

Consultation on the Online Harms White Paper Response of the News Media Association

The News Media Association represents the national, regional and local news media industry. Our members span all sectors of the industry, from the largest group to small family owned companies. They publish around 1000 titles, in print and online, including both national titles such as The Times, The Sun, The Telegraph, the Guardian, The Daily Mail and the Daily Mirror and regional and local titles, such as the Yorkshire Post, the Kent Messenger, the Monmouthshire Beacon and the East Anglian Daily Times. Our members' titles are read by 48 million adults each month, in print and online. These publishers are also by far the largest investors in news journalism, accounting for around 58 per cent of the spend on original news content in the UK.

The White Paper presents a grave threat to press freedom. Yet there is no need for imposition of the proposed regime for governance of user generated content upon news publishers. NMA members, local and national, have well established systems relating to user generated content, subject to the operation of the law and independent oversight of IPSO, as practically all NMA members and their titles, local and national are in membership. These include policies on facility for user generated content, users, systems for moderating content where appropriate, reader alerts, complaints, review, take down or re-instatement.

In line with Government assurances to the industry, the NMA would be happy to work closely with the Government on the drafting of the total exemptions necessary, for news publishers and their content, however disseminated and discovered, which must be clear, comprehensive and robust and on the face of any Bill and relevant legislation, and we will keep the government informed on industry measures that will enable their practicable operation, as the White Paper proposals are developed.

1. The problem

The Online Harms White Paper proposals pose profound dangers to press freedom.

As drafted, the UK's national and local news publishers will be in scope of the new regulatory regime, subject to the new statutory duty of care, in remit of the new statutory regulator and subject to its draconian powers of investigation and enforcement. News publishers will be put in double jeopardy of new restrictions. First directly, as under the White Paper as drafted, the user generated content on their own sites will entail the application of the new statutory duty of care to publishers and bring them under direct control of the new statutory regulator. Second indirectly, as publishers' own trusted journalism disseminated by social media will be subject to the new regime, through policing by the tech companies in the course of their own fulfilment of the duty of care upon them.

As drafted, the White Paper pays no regard to publishers' efficient, effective systems to minimise risk of publication of user generated content which might be unlawful or considered offensive by its readers and to address alerts and complaints rapidly and effectively. As drafted, the White Paper

appears oblivious of the risk to press freedom and the sustaining of high-quality journalism of long-established titles of news publishers

As drafted, therefore the White Paper would require news publishers' compliance with the new regime's very broad and legally uncertain 'duty of care', the prohibitions and compliance obligations relating to the proposed revised criminal offences (yet to be clarified) and to the very broad, uncertain new 'harms' such as disinformation, and to the discharge of other new legal responsibilities (such as prevention of children accessing lawful forums if under the age specified for participation), all of which raise press freedom concerns. They would be required to comply with new codes framed by regulator and Home Office, yet to be drafted, but in outline already delineating the very broad compliance requirements for fulfilling the duty of care, which also already raise press freedom concerns. This would have a repressive and chilling effect upon press freedom.

As drafted, the White Paper means that news publishers will be subject to a new or augmented existing statutory regulator (identity as yet unknown) which will be armed with draconian powers of surveillance, oversight, investigation, enforcement and sanction, intended to prevent publication and disrupt publishing businesses.

The regulator is to be empowered to impose huge corporate fines, fine or prosecute individuals, enable others to bring class actions against a business, disrupt business activities by forcing others to withdraw their services such as search results, apps stores or links on social media from the business; block websites and apps to prevent companies' platforms from being accessible in the UK, and other measures such as issue public notice of business failure to comply.

News publishers' journalistic and publishing activities would be governed by new legal restraints over 'harms' and lawful content, which will be invented by the regulator and the Home Office, through creation of new codes, in addition to the revision of existing criminal law by Government and Law Commission.

There are to be new compliance requirements, processes and procedures that will even include new duties to report to the police and state authorities. The White Paper hints at new surveillance of private communications which could affect confidential journalistic sources- making yet further inroads into the freedom of expression safeguards for protection of confidential journalistic sources and journalistic material under Contempt of Court Act section 10 and PACE 1984. These have already been eroded by counter terrorism, investigatory powers and border control legislation. Any new proposals subsequent to this White Paper would also require thorough and detailed consultation to guard against further erosion, future abuse and exploitation.

The new regime will chill, censor and sanction news publishers' content, and those who work for them, as well as facilitate class or individual civil action against them.

The repressive effect upon press freedom and public access to news media content will be exacerbated as news publishers will be placed in double jeopardy of censorship and sanction.

Not only will news media companies fall within the direct remit of the new regulator, but their trusted journalism's dissemination online and their ever growing audience's access to it would be blocked by the tech companies and their operation of 'compliance' systems advocated by the White Paper, including algorithms, commercial 'fact checker' services and moderators.

The White Paper therefore creates a regime inimical to press freedom and would place unjustified, unnecessary and disproportionate restrictions upon the right to freedom of expression under ECHR Article 10.

Exemption of news publishers and their content is vital.

2. The solution: complete, comprehensive, robust exemption for news publishers and their content however disseminated, on the face of any Bill and relevant legislation, in pursuance of Government press freedom assurances

In view of the Secretary of State's welcome assurances on consultation and limitation of scope to safeguard press freedom, we trust that the Government will exempt news publishers such as NMA members and their content wherever it appears. Clear, comprehensive, robust exemption to achieve this must be made on the face of any Bill and any other relevant primary and secondary legislation and regulatory material.

The imposition of the new regime upon news publishers is simply unnecessary, disproportionate and an unjustified incursion into press freedom, not least because publishers already have systems in place to address user generated content concerns, backed up by transparent industry wide standards and enforced by a well-established industry wide regulator, commended by Government. There will be no risk of harm or detriment to individuals, the public or society.

In exempting the news publishers, the Government would simply recognise the well-established systems that publishers in membership of the NMA already have in place to address user generated content on their sites, as well as the content generated by their journalists and other contributors. Publishers and content are subject to the independent oversight of the industry regulator IPSO, which regulates practically all publishers in NMA membership requiring observation of the Editors' Code of Practice, complaints handling and standards. Publishers are of course also subject to the operation of the law as well.

It is imperative that news publishers- all NMA members- and their content are wholly exempt from the proposed regime. Exemption must be complete- both robust and comprehensive. Exemption must not only apply to the news publishers, corporately and individually to all their workforce and contributors and in respect of all their online publications, services, website content, but exemption must cover all news publishers' content that is disseminated online, broadcast, print or any other means, including by third parties especially the tech companies through social media and search. Such exemptions must be all encompassing and enduring, without any potential loophole that could be exploited to induce regulatory action, or legal claim, or state repression, or over cautious censorship by third party distributors.

Total exemption from the new regime is necessary. The White Paper's references to possible dispensation on application to the regulator, or the regulator's ranking of priorities and variable requirements do not provide sufficient protection for news publishers, or freedom of expression to which a free press is integral. Press freedom will have no safeguard if news publishers are within remit of the regulator, and merely subject to the regulator's own discretion as to whether it will target and prioritise news media companies, as the White Paper suggests. It would also be wholly incompatible with press freedom for independent news publishers to have to apply individually to a statutory regulator for discretionary dispensation from some processes specified, or validation of their journalistic activities and oversight arrangements. It is not for the new regulator to appraise the system of independent press regulation upheld by IPSO.

Thus robust, comprehensive, clear, complete exemption from the White Paper regime is vital and the only option that would actually safeguard press freedom. This must therefore be framed in any legislation, on face of any Bill, in all relevant primary and secondary legislation and all other regulatory material. This would wholly accord with the Government's welcome assurances to the industry, that *'we are seeking to build sufficient safeguards into our proposals to protect these freedoms. We are consulting the scope of our regulations, and I am keen that we work closely with you and the press industry to ensure our proposals are effective, proportionate and do not have unintended consequences'*.

The NMA very much welcomed the DCMS Secretary of State's assurances in statements inside and outside Parliament, notably in the published letter to the Society of Editors of 10 April 2019, [Jeremy Wright's response to the Society of Editors - GOV.UK](https://www.gov.uk/government/consultations/online-harms-white-paper), which was also sent to the NMA and IPSO and re-iterated by DCMS Minister Lord Ashton in the debate in the House of Lords on the Online Harms White Paper on 30 April.

<https://hansard.parliament.uk/Lords/2019-04-30/debates/A8EE53D6-D377-4C74-8802-3BB2480405DE/OnlineHarmsWhitePaper>

'the Government's stance on press regulation has not changed. The Government strongly supports press freedom and editorial independence. A vibrant, independent, plural and free press that is able to hold the powerful to account is essential to our democracy. High quality journalism also plays a key part in tackling misinformation and disinformation. I am completely committed to support this and taking forward the work of the Cairncross review.'

'... as I made clear at the White Paper launch and in the House of Commons, where these services are already well regulated, as IPSO do regarding their members' moderated comment sections, we will not duplicate those efforts'

'Journalistic or editorial content will not be affected by the regulatory framework'.

'We are clear that the regulator will not be responsible for policing truth and accuracy online'.

'The Government absolutely upholds the core principle of freedom of expression, recognizing the invaluable role a free press plays in our cultural and democratic life. I hope this letter reassures you of our intentions, and that we are seeking to build sufficient safeguards into our proposals to protect these freedoms. We are consulting the scope of our regulations, and I am keen that we work closely with you and the press industry to ensure our proposals are effective, proportionate and do not have unintended consequences.'

We also noted the DCMS Secretary of State's helpful assurances at the launch of the Online Harms White Paper: *'[what we are interested in] is user-generated content where there is no other control of that behaviour. The activities of newspapers and broadcasters are already regulated'*.

The NMA therefore trusts the Government will now act upon these assurances. The NMA is very happy to participate in detailed discussions with the DCMS and Home Office as necessary and keep it informed of industry developments as appropriate, in order to ensure that robust comprehensive exemptions for news publishers, their companies, their staff and their content are secured, properly framed in all relevant legislative measures and implemented alongside any White Paper proposal.

3. Next steps

NMA consultation and further discussion on drafting and practical operation of exemption: The NMA would welcome further discussion with the Government on drawing up of the necessary comprehensive, robust exemption for its member news publishers and their content from the scope of the White Paper proposals.

The NMA wishes to discuss both any detailed drafting of proposed legislation and the means of ensuring efficient operation of exemptions in practice, including a system of kite marking and other relevant matters so that exemptions are observed by regulator, social media companies and all others.

The NMA notes that even if exempt, there should be swift low-cost appeals procedures which news publishers can activate in respect of any action by regulator or social media company or another against its company, any individuals and content. Judicial review alone would not be sufficient.

Freedom of expression audit and consultation of NMA and other media on White Paper's proposed changes to the substantive law, revised criminal offences, revised civil causes of action, new online harms, other new legal restrictions, procedural requirements: In addition to comprehensive, robust exemption from the White Paper regime, the NMA stresses that there must also be prior, detailed consultation with the NMA, its members and other media organisations on any proposals for changes to the existing criminal and civil substantive law or statutory procedural requirements or regulatory specification and guidance in pursuance of the White Paper. These could impact upon courts' interpretation of media defences and press freedom protections, with adverse impact upon publishing freedoms or protection of sources and journalistic material, even if news publishers and their content are exempt from the White Paper regime.

For example, this would entail media consultation on the second phase of the Law Commission's work as well as any measures instigated by the Home Office, DCMS, Cabinet Office, Ministry of Justice, Law Officers or other Government departments, government agency including police forces and police bodies, or independent regulators.

Pre-legislative scrutiny of draft primary and secondary legislation and guidance etc will also be necessary.

Press freedom must be protected in a comprehensive, coherent and consistent way, including safeguard of journalistic sources, journalistic material, publisher archives, journalistic newsgathering, investigation, communications, reporting and publication.

Press freedom threatened by scope of new regime- how NMA member news publishers could fall within remit of the new regime and why they must be excluded from its remit

News publishers in scope of White Paper regime

Unless exempted, news media companies will directly be in scope of the new regulatory framework as described at 4.2 of the White Paper and therefore would be subject not only direct to the new duty of care, revised criminal law, new online harms and obligations, as summarised at p 31 and set out in Part 7, the strictures of the new regime and the remit, enforcement and sanction by the new statutory regulator, as set out in part 6. Their content would also be subject to third parties' application of the regime and compliance requirements to news publishers' own journalism, by the tech platforms, social media, search and others who have significant control over important means

of the dissemination, discovery, drive of audience or other means of delivery of their trusted journalism to their audiences, and imparting and receiving information from the public.

User generated content on publishers' sites: National and local titles enjoy a close relationship with their readers and audience, fostering access and imparting of information, contribution, engagement, participation and debate vital to the role of the press in a democracy. Their readers' active engagement and public contribution are no longer confined to printed readers' letters and editorial contributions in the next edition, delayed until the next day or the next week. They now employ social media, participate in a community forum provided by the news publisher, or post comments to articles in the online edition or news website. These will apparently fall within the types of online activity described in 4.2 of providing services allowing the audience to share or discover user-generated content or interact with each other online.

However, the NMA submits that there is no need for inclusion of news publishers in scope of such a far reaching and potentially repressive regulatory system at all, as news publishers have well established, efficient systems already in place for user generated content, with independent oversight, mainly by the industry regulator IPSO, to which practically all national and local news publishers and their titles are in membership.

As the DCMS Secretary of State recognised, there is no need for duplication of systems which work well.

The absence of exemption and imposition of the White Paper regime would constitute an unnecessary and onerous inroad into press freedom.

Third party controls intended for user generated content deployed against news publishers' trusted journalism: Second, unless exempted, news media companies and dissemination of their online journalism will be put in jeopardy by the tech companies' compliance measures, intended to discharge their own new legal responsibilities under the duty of care. News publishers and distribution of even their trusted journalistic content could be vulnerable to the vagaries of the tech companies' interpretation, application and operation of the new regulatory framework, including through their own human agents, algorithm and third party commercial fact checker.

The tech companies play a major, significant role in the dissemination of news media companies' journalism, such as through Facebook, Google, and Twitter. They will therefore regulate news publishers' editorial content itself as 'user generated' content, in accordance with their interpretation of their necessary discharge of the new duty of care. That will depend upon tech companies' views, third party evaluation, algorithm and other the methods of assessment of risk as to whether the long-established, trusted, news publishers' editorial content might contravene the existing law or any new harms invented by codes somewhat dangerously dictated by the regulator or the Home Office. It will also depend upon tech companies' determinations as to the reasonably foreseeable reaction or consequences of the dissemination of that editorial content- be it readers' posts or readers' action- and their liability for it.

Again, there is no harm to the public or other justification for compromise of press freedom and extension of the White Paper regime in this way and so robust comprehensive exemption for news publishers' content is imperative.

The existing criminal and civil law delineate news companies and their workforce's legal responsibility and liability for unlawful content and statutory or regulatory duties. In addition practically all national and local news publishers observe the Editors' Code of Practice and standards

that it requires over and above the law. Nearly all NMA members are in membership of IPSO and subject to its oversight and enforcement of consistent, transparent industry standards.

Exemption is vital. Without exemptions, news media companies therefore face not just the draconian direct controls of the new regulatory system upon them, but exacerbation of their repressive effect due to tech companies' own 'compliance' systems and policing methods for their discharge of the new statutory duty of care that the new system will put upon them, if they apply them to news publishers which use them to disseminate their content online. The dominance of the tech companies in search and social media entails that they now play a very significant and unavoidable role in the dissemination of news publishers' trusted content online and the audience which it attracts- as well as the advertising revenue which funds that trusted journalism.

The White Paper encourages the tech companies to use algorithms and commercial third-party fact-checking service. These will not recognize the trusted journalism of NMA members whose titles may have been serving their communities of readers some three hundred years. Human moderators and commercial companies do not mitigate any risk. For example, one such fact-checking company Newsguard, notoriously downgraded one national newspaper, apparently through its misunderstanding of the system of UK independent press regulation and the transparency of IPSO processes.

The White Paper's proposed regime will increase and legitimize the tech companies' powers and controls over the public's discovery and access to news publishers' content and their controls over the dissemination of national, regional and local news publishers' online content through Facebook, Twitter and other platforms, or the tech companies provisions of news feeds to Facebook users, traffic to its websites and search rankings. This will put at risk news publishers' journalism, its audience and the advertising revenues that fund that journalism. The White Paper proposals would therefore create disproportionate and unnecessary restrictions on press freedom.

Repressive impact of White Paper regime upon press freedom: necessity for news publisher and content exemptions

Powers and sanctions

A new regulatory framework would thus impose unprecedented controls upon news publishers and their content, as specified and enforced by a new statutory regulator and backed by the draconian powers and sanctions exercisable against those which fall within its remit. These powers are actually intended to scupper publication and disrupt publishing businesses, without proper regard to the ECHR Article 10 right to freedom of expression, press freedom, protection of sources.

New legal restrictions

Alarming, the new regime gives the regulator and the Home Office powers to write and impose codes which provide a gloss on the existing law and new online harms, narrowing freedom of expression safeguards intending to enable lawful investigation and publication to the public.

The White Paper even proposes new surveillance powers, including of private communications. It indicates that the codes would set out guidance on requirements for how companies should inform and support law enforcement and other relevant government agencies' investigations and prosecution of criminal offences, including preservation of material and requirements to proactively alert regulatory and investigation authorities.

Such measures could undermine or bypass statutory and constitutional freedom of expression protections of journalistic sources, journalistic material and journalistic activities against state access and interference.

The proposed system will therefore provide an all too convenient means of bypass of the right to freedom of expression under ECHR Article 10 and a range of UK freedom of expression and journalistic safeguards enshrined in statute by Parliament, often after specific discussion with the NMA and media organisations, or developed by the courts as a result of actions pursued by the media.

The NMA would be happy to discuss in more detail the threat to these legislative safeguards and defences against criminal and civil legal liability, prosecution or claims or use of powers against publishers, editors, journalists in respect of journalistic investigation, reporting and publication, journalistic sources and journalistic material.

The strictures and sanctions of the new regulatory framework proposed by the White Paper would also of course be a new additional legal duty which would apply in addition to news media companies', publishers', editors' and journalists' existing, direct legal liability in respect of their content and activities under criminal and civil law – the current criminal offences and civil torts, regulatory duties, backed by the powers of police, intelligence services, investigation and enforcement authorities, and subject to the civil and criminal courts and tribunals, imposing sanctions and awarding remedies and redress such as injunction, damages, unlimited fine and imprisonment.

The White Paper provides little explanation as to how the new regime will interact with the existing criminal and civil law, how the existing criminal law is to be clarified, how the online harms are to be defined, how any part of the new regime might erode defences necessary to press freedom, how it might increase publishers' vulnerability to legal claims brought by individuals, or companies or state authorities, in addition to the new regulators' powers

This again demonstrates why press freedom must not be put at risk and why news publishers and their content must be the subject of a comprehensive and robust exemption from the regime proposed by the White Paper in its totality, and that exemption is observed by all.

To superimpose a new legal duty of care upon news publishers and their journalistic content, with contradictory duties and obligations, with restrictions imposed and enforced not only directly by a new statutory regulator with draconian powers, but also indirectly by tech platforms' interpretation of their own duty of care compliance obligations, in addition to the primary liability upon publishers under existing criminal and civil law and industry wide codes would be otiose, unnecessary and disproportionate – and open to abuse to the detriment of press freedom.

White Paper disregard of existing Article 10 ECHR protections for freedom of expression, press freedom, confidentiality of sources

Without robust, comprehensive, clear exemption for news publishers and their content, the new White Paper regime will allow the government, the new regulator and other investigatory and enforcement authorities to bypass and undermine the specific press freedom and freedom of expression statutory safeguards in criminal and civil laws.

Many of these protections resulted from careful discussions between Government and the NMA and other media organisations and full Parliamentary consideration. They have also originated from media challenges pursued through the UK courts and ECtHR.

Such protections span civil and criminal laws: human right legislation, defamation, terrorism/counter terrorism legislation (including exemptions, procedural protections for journalistic material, and the framing of encouragement of terrorism offences and statutory duties to provide information to the police about matters related to terrorism in ways which avoid undue threat to media investigation, reporting and sources), official secrets, unauthorized disclosures, incitement to hatred, extreme violence and pornography, obscenity, sexual offences, reporting from war zones, protection from harassment, contempt of court and court reporting restrictions. The existence of such legal provisions and news publisher's awareness and compliance with such laws within their parameters strengthens the case for comprehensive exemptions.

The White Paper also ignores the existence and use by the media of long established media/government committees and protocols to facilitate lawful publication without threat to national security, jeopardy to armed forces operations or threat to members of the armed forces, security and intelligence services, police investigations and active court proceedings. These measures include Defence, Security and Media Advisory Committee, the Ministry of Defence Green Book, protocols with Crown Prosecution Service, Police, Ministry of Justice, HMCTS and engagement with police bodies, the judiciary and others.

Again, these underline the case for exemption, as the industry has well established systems in place to counter risks of unlawful content or risk to national security and members of the armed force, security and intelligence services, or their operations.

Publishers are already vigilant and active, with systems that pay due respect to press freedom – there is no necessity for any imposition of a new statutory duty of care and the White Paper regime which makes scant acknowledgment of the news media's freedom of expression concerns.

New 'online harms'- unjustified and repressive impact upon press freedom unless news publishers and content exempted from duty of care and online harms

As outlined above, the new regulatory framework worryingly entails the invention of new harms, to be countered by new duties and new procedures set by the regulator, Home Office and government through new codes then enforced by the new regulator by draconian powers and sanctions (possibly only for 'process' shortcomings, such as failure to document, rather than any substantive harm). As drafted, these could not just affect user generated content, but impose new, uncertain, unnecessary and disproportionate restrictions upon news publishers' investigations, reporting, publication and distribution. The potential infringement of Article 10 right to freedom of expression justifies exemption of news publishers and their content from the White Paper regime.

That case for exemptions is again reinforced because, as outlined above, existing criminal and civil law already govern NMA members' activities, upheld by the enforcement authorities, existing statutory regulators and the courts as appropriate and backed by sanctions of injunction, damages, high or unlimited fine, imprisonment, etc. In addition, most NMA members are bound to observe a further layer of regulation over and above the law imposed by the Editors' Code of Practice upheld by IPSO in relation to editorial content and the CAP Code and ASA in respect to advertising content.

In the absence of exemptions, the social media platforms might apply the proposed harms described in the White Paper to news media publications and that would create new, unnecessary and

unjustified restrictions on the press, in addition to the existing civil and criminal law and industry codes.

A new harm such as 'online disinformation' will be subverted to restrain news publishers and outlaw or chill publication, however strong the public interest in investigation and reporting. It is extremely broad. Backed by threat of the regulator's powers and sanctions, such a harm will be particularly prone to abuse and exploitation by state, companies and individual to repress media inquiry and publication. It could also lead to class actions and contribute to the threat or instigation of other civil claims or criminal prosecutions against news publishers, their workforce and sources in order to chill investigation and reporting.

It would curb whistle-blowers and media alike, restricting readers' sharing experience and revealing issues of great public interest, journalistic inquiry, news gathering, investigation, report and publication of matters of legitimate public interest - as the all too frequent and prevalent denunciation as 'fake news' of any unwelcome question, investigation and publication already demonstrate.

A new harm such as 'Online abuse of public figures' could similarly be deployed against media publication of news, views, comments, profiles and satire, rather than stopping the authors of the real threats received by journalists and politicians.

The White Paper's outline of the content of Codes on how to fulfil the duty of care for terrorist content online, serious violence online, hate crime, harassment, CSEA ,online abuse of public figures, cyberbullying and disinformation suggests that, in the absence of exemption, these might easily be subverted and used as instruments of news censorship, or chill the publication of investigative reporting, features, comment and opinion pieces.

Without exemption, news publishers could be subject to threat of investigation, class action or severe sanction, not for breach of the substantive law but for allegation of failure to fulfil the duty of care and breach of procedural codes. Invention of new broad and vague categories of harm such as disinformation exacerbate that threat.

For example, the open letter of Assistant Commissioner Neil Basu, Counter Terrorism Policing published in April advocated restraint of currently lawful, accurate, mainstream news reporting of terrorist incidents, for fear of inspiring radicalization or instigating unacceptable comment. He suggested that the White Paper might address this.

Lawful, accurate, serious news reports have been denigrated as sensationalist 'click bait' due to lawful inclusion of images, perhaps taken from material originating from supporters of so called Islamic State, highly relevant and appropriate to the context and the importance of the subject matter of the report, in compliance with the law and code and editorial consideration.

Proposed code provisions, such as duties of proactive prevention of publication of content, or of keeping informed of the relevant landscape, or current outlook of the police etc could all be subverted and used by the state and others to deter unwelcome publicity and repress important news media reporting, irrespective of the strong public interest in the particular reports, its compliance with the current criminal and civil law and industry codes- and the fundamental importance of the citizen's right to freedom of expression, a free press and its ability to perform its democratic function.

Furthermore, the application of the White Paper's regime by third parties to news publishers' content raises additional strong freedom of expression and industry concerns.

Without robust and comprehensive exemption for NMA member news publishers' content, the dominant social media companies, platforms and search engines will deploy algorithms, which will inevitably fail to distinguish lawful reporting from illegal content.

For example, these will not distinguish between perpetration of the unlawful act of encouraging terrorism or inciting hatred or some other crime contrary to existing law - and a lawful news report conforming to the criminal law, civil law and Editors Code of Practice after careful editorial consideration and decision, perhaps also involving specialist media law advice, industry protocols and advisory committees.

That could affect a wide range of news reporting and other editorial content- the report from a war zone whether or not the reporter is embedded with UK armed forces, a video of a Sri Lankan bomb blast and its aftermath, a still from a jihadi video illustrating a war crime, a news report of police battling Hong Kong demonstrators; a riot in Londonderry, criminal acts revealed in material released to the media after being shown to the jury in a criminal trial, inquest or public inquiry for court reporting purposes, or in material released by the police in appeals for information and witnesses after a crime such as a terrorist incident in London.

Those categories could affect a wide range of investigative reporting, news reporting, features, opinion pieces and contributions. Would articles on vaccination highlighting the problems created by those opposed to them be blocked? Could court reports or investigations revealing child sexual abuse be obstructed? Might pharmaceutical companies, as Viscount Colville suggested, be quick to obscure concerns about products? Would any local or regional or national press article dealing with controversial themes be blocked?

In order to prevent new fetters upon the press and freedom of expression, exemptions are vital. In view of the systems which news publishers already have in place, no public detriment would stem from exemptions. In the absence of exemptions, the White Paper would establish wholly unnecessary, disproportionate, legally uncertain restrictions upon press freedom, which would undermine rather than sustain news publishers' provision of high quality, trusted journalism to the ever-growing audience which demands it.

Why regulation by the White Paper proposal is unnecessary and disproportionate: news publishers already have well established effective systems in place to govern user generated content on their sites, which are also subject to well established, consistent, transparent, independent regulation by IPSO and by the criminal and civil law.

In accordance with the Government's assurances, exemptions should be provided as news publishers already have well established systems governing user generated content on their sites. There is no need for any onerous new regime to force industry action.

NMA member news publishers have well established systems for governance of user generated content, backed by IPSO

The White Paper suggests that the Government's objective is that companies have effective and proportionate processes and governance to reduce the risk of illegal and harmful activity online, as well as to take appropriate and proportionate action when issues arise. It wants to ensure effective

oversight of take- down of illegal content and monitoring requirements. It wants consistency and transparency.

NMA members already have well established systems for governance of user generated content which fulfil these requirements.

News publishers already have systems in place to minimize the risk of breach of the law, the Editors' Code of Practice and their own company standards. They take swift action to address problems, take down content and deal with complaints. These systems apply to user generated content upon their sites as well as the editorial content produced by their own journalists and other contributors.

Nearly all NMA members- national and local- are in membership of IPSO which provides independent oversight and enforcement of the IPSO scheme requirements. This applies to user generated content as well as publishers' other editorial content online. IPSO's jurisdiction and powers to uphold the Editors' Code of Practice and standards requirements of the IPSO scheme apply to news publishers' pre-moderated content, moderated retained content such as where reader alert of inappropriate unmoderated content triggers review, and reader complaint about content which triggers review and taking down, review and re-instatement of content: see IPSO website and links below:

IPSO

[Independent Press Standards Organisation](#)

[Editors' Code](#)

[see also FAQ Editors' Code - Independent Press Standards Organisation and EDITORS' CODE OF PRACTICE COMMITTEE](#)

IPSO Governance and procedures

[Articles of Association of the Independent Press Standards Organisation](#)

[Rules and Regulations](#)

[Scheme Membership Agreement](#)

[Financial Sanctions Guidance](#)

News publishers are also subject to the impetus of the current law, since companies are aware of any provisions and conditions relevant to any of their operations' qualification for statutory exceptions to legal liability and defences against certain legal actions, if relevant, appropriate and applicable, for example under section 1 or section 5 of the Defamation Act 2013 and the Section 5 Defamation Act Regulations 2013 and regulation 19 of the Electronic Commerce (EU Directive) Regulations 2002.

Examples of NMA local and national members' governance and swift enforcement mechanisms:

The NMA would be very happy to facilitate meetings with the DCMS to discuss any further information about the systems and procedures which its members already have in place and IPSO's requirements and role in respect of user generated content. Examples of the safeguards, used in combination, are set out below, but these are not exhaustive.

Companies set terms and conditions for posting comments under articles or participating in online forum, etc. These are published and notified to users. They set out clearly the restrictions which users must obey and with which material posted must comply. Companies will have house rules.

Companies may require user registration as a condition of posting. This may require provision of relevant information by users (identification, contact details) and log-in, ensuring users have notice of terms and conditions for posting and to facilitate the operation of the NMA members' systems governing user generated content.

Companies' titles will have protections built into their algorithms, such as language and profanity filters.

Some titles have processes for identifying persons with potential aliases who are placed in a pen, so that none of their comments are published until their contributions have been pre-moderated.

Titles block persons who do not comply with their conditions.

Companies' policies govern whether or not posting of comments under certain articles is permitted at all, in order to reduce the risk of unlawful or other unacceptable comment.

For example, titles may ensure that no posts are permitted under articles considered to be at high risk of attracting unlawful comment or breach of the Editor's Code e.g. incitement to hatred offences or court reports (contempt of court, breach of reporting restrictions) or other unacceptable comment.

The NMA and its members responded to the AG's call for evidence on social media on the administration of Justice and discussed in more detail how press publishers addressed these issues. No new restrictions upon publishers were advocated.

Where lesser risk is perceived, user generated content might be permitted under articles but moderated. Review and decision to retain any particular comment triggers IPSO regulation, in addition to any impact upon legal responsibility and liability. Even where such content is moderated, titles may also have a system enabling users to flag comments which they find offensive. Once it has received perhaps just three flags, it is automatically removed and reviewed again by moderators. It will only be re-instated if it complies with the publishers' standards including the Editors' Code of Practice and will be subject to IPSO regulation, as well as any relevant application of the law.

It is important to understand that any review by NMA members of any particular item of user generated content upon its own website that amounts to exercise of editorial control over the particular comment and its retention, will trigger IPSO jurisdiction, in addition to potential legal liability, if any. That applies to material re-instated by the company's reviewer, whether it was independently detected and reviewed by company moderator, material reviewed after alert by a reader flagging 'offensive' comment, or as a result of a complaint.

Where there is limited risk of unlawful comment, user generated comment might be permitted by titles, but not moderated in the same way. However, just one flag might trigger automatic removal and review by a moderator for a national title. In the case of a local title, the flag might immediately generate an email which goes to all duty editors who are obliged to review it immediately. Retention or re-instatement triggers IPSO jurisdiction as well as any operation of the law. In addition to that, the local titles will have a system that any comment receiving three flags is automatically taken down, in order to ensure immediate removal of anything that might be more generally offensive, to avoid any delay in review.

Any title receiving a complaint will respond swiftly. Comment retained after complaint will be subject to IPSO regulation and complaints procedures, in addition to any operation of the law.

Thus national and local titles have systems in place to minimise the risk of unlawful or offensive user generated comment, respond very swiftly to any single alert and will use automatic takedown if they receive as small as number as three alerts, in addition to complaints. Pre moderation, retention or re-instatement after reviewing, all trigger IPSO jurisdiction.

Thus, in addition to any impetus from the existing law, including criminal and civil liability, or from defences and exceptions under the law if relevant and applicable (eg Defamation Act 2013 section 5 or section 1, or regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002), news companies already have well established systems to address user generated content concerns.

Moreover, once any item of user generated content on publishers' websites has been reviewed and retained or re-instated as a result of editorial decision and exercise of control, that triggers the remit of IPSO. That would make re-instatement dependent upon compliance with the Editors' Code of Practice, as well as the law and titles' own standards. It also entails that any complainant would have recourse to the swift complaints process in accordance with the time limits specified in the scheme, remedies including correction and takedown, with recourse to IPSO's independent investigation and adjudication and all other relevant governance requirements of the IPSO scheme.

IPSO oversight

As the Secretary of State acknowledged, IPSO already provides an effective system for user generated content. IPSO is the independent regulator for the newspaper and magazine industry in the UK. It holds newspapers, print and online, to account for their actions, protects individual rights and upholds high standards of journalism. The Editors' Code of Practice upheld by IPSO requires members to observe restrictions and standards above and beyond the law. IPSO and publishers enter into a binding, enforceable contract and publishers are required to make arrangements for observation of the SMA requirements by their workforce, freelance and other contributors.

The IPSO Scheme Membership Agreement and IPSO Regulations set out in detail the requirements which publishers are contractually bound to fulfil. These include swift complaints procedures applicable to such user generated content, with recourse to IPSO investigation and adjudication, IPSO monitoring and enforcement of press standards, including the return and publication of annual statements on how they follow the Editors' Code and handle complaints. It can investigate and sanction serious standards failings, with fines up to £1million. It requires and provides training, advice and guidance for journalists and provides a 24-hour anti- harassment advice line.

The links below provide further detailed information about IPSO's remit over user generated content and the application of the system to this. The NMA would be happy to discuss these matters further.

IPSO

[Independent Press Standards Organisation](#)

[Editors' Code](#)

[see also FAQ Editors' Code - Independent Press Standards Organisation and EDITORS' CODE OF PRACTICE COMMITTEE](#)

IPSO Governance and procedures

[Articles of Association of the Independent Press Standards Organisation](#)
[Rules and Regulations](#)

[Scheme Membership Agreement](#)
[Financial Sanctions Guidance](#)

The news media industry therefore already has a transparent, effective, industry- wide and consistent system for regulation of user generated content, supplemented by publishing companies' own comprehensive procedures. These ensure swift action and protections against content in breach of the law, in breach of the Editors' Code and in breach of the publishers' standards.

In addition of course, as news media companies and individual publishers, editors and journalists and publications must comply with the myriad criminal and civil laws governing publication online and in print including those listed in the White Paper.

Such laws include, but are not limited to, defamation, malicious falsehood, harassment, incitement to hatred, contempt of court and reporting restrictions, terrorism (including duties to pass on information about terrorist activity to the police), obscenity, extreme violence and pornography, sexual offences including those against children, official secrets, misuse of private information and data protection.

They must also observe the controls over and above the law imposed by the Editors' Code of Practice and company policies. The Editors' Code of Practice covers accuracy, privacy, harassment, reporting suicide, children, children in sex cases, hospitals, reporting of crime, clandestine devices and subterfuge, victims of sexual assault, discrimination, financial reporting, confidential sources, witness payments and payments to criminals.

Legal oversight: The industry has well established systems for compliance with the law and industry codes.

Professional journalistic qualifications require training in media law and media codes and companies provide training to maintain up to date awareness. IPSO provides training. IPSO and the Editors' Code of Practice Committee provide guidance. Companies have additional policies and training.

Editors have legal responsibility for publication and have oversight of journalists.

National newspaper companies and some regional newspaper groups employ in house specialist media lawyers to advise their editors and journalists and duty lawyers.

All news publishers' companies can also consult external specialist media lawyers with substantial experience of advising both local and national press (The NMA itself also provides an optional telephone advice service available to local publishers).

This is another reason why the White Paper regime should not apply to news publishers and news publishers' content and made subject to the new regime, the regulator's powers, others' legal actions or put at risk of repression by third party tech companies' policing of their own duties of care. Publishers' content must be exempted and its exemption observed by third parties (perhaps through operation of a kitemark applicable to NMA members).

Imposition of the White Paper proposals cannot be justified as necessary or proportionate restrictions upon press freedom and freedom of expression. Exemption of news publishers and their content however disseminated, including through search and social media, would not diminish

consumer protection. The well-established industry systems will continue to maintain and enforce standards.

News publishers such as NMA members which carry user generated content on their sites and the content of such news publishers must be totally exempted from the new regime proposed by the White Paper and such exemption must be observed by third parties in addition to the regulator. The NMA would be happy to discuss these matters further discussions with the DCMS and Home Office.

Next steps- comprehensive exemptions from the White Paper regime

The NMA and its members would welcome further discussion with the Government on the vital clear, robust, comprehensive exemption for news publishers and their content from the White Paper's proposed regime, which must be framed on the face of any Bill and all relevant primary and secondary legislation and other regulation, and for its observation by all others in practice.

Other issues

Advertising regulation

The NMA urges the government to ensure that the DCMS review of UK online advertising regulation including its terms of reference, its specific inquiries and its recommendations all explicitly address the necessity for the tech companies to make a full contribution to ASA funding. It is imperative that the government puts pressure upon the tech companies to pay their full, proportionate and proper share of the costs of funding the ASA and advertising self-regulatory system and ensure the survival of the system.

News publishers are already subject to legal requirements of the laws governing advertising online and in print. The NMA and its members support the system of advertising self-regulation and the CAP code of upheld by the Advertising Standards Authority.

[Non-broadcast Code - ASA | CAP - Advertising Standards Authority](#)

Again news publishers have very long-established systems for dealing with advertising and complaints, with recourse to the ASA. We would be happy to discuss any advertising aspects in more detail. CAP provides training and publishes guidance. (The NMA provides an online A-Z guide on Advertisement Points to Watch and optional telephone advice service for local titles.)

The NMA notes the White Paper 's reference to a Home Office/advertising industry working group. The NMA has not been consulted by the Home Office or DCMS on the work of that group. It is imperative that the NMA and news publishers are consulted on any work or recommendations that might impact upon publishers and press freedom.

The NMA also urges the government to maintain pressure upon the Competition and Markets Authority to launch a market study, investigation and take action on the digital advertising market, focused upon the tech companies, as advocated by the Chancellor of the Exchequer, the Treasury's Digital Competition Experts Panel chaired by Professor Furman, the DCMS Secretary of State, the Review into the sustainability of high quality journalism chaired by Dame Frances Cairncross; the House of Commons DCMS Select Committee and the House of Lords Communications Committee.

Exclusions from scope

The NMA notes the proposed exclusion of intellectual property matters from scope of the White Paper.

The NMA therefore urges the Government to implement swiftly- as soon as possible this year- the Publisher's Right, in a way helpful to news publishers and sustaining of their high quality, original trusted journalism. The NMA also urges the Government to provide legal safe haven which permits the industry collectively to negotiate with the dominant tech companies in order to ensure a licensing system and fair remuneration by the tech companies to news publishers for the tech companies' use of publishers' original material and to establish appropriate codes of practice governing the tech companies' business dealings with publishers.

The NMA notes the Government's intention to exclude data protection from the scope of the White Paper proposals. However, the NMA asks the Government to take note of the very strong objections of the NMA to the ICO's age appropriate design code which if implemented could have devastating effects upon the industry. We also ask it to note the NMA's concerns that the ICO does not seek to exploit its powers to draw up a statutory data protection and journalism code and seek to establish itself as the de facto statutory regulator of the press. We assume that this exclusion also applies to ePrivacy measures- but we also ask the Government to note the united opposition of press and other media across the Europe to certain revisions proposed to the ePrivacy Regulation currently under negotiation, which would have devastating consequences for the independent commercial media if adopted.

Media Literacy

The NMA and member news publishers who are engaged in their own initiatives would be happy to continue to participate in Government discussions.

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