Written evidence submitted by the Guardian Media Group

Guardian Media Group submission to DCMS sub-Committee inquiry into Online Safety and Online Harms

About Guardian Media Group

Guardian Media Group (GMG) is one of the UK's leading commercial media organisations and a British-owned, independent, news media business. GMG is the owner of Guardian News & Media (GNM), which is the publisher of theguardian.com and the Guardian and Observer newspapers, both of which have received global acclaim for investigations, including persistent investigations into phone hacking amongst the UK press, the Paradise Papers and Panama Papers, Cambridge Analytica and the Pegasus Project. As well as being the UK's largest quality news brand, the Guardian and Observer have pioneered a highly distinctive, open approach to publishing on the web and it has achieved significant global audience growth over the past 20 years. Our endowment fund and portfolio of other holdings exist to support the Guardian's journalism by providing financial returns.

Introduction

GMG welcomes the opportunity to submit a short response to the Digital, Culture, Media and Sport Sub-committee on Online Harms and Disinformation's inquiry into Online Safety and Online Harms. The advent of global search and social platforms has created new opportunities and challenges for citizens and also for journalism. They have exacerbated some existing social harms and created new ones. Many of the harms referenced in the draft Online Safety Bill are real, serious and are already illegal in the UK. The Guardian and Observer have reported extensively on many of them.[1] However, where harms manifest themselves in speech, which is not itself unlawful, a careful balancing act needs to be undertaken to ensure freedom of speech is not unnecessarily or disproportionately impacted.

It is now widely accepted that the current approach to regulation of online platforms requires principles-based reform. Over recent years it has become clear, largely through journalistic reporting rather than regulatory action, that the senior management of the platforms themselves, are confused about their legal and ethical role under the current regulatory framework[2]. They are unclear whether existing regulation allows them to intervene to remove content, or whether by intervening, this automatically means that they take on editorial responsibilities. The platforms themselves have an apparent appetite to embrace clarity about their role and responsibilities online.[3][4] It is clear too, that the threat of regulation is driving more proactive steps being taken by the platforms themselves.[5]

In this short response, we:

- highlight inherent tensions in the government's approach to the Online Safety Bill (OSB);
- welcome the Bill's acknowledgement of the need for an exemption for news publisher's own services, as well as where news publisher content is distributed on 3rd party platforms, and;

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[1] E.g.s include Cambridge Analytica investigations, Facebook Files, Christchurch shootings and others.

[2] https://www.theverge.com/interface/2019/4/3/18293293/youtube-extremism-criticism-bloomberg

[3] https://www.theguardian.com/technology/2019/mar/30/mark-zuckerberg-calls-for-stronger-regulation-of-internet

[4] https://www.bloomberg.com/news/articles/2019-05-17/facebook-s-sandberg-says-breaking-it-up-won-t-solve-the-problems

[5] https://www.bbc.co.uk/news/uk-48740231

- outline ways in which that exemption could be clarified to meet the government's objective.

Relevant inquiry questions

- **How has the shifting focus between 'online harms' and 'online safety' influenced the development of the new regime and draft Bill?**
- **Are there any contested inclusions, tensions or contradictions in the draft Bill that need to be more carefully considered before the final Bill is put to Parliament?**

We are concerned that proposals in the OSB will create unnecessary tensions, due to a shift in emphasis as to how social media platforms are policed. The OSB not only seeks to regulate harms that have been judged illegal by the UK Parliament, but seeks to regulate content that is legal, but deemed harmful by the government. The lack of clarity on obligations to regulate legal but harmful content, backed by potential fines and other sanctions if in-scope platforms fail to do so, has the potential to chill legitimate freedom of expression on these platforms.

Such imprecision is not necessary, given that the UK Parliament has experience of passing laws that restrict speech, whilst also meeting long standing legal obligations in relation to protecting free expression[6]. It is on the basis of that tradition, that we do not believe that the same regulatory framework should be applied to illegal and legal harms. Legal but harmful content includes harms that are subjective and vague such as 'disinformation' and 'intimidation'. We agree, for example, that the introduction of action against subjective harms raises potential issues in relation to the right to free expression, including in relation to minority groups, such as the LGBTQ+ community.[7]

Similarly, the OSB includes obligations on in-scope platforms to combat the "evolving threat of disinformation and misinformation". Judgements as to which individual pieces of content represent disinformation or misinformation would require careful subjective judgement by a human being, in order to understand the detail and nuance of any speech act. Yet we know that the scale of sharing of user generated content across companies owned by just one in-scope platform business, Facebook, means that they will most likely use machine learning and algorithms to make highly subjective decisions. Such machine driven decisions are unlikely to be able to make nuanced judgements in the way that a human editor can, and could lead to the overblocking of user content. This has the potential to lead to a significant chilling of free expression.

As well as machine learning, it is likely that in-scope platforms will rely on third parties, such as fact checkers to assess journalism distributed on those platforms. GNM has recent experience of environmental coverage being targeted by fact checkers for removal from Facebook, based on claims that the article did not provide certain context[8] to the specific points made in the article. In reality, the level of context that the complainant in question was requesting in the article, was well beyond that which would normally be provided in a journalistic context.

The ad hoc process by which fact-checking and content takedowns takes place, misses the nuance of the judgements made when publishing a story. It enables fact-checkers to condense peripheral concerns into a top line accusation suggesting that: the Guardian is misleading/producing clickbait on the environment. This enables fact checking

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6 The human rights organisation Liberty, provides a useful summary of speech offences in the UK https://www.libertyhumanrights.org.uk/human-rights/free-speech-and-protest/speech-offences

7 https://inews.co.uk/news/online-safety-bill-would-give-legal-basis-for-censorship-of-lgbt-people-stephen-fry-and-campaigners-warn-1178176

8 https://climatefeedback.org/evaluation/guardian-article-on-arctic-methane-emissions-lacks-important-context-jonathan-watts/

organisations to post articles claiming issues with a legitimate story, without putting any of the claims in that post to the journalist or the news publisher more broadly. The impact of these claims can be significant, leading to articles being demoted in News Feeds, and potentially being labelled as misinformation. The effect of such accusations on public perceptions of our journalism, and the trustworthiness of mainstream science journalism more broadly, is a significant concern. The onus to correct the labelling of articles by Facebook, is for the news publisher to contact the fact-checking organisation in order to issue a correction, or to dispute a rating. Fact checking organisations can, therefore, wield a high degree of power over the credibility of individual news articles and, over time, news sources themselves. Yet the basis on which an organisation is given official fact-checking status by Facebook, is unclear. Facebook has, for example, designated right-wing sites such as the 'Daily Caller' into a position of fact-checker, to make these sorts of decisions.[9]

Fundamentally, if a harm is too vague to be defined by policymakers, it is not reasonable to impose an obligation on platforms to make decisions as to whether a piece of content or activity reaches an unclear threshold. This aspect of the proposed OSB should be interrogated further by the sub-committee.

Relevant inquiry question - What are the key omissions to the draft Bill, such as a general safety duty or powers to deal with urgent security threats, and (how) could they be practically included without compromising rights such as freedom of expression?

We welcome the government's commitment, articulated in the OSB, to exempt news publishers (and their content) from the scope of the Bill. We believe that Clause 40 provides a comprehensive definition, and we are also 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).

The Government's intention to protect news publisher content, has been clear throughout the development of the OSB[10]. However, the Bill's current drafting does not yet satisfy the Government's aim to ensure that news publishers remain out of scope.

Detail of the proposed exemption

The Bill aims to provide two forms of exemption for news publishers:

- First, an exemption for news publishers' websites from the scope of the legislation generally, and;
- Second, an exemption for news publisher content, from some of the duties of care, where that content appears on in-scope services.

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 Publisher Websites

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[9] https://www.theguardian.com/technology/2019/apr/17/facebook-teams-with-rightwing-daily-caller-in-factchecking-program

[10] See for example, paras 1.10- 1.12 of the government's response to the White Paper Consultation https://www.gov.uk/government/consultations/online-harms-white-paper/outcome/online-harms-white-paper-full-government-response

It appears that, without a clear 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. The government's stated objective appears to be 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.

However, this is not clear on the face of the Bill, which means that it could be subject to misinterpretation once the OSB becomes law. To prevent misinterpretation of the Bill's provisions, the Bill should 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 from the scope of the Bill. Without amendment, 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.

By framing the exemption this way, any news publisher website which goes further than the inter-user functionalities described in Schedule 1 Paragraph 5 may be classified as a regulated service, and would appear to fall within the scope of regulation. Many news publishers offer various functions for users on their websites that could be deemed as outside of the listed functionalities in Schedule 1 Paragraph 5, including games and online workshops. As currently drafted, the Bill does not exempt all news publisher websites as the government has stated it intends to do. Moreover, framing the exemption through the functionality of inter-user communication on a service, would disincentivise news publishers from investing in innovative features and services as part of their websites. On the basis of the current drafting, we are concerned that such innovation could leave news publishers facing a stark choice: maintain a static news site sitting outside of the scope of the online safety bill framework, or choose to innovate but risk all of their online services being subject to the obligations of the OSB. We do not believe that this choice is in the interests of readers, nor do we think it is the government's intention.

In addition, paragraph 5(a) of Schedule 1 is also 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 be clarified such 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.

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. We believe that this 'Henry VIII clause' should be rejected in favour of Parliament having the right to repeal this clause only by primary legislation.

There is a very good definition of a news publisher set out in Clause 40 of the Bill. To address the issues above and ensure that the exemption is effective, an additional sub-clause should be added to Clause 2, to make 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.

Schedule 1 Paragraph 5 should also 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

The second category of exemption is intended to apply where news publisher content is posted onto in-scope user-to-user services. This is achieved through Clause 39 of the Bill, which defines "*regulated content*", and which excludes "*news publisher content*" from its scope. This has the effect of excluding news publisher content from the scope of the safety duties imposed by the Bill on in-scope services.

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.[11] By excluding news publisher content from these categories, news publishers are excluded from being required to apply the safety duties under Clauses 9-11 of the Bill to their content.

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

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 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, when combined with high penalties for not taking action against content to which the Bill does apply, the OSB could incentivise platforms and search engines to err on the side of caution whenever their algorithms encounter content that might put them at risk.

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, meaning that an appeal to the platform, followed by another to Ofcom, is of limited value.

Duty to protect Journalistic Content

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.[12] This section of the response will address each in turn.

Category 1 Services

[11] 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).

[12] Clause 14(3)-(6).

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.

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.

As we note above, the combination of an unclear definition of harmful content, combined with significant penalties for not doing so, wis likely to incentivise in-scope platforms to take down journalistic content via the blanket application of algorithms that will not be able to distinguish between journalistic and non-journalistic content. The over-blocking of journalistic content by semantic and keyword blocking technologies deployed by so-called brand safety vendors, demonstrates how blunt such automated tools are in practice[13]. At present, there are no repercussions for an overly zealous approach, and scant redress for reinstatement of that content. This means there is an absence of much needed tension in the OSB regime as currently drafted, which could exacerbate concerns about the effect of the OSB on free expression and the distribution of journalistic content on in-scope platforms.

Similarly, there is no equivalent of the Clause 14 duty for search engines, which is a significant lacuna that must also be addressed. The current drafting of Clause 14 of the OSB 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. Again, this means there is an absence of much needed tension in the OSB regime as currently drafted, which could exacerbate concerns about the effect of the OSB on free expression and the distribution of journalistic content on in-scope search engines.

The Bill should 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. We believe that this can only be achieved by drafting a clear and watertight news publisher exemption to avoid the conflicting parallel system of regulation created by the journalistic protections. For example, adding an additional sub-clause to Clause 2, making clear 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.

Redress

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[14] and to ensure that content is "*swiftly reinstated*" in the event of a complaint being upheld.[15] This, however, is inadequate to protect news content.

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[13] https://www.thenewhumanitarian.org/analysis/2021/01/27/brand-safety-ad-tech-crisis-news

[14] Defined in Clause 14(11) as the publisher itself.

[15] Clause 14(3)-(6).

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. 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 relatively short shelf life of news.

We note concerns, expressed by the Chair of the House of Lords Communications Committee, that there may need to be a tiered approach to any appeals process, to ensure that redress is prioritised for journalistic content of democratic importance.[16]

These issues can only be meaningfully addressed by implementing the government's objective of a watertight exemption for news publishers, 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.

Conclusion

In summary the Bill should be amended: to clarify that news publisher content is entirely and clearly out of scope, and; to create tension in the proposed framework by placing in-scope platforms under a positive duty not to apply their codes of conduct to such content. Otherwise, a Bill that has the potential to create a framework of principles-based reform, could pose grave consequences for the distribution of journalistic content in the UK.

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[16] https://committees.parliament.uk/publications/6025/documents/68088/default/