



## SAVE ONLINE SPEECH COALITION – ONLINE SAFETY BILL – COMMITTEE STAGE AMENDMENTS

### Legal but “harmful” speech

The Online Safety Bill will lead to the removal of protected speech considered “legal but harmful”. We are particularly concerned over the provisions of the Bill which will place pressure on the largest platforms to remove specifically lawful online expression the government has designated to be “harmful”. This means that behaviours and forms of speech which are permitted in the offline world could be censored online, creating two different standards of permissible speech. This runs contrary to international and European human rights standards on permissible limitations of expression. It also leaves it to the whim of the government of the day to decide what is subjectively “harmful” in society and to then place pressure on online platforms to remove such content.

**Coalition amendment 1:** *MPs should give notice of their intention to oppose the question that Clause 13 stand part*

Explanatory note: This amendment seeks to protect freedom of expression by removing the clause which will cause intermediaries to remove free expression which the Government deem to be “harmful”. The amendment was recommended by the House of Lords Communications and Digital Committee in their report on Freedom of Expression Online, which scrutinised the draft Bill.

### Executive Power

The degree of government control over the UK’s supposedly independent regulator, Ofcom, that is granted by the legislation, is unprecedented. The Bill gives significant powers to government ministers to determine what is “harmful” content, to set out Ofcom’s “strategic priorities”, to tell Ofcom how it should carry out its duties, and even to direct Ofcom to modify codes of practice. Together, these provisions wholly undermine any suggestion that Ofcom will be fully independent and impartial as a regulatory body for online platforms. This is entirely inappropriate and risks political censorship in the future. It also goes against international and European human rights standards that require regulatory bodies to be independent from the government and political interests. The regulator should be accountable only to parliament, the representatives of the people to whom it is ultimately accountable, and protected from political or commercial pressures.

**Coalition amendment 2:** *Clause 40, Page 38, leave out line 5*

Explanatory note: This removes the Secretary of State’s power to modify Ofcom’s codes of practice for reasons of “public policy”. This power is excessive and would lead to political influence over the regulator. The amendment was

recommended by the Joint Online Safety Bill Committee in their report on the draft Bill.

**Coalition amendment 3:** *MPs should give notice of their intention to oppose the question that Clause 78 stand part*

Explanatory note: The Bill grants the Secretary of State the power to issue a statement of strategic priorities when it comes to Online Safety. While this is not problematic in and of itself, Clause 78 obliges Ofcom to “have regard” for this statement. This creates another means for the Secretary of State to politically influence Ofcom which threatens its independence as a regulator. This amendment calls for the removal of Clause 78.

**Coalition amendment 4:** *MPs should give notice of their intention to oppose the question that Clause 147 stand part*

Explanatory note: This amendment removes another executive power which allows the Secretary of State to give formal guidance to Ofcom. This power threatens the independence of Ofcom and would give the Government of the day undue influence over how expression online is policed. The amendment was recommended by the Joint Online Safety Bill Committee in their report on the draft Bill.

### **Private conversations**

The duties in the Online Safety Bill apply not only to public online spaces, but private communication channels, like WhatsApp. There is no way platforms will be able to comply with their duties without proactively monitoring these private channels. In the offline world, this would be equivalent to the Royal Mail opening and reading every letter, or telecoms providers listening to every phone call. Our ability to communicate privately, something which protects journalists, human rights defenders, and vulnerable and marginalised groups, should not be put at risk like this.

Clause 103 of the Bill sets out a mechanism for Ofcom to mandate online intermediaries to use new surveillance technology to scan for offending material, including in private channels. It is vital that terrorism and CSEA content are removed from the internet. However, tackling such content does not require entire encrypted channels to be compromised, sacrificing the security, safety and privacy of billions of people. This is a disproportionate step which does not comply with international human rights standards.

**Coalition amendment 5:** *Clause 103, Page 87, line 14, leave out “or privately”*

Explanatory note: This amendment prevents Ofcom from mandating intermediaries to use new surveillance technology in private messaging channels.

### **New communications offences and threats to freedom of expression**

Part 10 of the Online Safety Bill seeks to bring about substantial changes to the UK’s communications offences. Current offences as set out under the Malicious Communications Act 1988 and Communications Act 2003 have often received criticism for criminalising expression which is “grossly offensive”. However,

these revisions, based on recommendations by the Law Commission, have received widespread criticism for the threats that they also pose to freedom of expression.

The two offences which are of concern are set out in Clauses 150 and 151. These are the new "Harmful communications offence" and "False communications offence". The harmful communications offence criminalises communications that are "likely to cause harm to a likely audience". The offence defines harm as "psychological harm" amounting to "serious distress". This is an incredibly low threshold for criminality which is largely based on the recipient of a communication's emotions towards it. This new offence could, for example, criminalise blasphemy if the recipient of a message denouncing a religion felt seriously distressed by the communication in question. The offence is also overly broad in its application in talking about a "likely audience". Given large social media platform's complicated amplification systems, a "likely audience" is very difficult to define and creates too wide a scope, with the likelihood of over-criminalising expression.

The False communications offence criminalises communications that the sender knows to be false where they "intend to cause non-trivial psychological or physical harm to a likely audience". Once again, the threshold for criminality is low and non-trivial psychological harm is not defined. This offence carries the risk of a range of unintended consequences likely to damage free expression. For example, it is not inconceivable that a politician in an election campaign could make an assertion about a political opponent that is not entirely truthful with the intention of damaging their opponent's campaign. The assertion may even cause psychological "harm" but the prosecution of a politician in such circumstances is clearly disproportionate and would be disastrous for freedom of expression in the UK. It is also useful to note that false communications are already dealt with in other areas of civil and criminal law. Both offences also contain carve-outs for certain entities such as recognised news publishers. That such carve-outs are deemed necessary demonstrates the threat that these offences pose to freedom of expression, whilst also creating tiers of permissible speech which is problematic.

We believe that both of the previously discussed offences pose serious risks to free expression, are not a material improvement on existing communications offences and cannot be improved by amendment. As such we believe they should be removed from the Bill.

**Coalition amendment 6:** *MPs should give notice of their intention to oppose the question that Clause 150 stand part*

Explanatory note: This amendment has the effect of removing the new harm-based offence which criminalises expression which is deemed to be "seriously distressing". This creates a threshold for criminality based on the reaction of the recipient which would raise serious problems for freedom of speech and would likely be subject to legal challenge.

**Coalition amendment 7:** *MPs should give notice of their intention to oppose the question that Clause 151 stand part*

Explanatory note: This amendment has the effect of removing the new "misleading communications" offence. The offence has a low threshold for criminality which seriously threatens freedom of expression. Given that other areas of law can deal with false communications, it is not clear that the new offence is necessary or proportionate.