generated content and so are out of scope.** The government recognises the importance of below-the-line comments for enabling reader engagement with the news. **User comments below articles on news publishers' sites will be explicitly exempted from scope.** This will be achieved via the low-risk functionality exemption (see above).*”

*1.11 Journalistic content is shared across the internet, on social media, forums and other websites. Journalists use social media services to report directly to their audiences. This content is subject to in-scope services' existing content moderation processes. This can result in journalistic content being removed for vague reasons, with limited opportunities for appeal. Media stakeholders have raised concerns that regulation may result in increased takedowns of journalistic content.*”

*1.12 In order to protect media freedom, legislation will include robust protections for journalistic content shared on in-scope services. The government will continue to engage with a wide range of stakeholders to develop proposals that protect the invaluable role of a free media and ensure that the UK is the safest place in the world to be online.”<sup>1</sup>*

1.5. This response sets out ways in which the Government’s aim could be more clearly achieved in the Bill. To assist fully with the Inquiry, and wider Parliamentary scrutiny of the Bill, we are seeking advice from counsel which we hope will also generate drafting amendments that address these issues and more clearly articulate the Government’s intentions. We welcome further discussion with the Committee on these issues and the Bill more broadly.

## **2. Response**

### **2.1. Exemption for News Publishers**

2.1.1. The Bill aims to provide two forms of exemption for news publishers: (i) an exemption for news publishers’ websites from the scope of the legislation generally; and (ii) an exemption for news publisher content, from some of the duties of care, where that content appears on, or is shared via, in-scope services.

2.1.2. In overview, the general exemption for publishers’ websites is provided in Paragraph 5 of Schedule 1 (the “*limited functionality services*” exemption). The specific content-based exemptions are found in Clause 18, which limits the application of the duties of care for search services, and Clause 39, which defines regulated content for user-to-user services. This section of our response will address each in turn and will then focus on redress.

#### *News Publishers’ Websites*

2.1.3. Without an exemption, any news publisher’s website with links to the UK that allows users to upload or share content (including by commenting on an article) would be in-scope of the Bill and a regulated service. It appears to us, though differing readings are possible, that the Bill intends to exempt news publishers’ websites *per se* from the scope of the Bill by virtue of the limited functionality exemption in Schedule 1 Paragraph 5. Provided that a news publisher’s website satisfies the requirements in Schedule 1 Paragraph 5, then the intended effect of Paragraph 5 and Clause 3(7) is such that they are not a regulated service, and the website is intended to remain outside the scope of the legislation.

2.1.4. However, this is not clear on the face of the Bill, which must expressly state that Schedule 1 Paragraph 5 applies to ‘recognised news publishers’ as defined in Clause 40. Without such an express statement, news publishers may face an unnecessary hurdle to rely on the very mechanism that has been designed to explicitly exempt their services. Instead, the current exemption is framed by reference to the functionality of inter-user communication on a service, as opposed to either the nature of the website’s content or the identity of the Service Provider. This approach seems unnecessary given the Government’s express intention is to exempt news publishers.

2.1.5. Furthermore, by framing the exemption this way, any news publisher website which goes further than the inter-user functionalities described in Schedule 1 Paragraph 5 will be a regulated service and outside the scope of the exemption. Many news publishers offer

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<sup>1</sup> [Online Harms White Paper](#): Full Government Response to the Consultation (emphasis added).

various functions for users on their websites that may be deemed as outside of the listed functionalities in Schedule 1 Paragraph 5, including games and online workshops. As currently drafted, the Bill would not exempt all news publisher websites as the Government has stated it intends to do, and would act to disincentivise news publishers from investing in features and services as part of their websites. News would seemingly face the choice of remaining a static news site sitting outside of the scope of the Bill's framework, or choose to innovate but risk all of their online services being subject to the obligations of the new regulation.

- 2.1.6. In addition, paragraph 5(a) of Schedule 1 is problematic. The words "*relating to*" should not introduce a test of relevance by reference to the subject matter of the content, which we believe was never the Government's intention. The wording should also be amended to be clear that "*communicate*" specifically means communication with other users. The real issue is whether the comment or review function is ancillary to provider content (i.e. it is not a freestanding chat functionality). This is also important to ensure that a function to communicate with the publisher or its journalists would not undermine the news publisher exemption.
- 2.1.7. We also note that the limited functionality exemption can be repealed or amended by the Secretary of State by regulation under Clause 3(9)-(11) of the Bill. The NMA opposes this 'Henry VIII clause' that stands to circumvent the democratic process – it must not be repealed other than by primary legislation.
- 2.1.8. If we are correct in our reading of the Bill, and the overall exemption for news publishers rests on the limited functionality exemption, it is very unsatisfactory, because it means news publishers' websites are defined by a subsidiary service, readers' comments, rather than their prime function, which is the provision of news and comment. It would also limit innovation and can be removed at will by the Secretary of State.
- 2.1.9. There is a very good definition of news publishers in Clause 40 of the Bill. To address the issues above and ensure that the exemption is effective, we believe the simple solution is to add a sub-clause to Clause 2, to make it clear that news publisher content, whether published on their own websites or distributed by user-to-user or search services, is out of the scope of the Bill and that this rests on the fact that it is published by news publishers as defined in Clause 40.
- 2.1.10. Schedule 1 Paragraph 5 should be amended to (i) make clear that it relates to readers' comments sections on news publishers' websites; (ii) to accurately reflect how user-to-user communication works on news publishers' websites; and (iii) ensure it does not limit innovation.

#### *Exempting News Publisher Content Which Appears on In-scope Services*

- 2.1.11. The second category of exemption is intended to apply where news publisher content is posted onto, or shared via, in-scope user-to-user services. This is achieved in the Bill by Clause 39 which defines "*regulated content*", and which excludes "*news publisher content*" from its scope. This then excludes news publisher content from the scope of the safety duties imposed by the Bill on in-scope services.
- 2.1.12. In the case of user-to-user services, for content to be "*illegal content*", "*content that is harmful to children*", or "*content that is harmful to adults*" the content must also be

regulated content.<sup>2</sup> By excluding news publisher content from these categories, news publishers are, rightly, not required to apply the safety duties under Clauses 9-11 of the Bill to their content.

2.1.13. In respect of search services, the exemption in Clause 18(2) is more straightforward. It provides that none of the duties imposed on search providers extend to recognised news publisher content, including the duty in Clause 23 concerning rights to freedom of expression and privacy.

#### *Redress*

2.1.14. Crucially, however, these exemptions have a fundamental drawback that risks undermining the news publisher exemption itself. While the Bill makes it clear that the duty of care does not apply to news publishers, and that platforms and search engines, therefore, do not face any sanction if they do not apply their codes of conduct to news publisher content when it is shared on social media, neither are they under any duty of care *not* to apply their codes of conduct to it. The impact of this is that the Bill creates significant incentives through high penalties to make platforms and search engines err on the side of caution whenever their algorithms encounter content that might put them at risk and take a zealous approach to police and take-down news publisher content. Indeed, we know the platforms are already taking down legitimate but controversial news publisher content in the US in response to vociferous lobby groups.

2.1.15. Clauses 39-40 do not stop platforms blocking news publisher content, and, as described more fully below, the protections for journalistic content in Clause 14 are insufficient to do so. News is a perishable commodity; therefore, an appeal to the platform, followed by another to Ofcom, which may take weeks or months, has no value at all as a protection for news publishers.

## 2.2. ***Duty to protect Journalistic Content***

2.2.1. The Bill aims to create a duty on in-scope Category 1 Service Providers to protect journalistic content on in-scope services via Clause 14 of the Bill. This provision is accompanied by a redress mechanism for the wrongful removal of journalistic content by platforms.<sup>3</sup> This section of the response will address each in turn.

### *Category 1 Services*

2.2.2. Only Category 1 Services are subject to the proposed duty to protect “*journalistic content*” defined in Clause 14 as: (i) regulated content or news publisher content which is (ii) “*generated for the purposes of journalism*”; and (iii) “*UK linked*”. The effect of (i) is that the Clause 14 duty will apply to both regulated and exempt journalistic content on in-scope services. It will apply equally to an article shared by a recognised news publisher, a post by a journalist or small publisher which does not meet the Clause 40 definition, and a post by a “*citizen journalist*” provided, in each case, the content is UK linked and generated for the purposes of journalism.

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<sup>2</sup> For illegal content see Clause 41(2)(a), for content that is harmful to children see Clause 45(2)(a) and for content that is harmful to adults see Clause 46(2)(a).

<sup>3</sup> Clause 14(3)-(6).

- 2.2.3. This raises three primary concerns: (i) there is no meaningful standard for decision making involving journalistic content; (ii) there is no specificity in provisions for handling complaints; and (iii) the proposed system of redress (which stops with the Service Provider), as outlined below, is not fit for purpose.
- 2.2.4. It is notably not in the interest of many Service Providers to protect journalistic content. Indeed, Service Providers may face large fines for not removing harmful content, which incentivises them to be broad and heavy-handed in applying their safety duties. There is every incentive for platforms to take down journalistic content via blanket application of algorithms that may not distinguish journalistic or news publisher content, no repercussions for doing so and scant redress for reinstatement of that content.
- 2.2.5. In addition, there is no equivalent of the Clause 14 duty for search engines, which is a significant lacuna that must also be addressed.
- 2.2.6. The current drafting of Clause 14 of the Bill leaves it to the Service Provider to decide how freedom of expression is taken into account when preparing its terms of service. The requirement is then to apply those terms of service consistently. This is insufficient. The Bill incentivises platforms to err on the side of caution and to take down any potentially risky content. Therefore, the Bill must go further than requiring Category 1 Services to “*take into account*” the importance of the free expression of journalistic content when designing their systems of processes, and instead set a positive standard to be applied when they make decisions about it.
- 2.2.7. There is precedent on which such a duty can be based which we believe can be achieved by drafting a clear and watertight news publisher exemption to avoid the conflicting parallel system of regulation created by the journalistic protections. The best way to address this would be by: (i) adding a sub-clause to Clause 2, to make it clear that news publisher content is out of the scope of the Bill when it is distributed by user-to-user or search services, as well as when published on news publishers’ own websites, as set out in paragraph [2.1.9](#) above; together with (ii) a duty on Service Providers not to remove such content.

### *Redress*

- 2.2.8. The Bill provides that Category 1 Services must make available a dedicated and expedited complaints procedure available to either the user who uploaded the content, or its creator<sup>4</sup> and to ensure that content is “*swiftly reinstated*” in the event of a complaint being upheld.<sup>5</sup> This, however, is inadequate to protect news content.
- 2.2.9. It is inappropriate for the terms ‘journalistic content’, ‘content of democratic importance’, and what is meant by ‘protect’ and ‘take in account’, to be determined by platforms. The current draft also creates a conflicting parallel system of regulation for journalistic content ultimately overseen by Ofcom, which is entirely inappropriate and unworkable. For any exemption and redress procedures to be fit for purpose, they must be effective in practice and the swiftness of redress specified must be commensurate to the short shelf life of news.
- 2.2.10. Furthermore, we agree with the Chair of the House of Lords Communications Committee that giving citizen journalists (i.e., any member of the public) the same protections as

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<sup>4</sup> Defined in Clause 14(11) as the publisher itself.

<sup>5</sup> Clause 14(3)-(6).

professional journalists could [overwhelm a fast-track appeals process](#), further delaying redress.

2.2.11. These issues can only be meaningfully addressed if news publishers have a watertight exemption, as originally envisaged by Government, which would mean extending the duty of care so that social media companies are obliged not to apply their codes of conduct to news publisher content. General oversight by Ofcom of this process is neither appropriate nor practicable, and we shall put forward a workable alternative.

### **3. Next Steps**

3.1. In summary: (i) news publisher content needs to be entirely and clearly out of scope; and concurrently (ii) platforms must be under a positive duty not to apply their codes of conduct to such content. Otherwise, this will pose grave consequences for the news industry given the incentives in the Bill for platforms to police all content defensively, the paucity of redress mechanisms for news publishers.

**3 September 2021**