

Written evidence submitted by Dr Mikołaj Barczentewicz, Senior Lecturer in Law, University of Surrey (OSB0152)

1. Dr Mikołaj Barczentewicz is a Senior Lecturer in Law and the Research Director of the Law and Technology Hub at the University of Surrey. He is also a Research Associate of the University of Oxford Centre for Technology and Global Affairs, a Research Associate of the University of Oxford Programme for the Foundations of Law and Constitutional Government, and a Fellow of the Stanford Law School and University of Vienna Transatlantic Technology Law Forum. Dr Barczentewicz holds a D.Phil. in Law, M.Phil. in Law and M.Jur. from the University of Oxford. This submission does not purport to represent the views of any organisation with which the author is affiliated.
2. **This short submission makes the case for an Independent Reviewer of Online Safety Legislation, an independent statutory body tasked with scrutinizing the regulator (Ofcom) and informing the public on how the online safety regime affects freedom of expression, innovation, and the quality of digital services available in the UK.**
3. This proposal is not intended as antagonistic to Ofcom and is meant to help ensure the success of the online safety regime. The need for an oversight body independent from Ofcom stems from the unavoidable difficulty of realising conflicting goals within one organisation without sufficient independent input. Given how important are the interests in question—freedom of speech, innovation—the proposal made here is a proportionate response, which does not contradict or diminish any of the solutions included in the Draft Bill.
4. There are serious concerns that despite the best intentions of the authors and of the future regulator (Ofcom), the new online safety regime will have significant negative consequences for freedom of expression, for innovation, and for the quality of digital services available in the UK.¹
5. The authors of the Draft Bill opted for a relatively high level of abstraction, leaving key details to be determined after the Bill becomes law. Those details will determine whether the potential negative consequences just mentioned will be realised. To a large extent it will be for the regulator, Ofcom, to make those key decisions. However, it is far from clear that Ofcom will have

¹ Those concerned have been ably presented among others by Graham Smith, see e.g. <https://www.cyberleagle.com/2021/05/harm-version-30-draft-online-safety-bill.html>; <https://www.cyberleagle.com/2021/06/on-trail-of-person-of-ordinary.html> ; as well as by Neil Brown, see e.g. <https://decoded.legal/blog/2021/08/how-the-draft-online-safety-bill-would-affect-the-development-of-free-open-source-software>; <https://decoded.legal/blog/2021/07/online-id-age-verification-the-death-of-online-search-and-non-browser-web-access> .

sufficient incentives to treat the aims of protecting freedom of speech and of promoting a vibrant digital economy as seriously as the aim to ensure online safety. Given that those goals are in tension, it is difficult to expect one organisation—like Ofcom—to retain an even-handed attitude to the competing aims instead of associating its mission more closely with one goal (promoting online safety).

6. Thus, if the potentially risky regulatory tools in the Draft Bill are to become law, there is a need to create an independent, permanent, and adequately resourced mechanism of oversight, to ensure that the crucial interests likely to be given less weight by the regulator (freedom of speech, innovation) are safeguarded.
7. The office of the Independent Reviewer of Online Safety Legislation proposed here is intended to play that role. The Reviewer's purpose should be to ensure that the online safety regime promotes freedom of expression, innovation, and the quality of digital services available in the UK.
8. The Reviewer should have powers to scrutinize Ofcom's activity, to communicate findings directly to the public, and to advise Ofcom on issues within the Reviewer's remit.
9. For the Reviewer to be able to exercise the scrutiny function adequately, the Reviewer should, at minimum, have powers to interview Ofcom employees and to access any internal Ofcom documents the Reviewer considers relevant. Moreover, the Reviewer should gather evidence voluntarily provided by civil society organisations, academia, and industry.
10. The Reviewer will have both expertise and a clear mandate to promote freedom of speech and innovation, and thus will be well-placed to engage formally and informally with Ofcom to advise on issues within the Reviewer's remit. Having such an independent advisor would help Ofcom better to realise the difficult mission that involves conflicting goals.
11. However, limiting the Reviewer's role to advising Ofcom would be insufficient for creating a desired incentive structure within the online safety regime. By communicating directly with the public, the Reviewer will be able to inform the public debate, which will likely have beneficial effects on the practice of the online safety regime. Knowing that actions that hinder innovation or freedom of expression will be publicly discussed by the Reviewer will create a serious incentive, otherwise absent, for Ofcom to give more weight to those issues and potentially to refrain from some such actions. Moreover, by publicising the negative effects of the online safety regime on issues within the Reviewer's remit, the Reviewer will contribute to continuous post-legislative scrutiny of the future Online Safety Act, which may inform potential changes to the Act.
12. Finally, the Reviewer should be supported by an adequately staffed and resourced office, independent both from Ofcom and from the Government.

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