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Online Harms White Paper Consultation Response

by Dr Kim Barker and Dr Olga Jurasz

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Overview

We are responding to the Online Harms White Paper consultation in our capacity as experts on social media abuse, online abuse, and online misogyny. We have in the past made significant contributions to UN calls for evidence on online harassment, and to the Bracadale Review on Hate Crime in Scotland, as well as the Joint Committee on Human Rights inquiry on democracy, free speech and freedom of association, amongst others. In addition, we have made representations to the Scottish Government as to the need to amend legislation to cover a wider range of harassing and abusive behaviours online.

We have recently published a world-leading volume '*Online Misogyny as a Hate Crime: a Challenge for Legal Regulation*' (Routledge 2019). We have been working on issues relating to harassment of women and girls in online spaces since 2013. We are possibly your only evidence respondents that have experience of the wider issues surrounding online harassment, and who take a holistic approach to the legal problems posed by such harassment, merging criminal law, gender, human rights, and internet law expertise.

We are only responding to selected questions from our expert perspectives, focussing on:

- online harassment and abuse
- social media abuse
- online violence against women
- online misogyny
- responsibilities of social media platform providers.

General Position

It is our general position that the Online Harms White Paper is unsuited to its intended purposes, and that the Government seems set on introducing legislation without understanding the full scope of the issues here. We do not believe that a statutory duty of care – as outlined in the White Paper – is a measure which is ready to be imposed, and a fuller consideration of *all* aspects of online harms must be made before any legislation should be introduced. Furthermore, suggestions that a Government body, or regulator could be charged with determining the scope of the duty is problematic, and undermines the justice system – issues relating to duties of care should be left to the courts to resolve, and only the courts.

The protection of freedom of expression, and the protection of participatory rights to ensure equality online must be the paramount considerations in any social media regulation.¹ We find the Online Harms White Paper to be well-intentioned but fundamentally flawed. We favour an approach to social media regulation that is *rights based*, prioritises gender equality online, and puts the rights of users at the heart of any regulatory framework.

¹ K Barker & O Jurasz, 'Online Misogyny: A Challenge for Digital Feminism?' *Journal of International Affairs* (forthcoming 2019).

Preliminary Remarks:

We address specific questions posed by the consultation below, but our preliminary remarks here address the statutory duty of care that the White Paper proposes.

1) Online Violence Against Women (OVAW)

- (a) There is no specific attention paid to online violence against women (OVAW). Specifically, this online harm is not mentioned in the White Paper, and whilst we recognise that the White Paper makes it clear that the list contained within it is not exhaustive, this is a significant omission and online violence against women needs to be included as a specific online harm.
- (b) Gender-based harms are specifically excluded from the current list within the White Paper so whilst the claim that the DCMS is keen to be 'world leading' in the development of a regulatory framework for online harms, the absence of a gender-dimension is not progressive.
- (c) There is a lack of attention paid to the issue of OVAW by platform providers / forums, and as a result, there is a lack of deterrence. Increasingly women are victims of online abuse, directed at them *because* they are women. The lack of specific legal protections from abusive behaviours motivated by gender-based hostility is problematic and must also be addressed.

2) Statutory Duty of Care

- (a) We acknowledge that the White Paper stipulates the creation, and introduction of a statutory duty of care as the legal framework to address obligations of platforms with respect to online harms. However, we have concerns about this proposal and its practical implications, especially given the operation of duties of care, and statutory duties in tort law. For instance, if the proposed duty is intended to operate as a mirror of other statutory duties, it is unclear from the White Paper how foreseeability will operate. Equally, it is unclear at present how the duty of care will be specific enough to be actionable given the (incomplete) indicative list of harms contained within the White Paper.

These concerns relate most notably to the ambiguity surrounding the concept, as well as the lack of certainty in respect of the applicable legal test to identify the class of persons who will be able to make a claim for such a breach of duty. There is further imprecision relating to the availability of remedies here and we think this suggestion requires further thought.

- (b) If the White Paper envisages a statutory duty of care, then it will be difficult to address gender-motivated hate against women because presently, hostility against women is not a feature of the legislative landscape when it comes to hate crime,

and there are no statutory aggravations for underlying offences which are motivated by gender-based hostility.²

3) Terminology & Legal Meaning

- (a) As Barker & Jurasz indicate, “Content which is not illegal but harmful should be categorised differently and subjected to a different review process. Segregating content between that which is illegal, and that which is harmful but not illegal may be one method of mitigating the volume of content to be dealt with in short time frames.”³
- (b) It is fundamentally important to note that there is a distinction between *illegal* content and *harmful* but not illegal content. These must be treated separately under the proposed duty of care, and subjected to different standards. They do not legally have the same meaning and should not be conflated.
- (c) It should also be noted here that the eCommerce Directive (eCD) specifically emphasises illegal content when talking about the imposition of the duty of care of platforms by individual member states rather than harmful and illegal.⁴

² K Barker & O Jurasz, *Online Misogyny as a Hate Crime: A Challenge for Legal Regulation?* (Routledge, 2019), Chapter 4.

³ K Barker & O Jurasz, Submission of Evidence to Australian Government Online Safety Charter Consultation (April 2019), 5.

⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Recital 48.

Question 3: What, if any, other measures should the government consider for users who wish to raise concerns about specific pieces of harmful content or activity, and/or breaches of the duty of care?

- (a) All platforms should have clear, accessible, and readable terms and conditions / End-User License Agreements. These documents should outline clearly, and in plain English (not legalese), the behaviours which are acceptable on each platform and which are not. These agreements should also outline hateful conduct rules – with a specific emphasis on gender-based hostile content – including the reporting and review process, as well as indicative resolutions e.g. notice & takedown. The terms and conditions documents / pages should also outline routes of appeal for redress in situations where there have been erroneous interferences with fundamental rights. Requiring platforms to have these agreements, which must be readable, and accessible, should be something that any regulator or oversight body acts to ensure compliance with. Annual reporting to the regulator / oversight body relating to these agreements and their changes / violations should be required from all platforms.
- (b) The proposed creation of a regulator suggests that this could result in an avenue of privatised law enforcement. In particular, if a regulatory body is introduced, it suggests that cases are even less likely to be publicly prosecuted through the criminal justice system, pushing individual redress into obscurity. If this is the situation, then private action is one of the few ways forward for individuals who have suffered online harms, and as a result, there are obvious financial implications for those subjected to such harms. This raises significant concerns about access to justice for all. This is likely to compound the harm suffered – especially for harms motivated by gender-hostility, which do not fall within the current hate crime framework. The Government should therefore be considering proposals which ensure that access to justice *for all* is safeguarded.

Question 4: What role should Parliament play in scrutinising the work of the regulator, including the development of codes of practice?

Ideally, there should be no Parliamentary involvement in the work of the regulator. The Codes of Practice should be drafted in conjunction with a selected group of those who will form part of the independent regulator. This represents the most suitable way of ensuring that the regulator has a role which is achievable, and which can be managed.

Scrutiny and oversight are not required by Parliament if the regulator is an independent body. It is our stipulation that the regulator be composed of independent experts who understand the online environment and its modes of regulation, as well as a group of users including those who have suffered from online harm. We do not favour Ofcom as the proposed or intended regulator and regard Ofcom as – at best – a temporary regulator until a purpose-designed regulator can be established.

The regulator should ensure that it includes a broad range of representation from industry, the legal sector, and selected NGOs (who have a track record of supporting victims of OVAW as well as the recognised expertise to do so).

Lessons must be learnt from other initiatives for independent regulation in other critical areas in a society where equal participation is championed. It would be far from ideal for lessons from press regulation to not be learnt in any establishment of an independent regulator for Online Harms. Equally, one-size-fits all is not an ideal way forward, and we have distinct reservations about relying on the regulator to set out its own competence and scope of influence.

Question 5: Are proposals for the online platforms and services in scope of the regulatory framework a suitable basis for an effective and proportionate approach?

The proposals outlined in respect of the regulatory framework do not amount to a suitable basis for an effective and proportionate approach.

First, the White Paper does not include sufficient clarity about the scope of what constitutes harm for purposes of the proposed regulatory framework. As such, it seems that the proposals are ambiguous, and lack detail. Consequently, the conclusion we have reached on this point is that the framework is not suitable in terms of being effective and proportionate.

Second, the proposals seem to overlook, and effectively dismiss judicial guidance from *Handyside v UK*⁵ relating to the tensions between freedom of expression, and offensive / obscene content. This is very concerning.

Third, attention also has to be paid to the provisions of the eCommerce Directive, especially in respect of the absence of a general monitoring obligation under Article 14. That said, there have been indicators that the Courts are willing to consider something which amounts to almost a general monitoring obligation in instances where serious harm could arise where with content is posted on, and shared via social media.⁶ In instances where serious harm is evident, proportionate measures are welcome. However, encouraging monitoring is not an effective nor proportionate approach to be adopted, and raises serious concerns about the rights of users of the Internet and social media. It is particularly important to note that even where serious harm is evident, a judicial decision about the removal (and, by extension, censorship) of the content is necessary to ensure that there is appropriate consideration given to acts of takedown and removal which interfere with fundamental rights.

⁵ *Handyside v The United Kingdom* [1976] ECHR 5.

⁶ See for example, *CG v Facebook Ireland Ltd* [2015] NIQB 11, and *XY v Facebook Ireland Ltd* [2012] NIQB 96.

Question 6: In developing a definition for private communications, what criteria should be considered?

First, it should be determined what kind of communications are falling under the scope of the definition. We suggest that both textual and image-based forms of communications are included, especially where it comes to communications that are abusive. Whilst image-based abuse (especially image-based sexual abuse) is regulated by the existing legislation,⁷ textual forms of online abusive communications – especially in form of tweets – are not currently regulated or punished in an equivalent manner. However, both textual and image-based forms of abuse can take gendered forms and can lead to online harms, but only sharing of sexual imagery is covered in the White Paper.

Second, the issue arises in relation to the distinction between private and public communications. Whilst public communications are likely to fall under the scrutiny of the regulator, monitoring of private communications is highly problematic – not least when considered from privacy and human rights perspectives.

Third, traditionally violence against women (VAW) has been viewed as a private issue and has fallen outside of the scope of public interest and regulation. More contemporary approaches indicate that private messaging and private communications via social media in the form of e.g. Facebook messenger, or Direct Messages on Twitter, can fall within the regulable realm and serve as indicators of coercive and controlling behaviour in domestic violence contexts.

However, where communications take the form of publicly visible tweets which demonstrate for instance, gender-based hostility, or incitement to violence against women, or misogynistic content, they are very much a matter of public concern and it remains in the public interest for these issues to also be addressed through legal avenues, with adequate support being provided to recipients of such communications. As such, whilst it is encouraging to see that legal regulation has dealt with private instances where communications are damaging, the same emphasis and significance has not been placed on publicly visible, yet equally damaging communications.⁸ The distinction in the visibility of the communications should not be a barrier to treating them equally seriously.

⁷ Criminal Justice & Courts Act 2015 s33; Abusive Behaviour & Sexual Harm (Scotland) Act 2016 s2; Justice Act (Northern Ireland) 2016 ss51-53.

⁸ The visibility of online communications has recently been given judicial attention by Lord Kerr in *Stocker v Stocker* (2019) UKSC 17, where he has indicated that in a social media age, posts must be read in the context of an 'ordinary reasonable reader'. This marks a departure from previous considerations and suggests that visibility is now a significant factor.

Question 8: What further steps could be taken to ensure the regulator will act in a targeted and proportionate manner?

Care must be taken to ensure that there are limited unjustifiable interferences with fundamental human rights protections. To ensure this, human oversight is required where content is moderated – and reliance cannot be placed upon an entirely automated system.

If something is taken down wrongly, then redress must be available to individuals who are censored unjustifiably. Reporting must include details of takedowns which were unjustifiable, and this should be part of the mechanism to ensure trust, accountability, and transparency.

The regulator should be established and designed specifically to address Online Harms, but should take its lead from judicial guidance if a duty of care is legislatively imposed (see Overview, above). In particular, if the regulator is to interpret and apply legal principles and standards, then it follows that such a regulator should also have an appropriate legal standing and expertise to carry out such tasks. If the regulator is to impose sanctions and penalties, there must be adequate means of challenge and appeal for such decisions to ensure due process.

The regulator must also take great care to ensure that the list of harms which fall within its remit are carefully defined (including gender-based harms), and regularly updated. The definitions would – ideally – be identified legislatively (or judicially) so that they are objectively phrased. Wherever possible these definitions should be taken from established – and tested – judicial precedent, or established legislation. Again, a one-size fits all approach to definitions will lead to a regulator acting in a manner which is neither targeted nor proportionate.

Question 10: Should an online harms regulator be: (i) a new public body, or (ii) an existing public body?

An online regulator should be a new public body (see response to Question 4, above). It should not be an offshoot of an existing regulatory body, nor should it be a subdivision of, for example, Ofcom.

The regulator we envisage should have diverse subdivisions to ensure that there is expertise in each of the realms of online harm. As such, we suggest that the regulatory body be established with branches categorised to deal with specific types of platform e.g. social media branch, on-demand video branch etc. This would allow tailored regulation and dedicated expertise to be utilised specifically.

The regulator should also be composed of different demographics and should include people who have gender expertise. Representatives with research expertise should also be included as part of the regulator, and this should also include those with Internet / social media activity

expertise, as well as users of the online platforms. This would ensure the right balance between research / professionals / NGOs, grass-roots organisations, and frontline users.

Where there are cross-platform harms, the same harms can be transferred across multiple platforms. As such, the regulator should ensure that cross-platform harms are monitored, and where there are multiple reports in one branch, care should be taken to ensure that these are traced and that other branches are checked too as part of reasonable diligence procedures.

Question 18: What, if any, role should the regulator have in relation to education and awareness activity?

Whilst they should play a role with recording and accountability, reports should be available and education and awareness raising should be directed towards other, more appropriate bodies.

Education should be not only school based and should be directed at all ages and demographics. These measures should also include information about prevalence of OVAW and other gender-based abuses online.

The regulator should maintain the public record of bodies delivering such awareness training and education activities (incl. charities, NGOs). These bodies should also produce an annual report and should declare funding received in the interest of transparency and accountability. The regulator should ensure that there is an adequate spread of organisations addressing those online harms identified in White Paper and that gender perspective is effectively incorporated throughout undertaken activities.

In addition, whilst we recognise the rise in the popularity of self-care initiatives, and the ideas behind such associated activities, it is important to note that these are not mechanisms of regulation, and they fall outside of the strict legal and regulatory framework. As such, they should be treated as subsidiary and complimentary mechanisms, rather than forming any part of the duties / tasks undertaken by any regulator.