Campaign Against Censorship Response to Public Consultation on Online Harms White Paper, 2019

Note: Respondents were asked to provide their views by responding to a number of questions. For ease of reference, the text of each question is given first, followed by the CAC's response. Although the following is a copy of the both the relevant questions and the CAC's responses, it has been reformatted into a more readable document.

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Q1: This government has committed to annual transparency reporting. Beyond the measures set out in this White Paper, should the government do more to build a culture of transparency, trust and accountability across industry and, if so, what?

CAC response: *To expect companies to share all information about their workings voluntarily with government is unrealistic. However, compulsory transparency would be incompatible with the values of a free society. In the case of internet companies we take the view that annual reports to the regulator (paragraph 3.17) are sufficient.*

Q2: Should designated bodies be able to bring "super complaints" to the regulator in specific and clearly evidenced circumstances?

CAC response: *No. The designated bodies would be perceived at best as vulnerable to influence from commercial interests, political organisations and pressure groups and at worst as agents of the regulator or of government, targeting content or behaviour which has been selected for additional control.*

Q2a: If your answer to question 2 is "yes", in what circumstances should this happen?

CAC response: *See response to question 2.*

Q3: 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?

CAC response: *The question takes it for granted that any specific piece of content or activity about which users raise concerns is "harmful" and not merely offensive or disturbing. This may not always be the case. The regulator's task is to provide companies with a standardized procedure for handling complaints, including clear information for the user on how to make a complaint and how to appeal against a company's decision. We disagree with the suggestion (paragraph 3.30) that there should be no role for the regulator in resolving disputes. We also disagree with the suggestion that complainants should be able to seek redress through the civil courts (paragraph 3.29) because such action is unaffordable by most people.*

Q4: What role should Parliament play in scrutinising the work of the regulator, including the development of codes of practice?

CAC response: *If the regulator is not receiving public funding (paragraph 5.21) Parliament's role in scrutinising its work should be minimal and its codes of practice are its own responsibility. An annual report to the DDCMS [Department for Digital, Culture, Media & Sport] and the Home Office is sufficient.*

Q5: Are proposals for the online platforms and services in scope of the regulatory framework a suitable basis for an effective and proportionate approach?

CAC response: *Some of what is proposed is comparatively experimental and the nature of an experiment is that is it not possible to decide in advance whether it will work.*

Q6: In developing a definition for private communications, what criteria should be considered?

CAC response: *We suggest two: 1) is any of the parties to the communication using it for commercial purposes (e.g. advertising, sales)? If so, it is not private. 2) if the communication were being sent in another medium (e.g. post, landline telephone) would it be private? If so, it is private online, too.*

Q7: Which channels or forums that can be considered private should be in scope of the regulatory framework?

CAC response: *Either all channels or forums that can be considered private should be in scope of the regulatory framework, or none should. It depends on whether privacy considerations should or should not override concerns about "online harms".*

Q 7a: What specific requirements might be appropriate to apply to private channels and forums in order to tackle online harms?

CAC response: *See response to question 7. It appears from this question that the authors of the White Paper believe that the possibility of "online harms" overrides the right to privacy of communications. If the content of a channel or forum is illegal it should be referred to law enforcement. If it is not, the justification for regulation rests on the "online harms" concept. This concept applies to such a wide range of content and activity that almost anything might be defined by the regulator as likely to cause "harm" in one way or another. Either the authors of the White Paper are themselves afraid not so much of what users say or do on the internet as of internet technology itself, or they hope, by persuading people that content and activity not previously considered dangerous becomes dangerous when fed through a computer, to frighten them into approving a system of control (or "regulation") which they would not otherwise accept.*

Q8: What further steps could be taken to ensure that the regulator will act in a targeted and proportionate manner?

CAC response: *Restrict the regulator's operations to content and activity which, whether or not they are illegal, would still be considered harmful or dangerous if they appeared or were performed elsewhere than online.*

Q9: What, if any, advice or support could the regulator provide to help businesses, particularly start-ups and SMEs, comply with the regulatory framework?

CAC response: *All bodies subject to the regulator, including new businesses and not-for-profit organisations, should be supplied with codes of practice and updates as they are published.*

Q10: Should an online harms regulator be (i) a new public body or (ii) an existing public body?

CAC response: *A new body. The volume of work involved, especially at first, is probably too much for an existing one in addition to the job it already has. Also a new body would start with no history of controversial decisions.*

Q10a: If your answer to question 10 is (ii), which body or bodies should it be?

CAC response: *See response to question 10.*

Q11: A new or existing regulator is intended to be cost neutral: on what basis should any funding contributions from industry be determined?

CAC response: *Either a percentage of turnover or a percentage of profits. This percentage should be the same across the industry; it must not bear too heavily on small firms. Care will need to be taken to prevent firms evading the levy by claiming to be not-for-profit. Viable arrangements would need to be made for collecting payments from firms based overseas.*

Q12: Should the regulator be empowered to i) disrupt business activities, or ii) undertake ISP blocking, or iii) implement a regime for senior management liability? What, if any, further powers should be available to the regulator?

CAC response: *The text of the White Paper exhibits confusion between content and activity which are illegal under existing criminal law and content and activity which it defines as "harmful". (For example, paragraphs 3.1 to 3.5 and 6.4 to 6.5.) Before deciding what penalties the regulator should have the power to impose, it is important to ensure that it does not encroach on the work of the criminal courts and that companies are not punished under two different systems for the same offence. As for the regulator's suggested powers: i) disruption of business activities. No, because it would mean loss of business for third party companies, who should not be penalised financially for someone else's offence. ii) ISP blocking. Possibly, but only after a hearing by the regulator. ISPs should not be able to pick and chose for themselves which companies to block. iii) senior management liability. No. As the White Paper admits (paragraph 6.5) this might not be proportionate for small companies. Members of staff in large companies could expect to have their*

fines paid for them by their employer; for a small firm this would not be possible. Also probably some people would claim that they were carrying out instructions and were not personally at fault.

Q13: Should the regulator have the power to require a company based outside the UK and EEA to appoint a nominated representative in certain circumstances?

CAC response: *Since the text of the White Paper (paragraphs 6.9 to 6.12) does not make clear what circumstances the authors have in mind, a yes or no answer is not possible. They appear to be suggesting that companies based outside the UK and EEA should be required to appoint a representative who would be responsible to the regulator as well as the company. "In certain circumstances" this would cause a conflict of interest for the person concerned, especially if the overseas government had a less controlling attitude towards online content and activity than is proposed for the UK.*

Q14: In addition to judicial review should there be a statutory mechanism for companies to appeal against a decision of the regulator, as exists in relation to Ofcom under sections 192-196 of the Communications Act 2003?

CAC response: *Yes.*

Q14a: If your answer to question 14 is "yes", in what circumstances should companies be able to use this statutory mechanism?

CAC response: *i) if they consider that the regulator's decision does not fit the facts of the case, ii) if they consider that the decision is at odds with decisions in other cases involving similar content or activity and iii) if they consider that the penalty imposed is excessive. There must be no bar for appeals (paragraph 6.13). There is no such thing as an offender so worthless as to have no right of appeal.*

Q14b: If your answer to Question 14 is "yes", should the appeal be decided on the basis of the principles that would be applied on an application for judicial review or on the merits of the case?

CAC response: *On the merits of the case. The statutory appeal is the equivalent of an appeal against conviction and/or sentence in criminal proceedings and should be decided on the facts of the case, not on principles.*

Q15: What are the greatest opportunities and barriers for (i) innovation and (ii) adoption of safety technologies by UK organisations, and what role should government play in addressing these?

CAC response: *The White Paper does not deal with product development in the real world, where unsafe products are physically dangerous to those who use them. It deals with hypothetical effects on some users of products consisting solely of words and images and for practical purposes does not distinguish between temporary offense, anxiety or distress and the more permanent consequences of actions said to have been caused by use of the product concerned. The concept of "safety" is inappropriate in the context of information, imagination and ideas and is likely to prove a barrier to*

innovation because it inhibits experiment. "Adoption of safety technologies" amounts to self-censorship; in a free country government may ask for self-censorship but must never impose it.

Q16: What, if any, are the most significant areas in which organisations need practical guidance to built products that are safe by design?

CAC response: *The only area in which organisations may need practical guidance to build products that are "safe by design" is where products are designed specifically for use by children. In all other areas, the alleged welfare of children should not be used as an excuse to build censorship into products intended for adults.*

Q17: Should the government be doing more to help people manage their own and their children's online safety and, if so, what?

CAC response: *The government should encourage people to have confidence in their own ability to decide for themselves and their children what online content and activities they wish to avoid. However, judging by the contents of the White Paper this government would rather devote its energies to making people feel threatened and unsafe online – and see response to question 7a.*

Q18: What, if any, role should the regulator have in relation to education and awareness activity?

CAC response: *None. The regulator's role is not to teach people to navigate the internet by themselves, but to do it for them. A regulator (= censor) who encourages people to be self-reliant around information, imagination and ideas is a contradiction in terms. We suggest that arrangements for the teaching of online media literacy and the co-ordination of initiatives in that field (paragraphs 9.17 to 9.22) should be the role of a new specialist body responsible to the Department for Education, not the DDCMS or the Home Office.*