

**Response of the Child Rights International Network (CRIN) to the Open Consultation
on the Online Harms White Paper**

Submission made on behalf of the Child Rights International Network (CRIN), 1 July 2019.

Website: www.crin.org.

About CRIN

1. The Child Rights International Network is a think tank that produces new and dynamic perspectives on human rights issues, with a focus on children. Established in 1995, we work on the full range of human rights issues that affect children and young people. Our goal is a world where children's human rights are recognised, respected and enforced, and where every rights violation has a remedy.

Summary

2. This consultation response focuses on the impact of the proposed reforms on the human rights of children and young people, including their protection from violence and sexual violence but also the realisation of their freedom of expression, to access information and right to privacy. This response also addresses structural issues within the proposal that do not specifically or distinctly impact children, but which may undermine the strength of the proposals as a whole.

3. We welcome aspects of the proposals, particularly insofar as they provide mechanisms to protect children from exploitation and abuse online and establish responsibility and accountability for companies that do not meet their obligations to prevent their platforms from being used to carry out this abuse and exploitation. Proposals to increase transparency among online service providers and to promote digital literacy are also very welcome aspects of the proposals that will empower children to exercise their rights online.

4. However, the White Paper relies on concepts that are not adequately defined to ensure clarity and proportionality of the regulation of online services. The concept of harm is at the core of the regulatory model, but the White Paper does not provide a definition of the term or set the scope of its application. As the concept of harm is also a fundamental part of the duty of care to be enforced by a regulator, the regulatory model is based on a fundamental uncertainty. This uncertainty is not a necessary feature of the regulation and this submission sets out means by which it could be limited to ensure a clearer application and that any restriction on the rights of internet users is proportionate.

Children's rights within the White Paper

5. The White Paper has clearly been significantly guided by the intention of protecting children from harmful content and behaviour online, but sets out a very limited analysis of the implications for the full spectrum of rights engaged by regulating children's behaviour and access to content online. The compatibility of the proposals with the Convention on the Rights of the Child (CRC) is not addressed but an analysis of the CRC provides meaningful guidance for the realisation of all of children's rights online.

6. The White Paper proposes a number of reforms that will better enable the protection of children from sexual exploitation and abuse in line with the commitments the United Kingdom has made under the CRC.¹ The UN Committee on the Rights of the Child has clarified that States have an obligation under the CRC to provide effective remedies and reparations for violations of the rights of the child, including those committed by third parties such as businesses operating in the digital environment. Meeting this obligation entails having in place child-sensitive mechanisms that are known by children and their representatives that are prompt, genuinely available and accessible and that provide adequate reparation for harm suffered.²

7. A code of practice setting out binding obligations on companies to prevent the grooming of children, livestreaming of sexual abuse of children and the viewing and sharing of child sexual exploitation and abuse (CSEA) material is a welcome development and its enforcement by an independent, properly resourced regulator is a strong mechanism to ensure the effective implementation of these obligations. While many companies have made voluntary commitments through engaging entities such as the Internet Watch Foundation to identify and remove CSEA material, the reforms will provide a means of requiring companies that have not voluntarily adopted effective policies and procedures to address child sexual exploitation and abuse to do so.

8. The consequences of the proposals set out within the White Paper place less emphasis on, and include less analysis of, the civil and political rights of children and measures to ensure that these rights are realised online. All users of online services, including children, have a right to freedom of expression,³ of association⁴ and to access information.⁵ Online platforms have brought huge benefits to children in creating new ways for them to communicate and express themselves and to be able to access information which supports their wellbeing and development. It is vital that these benefits are not lost in efforts to address unlawful and harmful content. This consultation response will highlight specific areas of the White Paper where stronger protection should be given to these rights.

¹ Convention on the Rights of the Child, Articles 19, 34 and 36.

² Committee on the Rights of the Child, *General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights*, CRC/C/GC/16, 17 April 2013, para. 30.

³ Convention on the Rights of the Child, Article 13; International Covenant on Civil and Political Rights, Article 19, European Convention on Human Rights, Article 10.

⁴ Convention on the Rights of the Child, Article 15; International Covenant on Civil and Political Rights, Article 22; European Convention on Human Rights, Article 11.

⁵ Convention on the Rights of the Child, Article 17.

Definition of harm

9 The concept of harm is at the core of the proposals set out in the Online Harms White Paper, underlying the proposed duty of care, the mandate of the regulator and application of any enforcement powers. If the regulatory regime is to be effective and compliant with human rights standards, it must be based on a clear definition of harm.

10. The right to freedom of expression, as enshrined in international human treaties to which the United Kingdom is a party, applies to children as to adults. Restrictions on free expression may be justified, but to be so they must have a legal basis, be in pursuance of a legitimate aim and be necessary and proportionate in achieving that aim.⁶

11. To ensure that any restrictions on a particular form of unlawful or harmful content complies with this requirement, any restriction on free expression to prevent “harm” must clearly define that harm. Some of the harms identified within the White Paper, particularly those for which an existing criminal offence or offences exist, for instance child sexual abuse and exploitation, have definitions that clearly meet this standard. However, in the case of many of the form of harm identified within Table 1 of the White Paper as “harms with a less clear definition”, there is an absence of a clear and agreed definition in law or within relevant academic literature to ensure that harms are defined with sufficient clarity and rigour to ensure that the standards of necessity and proportionality are met. For example, the White Paper sets out its intention that “the regulator will not be responsible for policing truth and accuracy online” (para. 36), but requiring the regulator to address “disinformation” online could require it to fulfil precisely this role.

12. The harms identified within Table 1 are also framed in a negative sense, phrased in terms of content or behaviour which must be prevented or from which users must be protected. Though there is a recognition in the White Paper that there is a need to ensure that measures meet human rights commitments, there is not a recognition that online behaviour that unjustifiably restricts freedom of expression, access to information and the right to privacy is itself harmful, including for children. The effect of this limited definition is that an imbalance exists at the core of the definition of harm within the proposals. Including unjustified restrictions on free expression and access to information within the definition of harm, could ensure greater balance.

13. The inclusion of unlawful and lawful but harmful content within a single definition of harm also has the potential to undermine attempts to ensure proportionate and appropriate responses to the types of harm identified within the White Paper. A proportionate response to a company which is permitting, enabling or taking no steps to prevent the online sexual exploitation and abuse of children on its platform is not the same as a proportionate response to online trolling or disinformation. While detailed and prescriptive codes of practice may be desirable to combat sexual exploitation and abuse of children online, the same approach in response to disinformation would pose a disproportionate restriction on

⁶ European Convention on Human Rights, Article 10, International Covenant on Civil and Political Rights, Article 19, Convention on the Rights of the Child, Article 13.

freedom of expression. A clear distinction between the regulatory approach to content and behaviour that is legal and that which is lawful but harmful would be a substantial means of ensuring proportionality with response to the harms within the scope of the White Paper.

14. Recommendations:

- Explicitly define harms that fall within the remit of the regulator within legislation;
- Limit the focus of the scope of harm to what can be clearly defined, whether through existing legal definitions or new definitions introduced following the outcome of the consultation;
- Empower the regulator to conduct research as to additional online harms and make recommendations to Parliament as to any additional harms added to the scope of regulator;
- Clearly distinguish in the regulatory and enforcement approach between forms of harm that are illegal and those that are lawful but harmful;
- Include unjustified restrictions on freedom of expression, access to information and the right to privacy within the list of harms included within scope to ensure explicit consideration of human rights standards.

The duty of care and regulatory model

15. The regulatory model proposed within the White Paper is built on establishing a new statutory duty of care “to take reasonable steps to keep their users safe and tackle illegal and harmful activity on their services.” The duty of care is to be overseen and enforced by an independent regulator which will produce duties of care detailing how companies must fulfil this duty. This proposed model relies on two fundamental uncertainties that risk undermining the clarity and effectiveness of the regulatory model that is proposed.

16. First, the nature of the “duty of care” within the Online Harms White Paper is not clearly addressed. It does not appear from the functioning of the duty set out within the proposals that it is intended to constitute a common law duty of care that may act as a basis for a claim of negligence as is the case with some other statutory duties of care, such as under the Occupiers’ Liability Act 1957. Nor does the “duty of care” appear to be intended to act as a basis for criminal liability, as is the case with the duty of care with respect to waste under Section 34 of the Environmental Protection Act 1990. The primary effect of the duty within the proposal appears to be to set the scope of regulation and the remit and mandate of the regulator. This aim would be more clearly achieved by doing so explicitly, rather than clothing this purpose in the language of a duty of care and therefore risking misunderstanding and misinterpretation.

17. Second, the scope of the duty of care is reliant on a definition of harm that is itself too vague to provide meaningful guidance as to its application. As stated in the White Paper (para. 2.2) a non-exhaustive list of harms is proposed as “[a] static list could prevent swift regulatory action to address new forms of online harm, new technologies, content and new online activities.” While this proposal allows greater flexibility and enables the regulator to act with greater speed with regards to developments in technology and production of online content, it undermines certainty within the regulatory regime and limits democratic oversight

over what content and behaviour falls within the remit of the regulation. The effect of declining to explicitly define “harm”, but empowering a regulator to set out the scope of the term and enforce the obligations of companies based on that definition is that Parliament is empowering a regulator to set the limits of its own mandate.

18. This vagueness could be addressed by clearly defining the mandate and remit of the regulator with regards to only those forms of harm that can be clearly defined, as recommended above, but requiring and empowering the regulator to conduct research with regards to developments in technology and the production of online content, and to make recommendations to Parliament as to the extension of the regulator’s mandate to address developments.

19. Recommendations:

- The mandate and remit of the regulator must be clearly defined and based upon a clear and unambiguous definition of harm set out in legislation;
- If the intention of the duty of care is to set the remit and mandate of the regulator, then it should be reformulated to more clearly achieve this aim;
- The regulator must have a strong mandate to monitor and research developments in online behaviour and technology and be empowered to make recommendations to Parliament as to any extension of the regulator’s mandate or remit;

Independence of the regulator

20. The White Paper proposes an independent regulator to implement, oversee and enforce the new regulatory framework (para. 34). However, aspects of the proposed regulatory model risk undermining the independence of the regulator.

21. In particular, the White Paper states that the government “will have the power to issue directions to the regulator” regarding the content of the codes of practice addressing child sexual exploitation and abuse and terrorist use of the internet. Such direct control of aspects of the work of the regulator undermines its independence, forcing the regulator to act as a limb of central government with regards to some of its functions. To avoid this effect, maintain the independence of the regulator but enable the government to provide input, the government could establish an obligation for the regulator to consult with relevant government departments, professional bodies and civil society in the development of codes of practice.

22. Recommendations:

- Remove powers of government to direct the regulator as to the content of codes of practice to ensure its independence;
- Require the regulator to consult broadly with interested parties in developing codes of practice;

Transparency

23. Greater transparency on the part of online platforms is an essential and welcome part of the regulatory proposals. These measures should be designed to empower users, the government and civil society to play a meaningful and effective role in strengthening accountability and transparency in how online platforms shape our society. This should range from how the platforms moderate user-generated content to broader issues relating to the different actors in the online world.

24. To fulfil the government's commitment to improving transparency in the sector, any regulatory body should have strong technical research capabilities. In order to understand how algorithms shape the online information ecosystem and encourage certain user behaviour, for example, the regulator would require sufficient technical capacity to develop and implement appropriate auditing practices and methodologies.

25. The proposal that companies in scope produce annual transparency reports should, as a minimum:

- a. Help users and the regulator to understand how platforms make decisions in relation to what content is and is not permitted;
- b. Help users and the regulator to understand what decisions are made by platforms in relation to content, including the use of algorithms to filter, curate or push particular forms or pieces of content;
- c. Help users to understand how to report particular pieces of content, how long it will be before a response is provided, and what appeal processes exist to challenge decisions;
- d. Enable users to assess, and any regulator to audit, how platforms are performing in implementing their own content moderation policies and any legal obligations;

26. For transparency to be meaningful for children, transparency reporting on behalf of companies that provide services that are used by children must include key information that children need to know, presented in formats and language that is accessible to children. For these companies, transparency reporting should also specifically address their impact on children.

27. Recommendations:

- Require that transparency reporting for services aimed at or used by children include key information that children need to know, presented in formats and language that is accessible to children;