



# The proposal to expand criminal liability for social media managers in the UK's Online Safety Bill

## Policy Summary

February 2023

- The UK government is considering amending the UK's Online Safety Bill (OSB) to expand the scope of criminal liability for individual social media managers who have failed to comply with their duties laid out in Section 11 of the Bill relating to safety and protections for children, subject to fines or imprisonment of up to two years.<sup>1</sup>
- Such a proposal would constitute a **significant divergence** from like-minded countries' approaches to online safety and from the UK's obligations under international human rights law.
- It would also risk making the UK **a less attractive market** for the tech industry and disproportionately burden smaller companies.
- We strongly recommend that the UK government should **retain the existing enforcement mechanisms** in the current version of the bill
- If the UK government must expand criminal liability, it should include strong safeguards to ensure that such a power is used **only as a last resort**, and only in instances where senior managers of social media platforms have persistently and negligently ignored clear direction from Ofcom on illegal content in a way that poses an immediate risk of harm.

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## The proposed amendment

Under **the current version** of the OSB, Ofcom is empowered to require online platforms and search engines to name a senior manager responsible for compliance with information and audit requests. This individual can be held criminally liable **only** for failing to comply with requirements to provide Ofcom with information or access to information under relevant provisions of the OSB. Criminal sanctions are therefore targeted at ensuring compliance with Ofcom's need for timely access to relevant information. This approach has been informed by extensive consultation with relevant stakeholders and maintained through several rounds of pre-legislative and legislative scrutiny.

**The proposed amendment**, put forward by a coalition of 37 MPs in January 2023, seeks to expand the scope of this individual criminal liability for senior managers of social media platforms. Under the

proposed amendment, such managers could be held criminally liable for non-compliance with duties laid out in **Section 11** of the Bill relating to safety and protections for children, punishable by a fine or imprisonment for up to two years.<sup>2</sup> Proponents of the amendment argue that without this strengthened criminal liability, the OSB will not do enough to hold social media platforms accountable for the harms their services pose to children.

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## Comparison to like-minded regimes

Online safety laws in other jurisdictions like Australia, Canada, Ireland, the European Union and New Zealand either do not impose criminal liability on senior managers of social media platforms, or do so under much more limited circumstances than those proposed in the amendment.

Even though the UK government has indicated that it will model the amendment on the provisions for individual criminal liability in the Irish Online Safety Act, Ireland's approach to criminal liability for online safety duties is fundamentally different to that suggested by the proposed amendment:

1. An individual employee would only be criminally liable for breaking Ireland's Online Safety Rules if the Commission had exhausted all other enforcement powers
2. An individual employee would only be criminally liable in relation to a specific and clear contravention of one of Ireland's Online Safety Codes, which will be designed by the Irish Media Commission independently of the Irish government
3. An individual employee would only be criminally liable in relation to contravention of duties relating to four specific categories<sup>3</sup> of online harm defined in Ireland's Online Safety Act, not any content which may be harmful to children

The UK's proposed amendment is **therefore fundamentally different from the provisions on individual criminal liability in the Irish legislation**, and relating to different duties and circumstances.

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## Our concerns

We are concerned that the proposed amendment to the OSB will, if adopted:

- Fail to provide sufficient clarity for an individual to reasonably know what conduct is prohibited under the law;<sup>4</sup>

- Pose disproportionate risks to individuals and children’s rights to freedom of expression and access to information;
- Incentivise platforms to overremove content, posing risks to individuals and children’s rights to freedom of expression and access to information and disproportionately impacting marginalised users;
- Require platforms to age-gate their services by rolling out untested and unregulated age verification and age assurance technologies at scale, posing risks to children’s rights to freedom of expression and to access accurate information, and to all users’ rights to privacy and nondiscrimination;
- Strengthen top-down platform content governance rather than empowering children and their parents to use and navigate such platforms on their own terms;
- Disproportionately burden smaller companies and further increase dominance by a small number of very large platforms over the UK market and online public discourse;
- Further embolden less democratic states seeking to introduce “hostage-taking” laws to force online platforms to comply with government content requests.

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## A way forward

- We strongly recommend that the UK government should **retain the existing enforcement mechanisms in the current version of the bill**, including fines, court-ordered business disruption measures and information and audit notices, and keep the scope of individual criminal liability for Senior Managers restricted only to non-compliance with Ofcom’s information requests, not including non-compliance with child safety duties.
- If the UK government insists on pursuing some form of an amendment to individual criminal liability, we recommend that the proposed text is published in full as soon as possible for scrutiny by Parliamentarians and relevant stakeholders.
- Furthermore, we recommend that criminal liability should only be triggered as a “proportionate last resort for the Regulator” at the end of an “exhaustive legal process”<sup>5</sup>.
- In practice, this should mean that a Senior Manager would only be held criminally liable when Ofcom has **exhausted all other enforcement powers** to incentivise compliance, and the individual has **persistently and negligently** ignored clear direction from Ofcom relating to the platform’s responsibilities relating to **illegal content that has been confirmed as illegal by a jurisdictional authority** and that poses **significant and demonstrable harm to a child or children using the service**.

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## Notes

1. Online Safety Bill Amendment Paper, Thursday 12 January 2023, New Clause 2 (p.2), [https://publications.parliament.uk/pa/bills/cbill/58-03/0209/amend/online\\_safety\\_rm\\_rep\\_0112.pdf](https://publications.parliament.uk/pa/bills/cbill/58-03/0209/amend/online_safety_rm_rep_0112.pdf); Michelle Donelan, [UK Secretary of State for Digital Culture, Media and Sport], "Online Safety Update" 17 January 2023, Statement UIN HCWS500, <https://questions-statements.parliament.uk/written-statements/detail/2023-01-17/hcws500>
2. Online Safety Bill Amendment Paper, New Clause 2. Please note that Section 11 duties relate to content which is or may be harmful to all or some children, not to child sexual abuse material (CSAM). CSAM is and has always been illegal and is dealt with elsewhere in the bill
3. "Harmful online content" is defined as content which (1) constitutes a criminal offence; (2) is subsequently specified as harmful online content by the Commission, and confirmed as such by the Minister through an order; (3) falls into the categories of bullying, promotion of eating disorders, self-harm or suicide; or (4) meets the "risk test" in that it gives risk to a person's life, or risks significant and reasonably foreseeable harm to a person's physical or mental health. See Section 139A of the Irish Broadcasting Act, 2009, as introduced by Part 8 of the Irish Online Safety and Media Regulation Act, 2022.
4. As recognised in the Human Rights Act 1998 and Article 15.1 of the International Covenant on Civil and Political Rights (ICCPR)
5. Joint Committee on the Draft Online Safety Bill, *Draft Online Safety Bill: Report of Session 2021–22*, <https://committees.parliament.uk/publications/8206/documents/84092/default/>, paras. 360–369