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Note Verbale No. 112

The Permanent Mission of the United Kingdom of Great Britain and Northern Ireland presents its compliments to the Office of the United Nations High Commissioner for Human Rights and has the honour to submit the response to communication OL GBR 5/2022, further to the letter dated 14 March 2022 from the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

The Permanent Mission of the United Kingdom of Great Britain and Northern Ireland avails itself of this opportunity to renew to the Office of the United Nations High Commissioner for Human Rights the assurances of its highest consideration.



Geneva, 25 May 2022

Special Procedures Branch
Office of the United Nations High Commissioner for Human Rights

**Response from the United Kingdom of Great Britain and Northern Ireland to the letter
from the UN Special Rapporteur on the promotion and protection of the right to
freedom of opinion and expression – OL GBR 5/2022**

Thank you for your letter of 14 March 2022 to the Foreign Secretary following your scrutiny of the draft Online Safety Bill (the draft Bill). The Government has examined your report closely, and I note that you made a number of observations, to which we respond below.

The UK is committed to upholding our international human rights obligations. We continue to place a major focus on championing human rights, democratic values, good governance, the rule of law and open societies. We believe that this is central to our role as a force for good in the world. We are fully committed to the rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR), including in the context of the right to freedom of expression.

Since we received your letter, the Government introduced a new version of the Online Safety Bill to Parliament on 17 March 2022 (the Bill). The Bill makes a number of changes which we have referred to where relevant below.

We believe that this Bill is necessary to keep people safe online and to protect freedom of expression. The internet has transformed our relationships, working environments and exposure to the wider world. UK citizens now use the internet more than ever. Internet usage across all adult age groups increased by nearly 10% from 2009 to 2019.¹ However, unfortunately not all of the internet offers a safe experience for users. 62% of adult internet users reported having had at least one potentially harmful online experience in 2020 - worryingly this figure increases to over 80% for 12-15 year olds.² That is why the Government has committed to making the UK the safest place in the world to go online and why this legislation is necessary.

Currently vulnerable people are inhibited from expressing themselves online due to the abuse they can face when they do, particularly where that abuse targets people on the basis of race, gender and other protected characteristics. It is essential that legislation tackles the harm that this causes so that everyone can enjoy freedom of expression online.

The Bill will give adults greater control over their online experience, while protecting freedom of expression. Currently, platforms exercise unfettered discretion over how they treat content present on their service, with no legal obligations, judicial oversight or requirement to have regard to freedom of speech at all. Under the Bill user-user and search services will have to consider and implement safeguards for freedom of expression when fulfilling their duties. The largest and riskiest platforms, Category 1 services, will not be able to arbitrarily remove priority content that is harmful to adults. They will need to be clear what content is acceptable on their services, and how they will treat it, and enforce the rules consistently.

As a public body, the UK's independent communication regulator, Ofcom must exercise their functions in a way that is compatible with Article 10 of the ECHR.

¹ [Adults' Media use and Attitudes report' \(2005-2019\)](#) - Ofcom

² [Internet users' experience of online harms](#) - Ofcom and ICO (2020)

Alongside publication of the Bill, the Government also published a memorandum addressing issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Online Safety Bill³.

1. Duty of care to remove lawful but ‘harmful’ content

The definition of harm and the child and adult safety duties

Under the Bill, companies will not be required to remove or moderate legal content accessed by adults. Instead the focus will be on ensuring that companies are held to account for the consistent enforcement of their terms of service. The biggest and riskiest platforms, Category 1 services, will need to be clear about what content and activity is and isn’t acceptable on their service and how they will treat such content. If these services intend to remove, limit or promote particular types of content they will have to say so. This will create more transparency and enable easier benchmarking between companies’ online safety policies, empowering users to make more informed choices about which services they use.

For children, the impact of harmful content and activity online can be particularly damaging and there are growing concerns about the potential impact on their mental health and wellbeing. The child safety duties in the Bill will not require companies to remove or prevent adults’ access to legal content, but seek to ensure that children receive proportionate protections from content and activity that is harmful to them such as online pornography and bullying. The Bill aims to provide protections for children online which align with similar protections that exist for children from these harms offline.

With regard to the definition of harm, the Online Safety Bill as introduced to Parliament in March 2022 includes a number of changes to the definition of harm compared to the draft Bill.

The Bill includes a clear and precise overarching definition of harm. Harmful content is in-scope of the Bill’s duties where it presents a material risk of significant harm to an appreciable number of children or adults. This is provided for in clause 53 (content that is harmful to children) and 54 (content that is harmful to adults) and clause 187 (harm). We do not believe that the terms used in the simplified definition of harmful content are vague. They can be interpreted using the ordinary English meaning of the words.

Beyond this overarching definition, secondary legislation will provide more detail about the priority categories of harmful content that companies need to address. This legislation will need to be approved by both Houses of Parliament. This ensures democratic oversight of the list of priority harms. It also enables further detail and precision which will strengthen protections for freedom of expression by reducing the risks of over-removal of legal content as a result of the safety duties.

For content that is harmful to adults, the relevant safety duties in clause 13 (with the exception of clause 13(7), which is a duty to notify Ofcom of emerging harm) will only apply to these priority categories of content. This change will make it clearer to Category 1 service providers which types of content they are required to address and in doing so will provide greater protections for freedom of expression.

³ [Online Safety Bill: European Convention on Human Rights Memorandum - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/111111/Online_Safety_Bill_ECHR_Memorandum.pdf)

The freedom of expression and privacy duty

Clauses 19 and 29 of the Bill require user-to-user and search service respectively to ‘have regard’ to the importance of protecting users’ freedom of expression and privacy when implementing the safety duties. Ofcom, under Clause 38, is required to design the codes of practice’s recommended compliance measures in light of the importance of protecting users’ right to freedom of expression and privacy within the law. Clause 45 sets out that a platform will be considered as complying with the freedom of expression and privacy duty if the provider takes the steps recommended in codes of practice to safeguard users’ freedom of expression and privacy when fulfilling their safety duties. A platform can also comply if they take alternative steps that have the same effect. An example of a step that a platform can take to comply with this duty could include providing detailed guidance and training for human reviewers about content that is particularly difficult to assess.

In practice this means that user-to-user and search services must implement safeguards for freedom of expression and privacy when fulfilling their safety duties. The codes of practice will provide guidance on how to do this when fulfilling the different safety duties in the Bill.

As noted above, as a public body Ofcom is required to act in a way that is compatible with Article 10 of the ECHR. Ofcom’s obligations under Article 10 will be particularly important when developing codes of practice and making enforcement decisions.

More broadly, our approach with regard to freedom of expression recognises that the ECHR imposes obligations on States and public bodies, as well as private bodies where they are exercising a public function. Private entities, including in-scope service providers, have a right to freedom of expression under the ECHR just as individuals do. They should respect freedom of expression and assist with remedying business-related impacts on individual’s freedom of expression. Platforms are free to decide what content should and should not be on their website within the bounds of the law, just as a supermarket can decide to remove unsuitable content from its community noticeboard. As such, it is appropriate to ask them to “respect” human rights.

We also note that the wording of the privacy duty has now been changed to ‘protecting users from a breach of any statutory provision or rule of law concerning privacy that is relevant to the use or operation of a user-to-user service (including, but not limited to, any such provision or rule concerning the processing of personal data)’. This better reflects that there are existing statutory provisions related to privacy that platforms must adhere to when carrying out their duties. This includes data protection law which in-scope services must comply with alongside their safety duties under the Bill.

The definitions for democratic and journalistic content

The duties to protect content of democratic importance and journalistic content are important to safeguard pluralism and ensure internet users can continue to engage in robust debate online. In practice, many of the major platforms already have in place policies that make exceptions for these types of content when applying their terms of service. However, the policies are often vague and lack transparency, and they are not applied consistently. The content of democratic importance and journalistic content duties seek to ensure that the policies are more transparent and applied consistently.

Platforms must use proportionate systems and processes to take into account the importance of democratic and journalistic content when deciding how to treat different types of content. They will need to set clear policies up front for how they will treat such content and enforce these consistently. For journalistic content, Category 1 service providers will need to set out how they will identify journalistic content and they must also make a dedicated and expedited complaints procedure which will act as an additional safeguard to the freedom of expression.

As for the other duties in the Bill, Ofcom's codes of practice will set out more detail about the duties and how they can be applied. This will help platforms to know how they can comply with the duties.

In terms of the definitions themselves, both journalistic content and content of democratic importance have specific, tailored protections which safeguard free speech. The journalistic protections are intended to include any content published for the purposes of journalism whilst democratic content includes any content published for the purposes of engaging in democratic political debate in the UK.

We have ensured that both definitions are broad enough to capture a diversity of political opinion and pluralistic debate. Content of democratic importance, for example, will apply to content not to people, so that content supporting or opposing government policy will be captured whether the creator of that content is a government minister or an individual political campaigner. This definition of democratic content does not, therefore, privilege politicians and/or specific political parties. As it stands, the definition is broad enough to cover content from across the political spectrum, including grassroots campaigns and smaller parties. Narrowing the definition could inadvertently exclude certain political perspectives which could be harmful to freedom of expression.

With respect to journalistic content as defined in clause 16(8), platforms will be expected to consider the ordinary English meaning of journalism and use relevant case law. 'Journalism' should therefore be interpreted broadly and includes content produced by individuals, freelancers and others and delivered through all channels including social media.

2. Duty to remove illegal content

The safety duties about illegal content impose a duty on regulated user-to user and search services to use proportionate systems and processes to mitigate and manage the risk of harm as per the illegal content risk assessment. The systems and processes must be designed to prevent users from encountering priority illegal content and to minimise how long any such content remains on their services. Companies must also operate proportionate systems and processes designed to take down priority and other illegal content they become aware of, either through reports from third parties or their own systems. This approach does not require that platforms ensure that users never encounter illegal content, rather it is about ensuring companies have proportionate systems and processes in place to minimise the risk of harm. This risk-based and proportionate 'systems and processes' approach ensures that the regime is focussed on safety processes as a whole, rather than on the quality of individual content decisions. Companies cannot be sanctioned for individual content decisions. This reduces the risk of companies taking an overly cautious approach to compliance and helps to protect freedom of expression, particularly when compared to an approach which mandates removal of individual pieces of illegal content in a certain timeframe.

Illegal content is defined in Clause 52 and is content which amounts to a terrorism, CSEA, or other priority offence as set out in the Bill or is any other criminal offence where the intended victim is an individual (or individuals).

The priority offences other than CSEA and terrorism offences are offences which cause significant harm to individuals. It is clearly a legitimate aim for the government to ensure that providers take steps to restrict the dissemination of such content given the harm it causes to individuals. These priority offences are defined in Schedule 7 and include assisting suicide, threats to kill, public order offences, harassment and stalking, hate crime, drugs and psychoactive substances, firearms and other weapons offences, people trafficking, prostitution, sexual images, proceeds of crime, fraud, financial services and Inchoate offences relating to the above. Setting out these offences on the face of the Bill will give in-scope companies more certainty about the content they must address.

3. Removal of disinformation or misinformation

Your letter raised concerns that ideas categorised as false information may be improperly restricted in violation of international standards and national law. The Online Safety Bill's duties regarding disinformation and misinformation have been developed in strict adherence to the Government's obligations under the European Convention on Human Rights. The Government recognises the importance of freedom of expression and is committed to ensuring that users are able to engage in robust debate online.

There is no distinct duty in respect to disinformation or misinformation in the Bill. Instead the issue is addressed if the disinformation or misinformation content in questions falls in the aforementioned categories of either illegal content, content that is harmful to children, or priority content that is harmful to adults. Companies will only be required to put in place proportionate systems to prevent the dissemination of disinformation if it amounts to a criminal offence.

Given the potential impact of disinformation and misinformation on the internet and the need to protect free expression and robust debate, the UK Government has recognised the need to explore this area further. Therefore, the Bill imposes a duty on Ofcom to establish and maintain a committee of users, providers and experts to provide advice on how regulated services should deal with disinformation and misinformation and how Ofcom should exercise its transparency reporting and media literacy functions in respect to disinformation and misinformation.

4. Lack of judicial oversight

Appeals

Your letter notes your concern that the Bill does not foresee any external appeal mechanism for individual content moderation decisions. You assert this means that, for both illegal and "legal but harmful" content, regulated providers will make decisions regarding content removal without adequate judicial or independent oversight.

The Online Safety Bill legislates primarily to ensure that there are appropriate systems and processes in place to ensure that regulated providers deliver on the Bill's principle objectives; tackling criminal activity, protecting children and addressing content that is harmful to adults.

Legislation will require Category 1 services to assess the risk to adults of harmful content, to set out clearly for users what is acceptable on their services, and to enforce their own terms of service consistently. Given this, it is appropriate that regulated providers make the decisions on content removal.

All companies in scope of the new regulations will have a legal duty to have effective and accessible user reporting and redress mechanisms. This must cover wrongful takedown and restrictions placed on illegal content and activity, as well as broader concerns about a company's compliance with its regulatory duties. In addition, services likely to be accessed by children and Category 1 services have a duty to enable content reporting and complaints procedure in relation to harmful content. This is an important safeguard, which protects freedom of expression and discourages arbitrary take-down. While the regulatory framework will not establish new avenues for individuals to sue companies, existing legal rights individuals have to bring actions against companies will not be affected.

In addition, the Bill contains a super-complaints mechanism which will allow organisations to raise concerns about systemic issues with Ofcom, who will be required to investigate and respond publicly. This will include complaints about a feature or the conduct of a service that risks significantly affecting an individual's right to freedom of expression.

The Government has also introduced a new requirement under clause 19(4) for user-user service providers "to include clear and accessible provisions in the terms of service informing users about their right to bring a claim for breach of contract if content which they generate, upload or share is taken down, or access to it is restricted, in breach of the terms of service". This will make clear to users that they can seek action through the courts on contested freedom of expression challenges.

Going beyond the above, and beyond Ofcom's own enforcement of the regime, would be a hugely expensive endeavour given that platforms receive a huge volume of complaints daily and it is not clear what benefit it would offer. There is not enough evidence to suggest that an ombudsman or another external appeals mechanism would be effective for the online safety regime.

Removal of illegal content and court orders

Your letter argues that companies should only be required to remove content from their service pursuant to a court order. The Bill will require in-scope companies subject to the safety duties to take more responsibility for how the design and operation of their service increases the risk of harm to users arising from the presence of illegal content. They will need to risk assess for this content and then put in place proportionate systems and processes designed to prevent users from encountering illegal content, and to minimise the length of time such content is present. They will also need to remove illegal content once they are aware of it.

Given the scale and speed of dissemination of illegal content, and the significant harm that it can cause, it is appropriate that companies put in place proportionate systems and processes to minimise the risk of harm to users.

When carrying out these safety duties, companies must implement effective safeguards to mitigate the risk of service providers taking an overly cautious approach to the removal of illegal content. As set out above, Ofcom will incorporate such safeguards into the codes of

practice such that service providers are given clear guidance about how to fulfil their safety duties in a way that protects freedom of expression. Service providers can follow these safeguards or take alternative steps that meet the same objectives.

The Bill also requires companies to put in place user redress mechanisms that allow users to seek action where their content has been removed unfairly. All in-scope companies subject to the safety duties will have a specific legal duty to have effective and accessible user reporting and redress mechanisms. This will cover concerns about wrongful takedown or restriction of content and/or accounts and broader concerns about a company's compliance with its regulatory duties, as well as concerns about illegal or harmful content or activity.

The user redress duty

You set out your views that the user complaint duties are too vague and do not set 'minimum quality standards'. As for all the duties, Ofcom will be required to set out in more detail about how in-scope companies can comply with their duties in codes of practice. The Government expects the codes to cover areas such as accessibility (including for children), transparency, communication with users, signposting and appeals. The steps set out in the codes of practice must be risk-based and proportionate. Given the wide range of companies in scope of the regime, specific expectations are likely to vary among different platforms. As such, it would not be practical to include more detail in legislation.

Ofcom's assessment of over and under removal of content

You note concerns about how Ofcom will assess compliance in cases of over- and under-removal of content. As we have set out above, companies will have obligations to operate their services using effective and proportionate systems and processes designed to address illegal content and that which is harmful to children. Each company in scope will be required to put adequate measures in place to identify and handle that content dependent on their own system design and the risk of harm that they assess to exist on their services. As such, when enforcing, Ofcom will be interested in whether or not the systems and processes a platform has put in place are working, rather than whether or not individual content decisions were correct.

Clause 45 details the relationship between duties and codes of practice which will act as a benchmark for compliance with the relevant duties. If Ofcom is assessing whether a company has implemented a system which is over- or under-removing illegal content, it will be able to request and consider information such as a random sample of content moderation decisions and the volume of appeals against companies' decisions and the proportion of them that are successful.

Ofcom has a range of information gathering, investigation and audit powers which will enable them to investigate whether companies are dealing with content in compliance with their duties.

5. Pluralism

We have designed the regulatory framework to ensure that regulatory expectations on services are reasonable and proportionate to the severity of the potential harm posed and the resources available to the service. As set out above, the Government is aware of the

importance of pluralism and shares concerns that the majority of online speech is now facilitated by a small number of private companies.

The framework has been designed to avoid any unnecessary burdens on small and micro businesses - for example, we anticipate many small businesses will be exempted from the scope of the Bill through the limited functionality exemption in Schedule 1 which exempts services with limited user-to-user functionality. Our Impact Assessment estimates that over 95% of estimated costs are expected to fall on medium and large businesses. As such, we do not think the Bill will lead to a reduction in pluralism.

Ofcom will also take a proportionate and targeted approach to monitoring and enforcement, focusing on the services where the risk of harm is highest. Codes of practice linked to safety duties will have to be feasible and cater for all service providers of a different kind, size or capacity.

6. Limits on the right to privacy

Anonymity

We agree that online anonymity matters. It's what can give activists in oppressive regimes the means to organise, it can give whistleblowers the opportunity to speak out, it can give the uncertain teenager the means to research their sexuality or it can give the most vulnerable in our society the chance to protect themselves from their abusers. The Online Safety Bill does not ban anonymity online.

Instead, the Online Safety Bill ensures that major platforms will provide all adult users with the option to verify their identity and give them control over who they interact with. This will help provide robust protections for adults, including vulnerable adults, and allowing users to have more control over their online experience.

Encryption and private messaging

You raise the importance of encryption in protecting user privacy. The government supports the responsible use of encryption and does not believe that this is incompatible with maintaining public safety. Users should be protected from illegal and (in the case of children) harmful content online.

A significant amount of illegal activity takes place on private communications, and there are a number of steps companies can take to mitigate the risk of harm to users, included on encrypted services, without undermining users' privacy, such as implementing effective reporting systems. Ofcom will set out steps service providers can take to mitigate the risk of harm on private messaging services, but will not be able to recommend the use of proactive technology on private communications, including automated content detection tools, in its codes of practice.

However, there is a significant challenge relating to the sharing and storage of illegal child sexual exploitation and abuse (CSEA) content on private communications. Therefore, on a case by case basis, where Ofcom considers it necessary and proportionate, it can require the use of accredited tools to identify and remove illegal CSEA content on private communications. This power will only be used where no less intrusive measures would have a sufficient impact on the risk of harm, and its use is justifiable because it is necessary and

proportionate based on a list of risk-based criteria including prevalence of illegal CSEA content, severity of harm and interference with users' freedom of expression and privacy.

Section 103 power

As detailed above, the power to issue notices to deal with terrorism and CSEA content (or both) are targeted powers which can be used by Ofcom in line with safeguards designed to uphold privacy and freedom of expression. However, the Bill is clear this is a targeted power which must be used only when necessary and proportionate to tackle the most egregious illegal harms.

7. Oversight and enforcement

Registration and news publishers

Thank you very much for your comments on Ofcom and it having the power to exempt news publishers from oversight if they meet the Bill's criteria of a 'recognised news publisher'.

A free press is one of the fundamental pillars of our democratic society. The Government is committed to independent self-regulation of the press. Online Harms legislation will not include any requirements for Ofcom, or anyone else, to regulate news publishers' content.

The legislation contains safeguards for news publisher content and wider journalistic content when it is shared on in-scope social media platforms.

First, news publishers' content will be exempted from platforms' new online safety duties. Below-the-line comments on news publishers' own sites are also exempt, as there is an explicit exemption in the legislation for comments on content published directly by a service provider. This means platforms will not be incentivised to remove news publishers' content as a result of this Bill. The criteria against which an organisation qualifies as a recognised news publisher is set in the Bill. The criteria have been designed to be objective and to prevent platforms having to make subjective decisions about what qualifies as news. This ensures the legislation does not undermine the government's commitment to independent self-regulation of the press.

Secondly, legislation will also impose a duty on Category 1 companies to safeguard all journalistic content shared on their platform. This provides specific protections to ensure users have access to journalism.

Specifically, they will need to have clear policies relating to their treatment of journalistic content, and ensure these are enforced consistently. These must ensure that when undertaking any content moderation, they balance the importance of ensuring users' access to journalistic content, against other objectives which might otherwise lead to it being moderated. They will also need to create dedicated and expedited complaints procedure for journalists, if their content is removed or any other action is taken against them.

This duty will apply to all content that is created for the purpose of journalism and which is UK-linked. This includes citizen journalists' journalistic content, as well as news publishers' journalistic content.

Finally, there is no system of registration and no mandate on Ofcom to register all in-scope services. In-scope services whose qualifying worldwide revenue is at or above a certain threshold will be required to notify Ofcom (and pay a fee), otherwise there will be no such requirement on companies in scope and none on Ofcom to maintain a register of all in-scope services. There is also no requirement on Ofcom to maintain a register of news publishers whose content is exempt from the regulation.

Enforcement sanctions

Your letter notes concerns Ofcom's enforcement of the Bill, and the Bill's sanctions regime, will have a chilling effect on freedom of expression. We do not agree with this. The legislation itself as well as the codes of practice and guidance documents provided by the regulator will give companies clear information on how they can comply with the enforceable requirements. When companies do fail to comply, Ofcom must take proportionate enforcement action. For example the regulator will have the discretion to set the level of fines which will take into account the size of the business (revenue, users, staff) alongside the actual or potential harm caused. The enforcement processes must also be set out in guidance by Ofcom to ensure they are transparent. These processes must give companies the opportunity to make representations to the regulator. Escalating enforcement sanctions will promote compliance, and avoid incentivising content takedown, with judicial oversight required for the most severe sanctions (business disruption measures).

Prior to starting enforcement action, the regulator will need to provide clear grounds for any intervention or escalation. This will ensure companies and the regulator engage in dialogue regarding processes they should adopt, reducing the risk that companies automatically adopt a risk-averse approach to avoid sanctions. Ofcom, as a public body, is under human rights obligations and is therefore legally bound to act compatibly with ECHR rights. This includes its enforcement of the regime.

Secretary of State powers

We recognise the importance of an independent regulator in this space, which is why we are appointing Ofcom, a well-established, independent regulator to oversee and enforce the regime.

Equally, given the novel nature of the framework and the fast-changing nature of online harms, it is essential that the regulator is accountable to Parliament and that the government and parliament retains control over the scope and policy intent of the framework.

With regard to the Secretary of State's power to direct Ofcom to modify its codes of practice, it is important that there are suitable, transparent checks and balances to ensure that the implementation of the regime by the independent regulator delivers the policy intent that will be decided by the democratically elected government.

The Bill which was introduced in Parliament in March 2022 allows the Secretary of State to direct Ofcom to modify a code of practice for reasons of public policy. (This is a change from the version of the Draft OSB you were commenting on, which referred to modifications 'to ensure that the code of practice reflects government policy.') In addition, in the case of codes relating terrorism or CSEA content only, the Secretary of State can direct Ofcom to modify a code for reasons of national security or public safety.

All codes of practice are subject to approval by Parliament, and any code that is subject to a direction for modification for reasons of public policy will be subject to the affirmative procedure, which requires that there be a debate in both Houses of Parliament. This is to ensure that Parliament has appropriate oversight over the use of the power of direction. Again this use of the affirmative procedure is a change that has been made to the Bill as introduced in March.

23 May 2022