What Next? Submission to Online Harms Consultation
24th June 2019
 **Please describe the organisation or interest group you represent and its activities**What Next? is a national movement of arts and cultural organisations, artists, funders, policy makers, institutions, and individuals who come together regularly to articulate and strengthen the role of culture in society. We’re interested in how we can act together to make change happen and how we can hold an authentic conversation about value with decision makers, the public and each other.

A non-constituted, open network of self-forming chapters, we aim to work collaboratively to build alliances outside of the cultural sector, build relationships with local and national government, and engage the public in new and different conversations about the arts. We argue for the ways that the arts and culture strengthen every aspect of the national economy and our social well-being and cohesion, and seek to make this case working closely with national bodies such as the Cultural Learning Alliance, Arts Council England, and the Creative Industries Federation.

We aim to be responsive to the changing climate and the ideas of everyone involved, working voluntarily together to take action around issues and challenges that face us all. What Next? reflects a thirst amongst individuals in the cultural sector around the country for honest and refreshing dialogue, and for shared action. Our work together in turn builds stronger networks and outward-facing collaboration, shares best practice and mutual support, and equips the sector to articulate a convincing case for the role of culture in society to decision makers across political worlds.

Over the last six years the What Next? movement has grown organically to encompass 34 chapters around the UK, each meeting regularly under Chatham House rules and our central principles and values. They bring together individuals, organisations and institutions to work on locally significant issues, and to consider how to contribute to wider action. Each chapter identifies its own priorities as well as collaborating with others and working as a national movement. Some are headed by cultural leaders, some by young professionals at the start of their career. All activity is open to anyone who chooses to attend. Chapter Chairs step forward to take the initiative to set up each What Next? Group. What Next is sustained by an extensive voluntary effort and buy-in - from Chairs, attenders and collaborators across this picture - and then also by a minimal enabling structure of paid freelance support at the core.

This submission has been developed chiefly by members of the London Young Vic Chapter. This group meets at the Young Vic Theatre on the Cut in Waterloo every Wednesday from 08:30 - 09:30, is Chaired by David Lan and Alistair Spalding, (Chief Executive of Sadler’s Wells) as well as volunteers from within the group. We have around 30 - 80 attendees every week from arts organisations like Dance Umbrella, Arts Admin, Royal Opera House, the Place, the National Theatre, Freeword, Arts Admin, the Royal Academy, the Imperial War Museum, the Gate Theatre, English Pen and many more. We also have regular attendees from several universities, from philanthropic trusts and foundations like Paul Hamlyn and Clore Duffield and pro-bono support from PR and Lobbying organisations.

**How many members are there in the interest group you represent and how did you obtain the views of your members?**

The Young Vic Chapter of What Next? has around 900 members, with a wider national network of 34 Chapters reaching across the cultural sector. To develop our thinking for this submission we ran two consultative sessions during regular weekly meetings (each attended by approximately by 40 colleagues), with input from representatives of Google, Index on Censorship and the DCMS. We talked through case studies from Shereener Browne, barrister at Garden Court Chambers, on the negative impact the proposals would have on Drill artists; and from Chris Campbell, Senior Editor at Oberon books, on the impact of the proposals on playwrights who use harmful content as subject matter.

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**Online Harms Bill Consultation Questions**

**Question 1: 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?**

**Supporting the right to artistic freedom**

Supporting the right to artistic freedom of expression is an integral part of What Next?’s mission to create the best possible conditions for art and culture to thrive in this country.

**Artistic use of ‘harmful’ content**

Whilst we acknowledge that there is a need to manage online harms where illegal activity is taking place, and to safeguard children where necessary, we are concerned that **the measures set out in the White Paper fail to recognise artists’ legal use of harmful content as a vital source of subject matter**. Our appendix lists just some of contemporary plays and other artworks. that use content that would potentially fall within the scope of the online harms, and that could be wrongly caught up in regulation, take down and possible penalties if the plans set out in the White Paper are taken up.

**Complexity, ambiguity, nuance, satire**

We are concerned that the White Paper has not attempted to accommodate the significant complexities relating to artistic expression and harmful content. **Nuance, ambiguity, satire, irony and the creation of ‘harmful’ characters should all be explicitly considered**, with measures and provision put in place to ensure that no artistic work is censored or discouraged due to the creation of a hostile environment to free expression.

**Freedom for artists to push boundaries**

[In its current 10 year strategy,](https://www.artscouncil.org.uk/sites/default/files/download-file/Great_art_and_culture_for_everyone.pdf) Arts Council England (ACE) states:

‘*Art is about the discovery of the unknown and unimagined. Artists will innovate, and push boundaries*.’ Further on ACE states that ‘*we want to offer arts and cultural organisations the commitment and freedom that allows them to experiment and take risks*.’ The proposals in the White Paper could create an environment in which artists do not feel free to push boundaries and take risks.

**Fuelling a culture of caution**

This question goes to the heart of our concerns that the existing proposals will create a culture of mistrust and lack of transparency. **Decisions to censor work could be taken outside a framework of legal accountability: by companies, platforms or by the independent regulator: leading to increased censorship of artists and art**. The imposition of heavy fines on, and potential criminal action against, senior executives of companies could fuel a culture of over-caution, where perfectly legal artistic work exploring the harms within the scope of this White Paper, could be taken down to avoid getting caught up in the regulatory framework.

**Double standards will undermine trust**

Artists are skilled at pushing the boundaries of what is acceptable and legal, whilst remaining within the bounds of the law. We are concerned that challenging, provocative yet perfectly legal artistic expression that is acceptable in the offline world, will fall foul of regulation online. This could drastically limit what can be expressed by artists, many of who rely almost entirely on the internet to promote their work; it would also impact negatively on the debate that artwork naturally generates. **We therefore urge the government to apply existing legislation, rather than creating any new law** to ensure that the new regulation doesn’t outlaw legal expression.

**Transparent, rights approach to build trust**

Artists increasingly use the internet as their most important tool to access an audience, opportunity and livelihood. **The internet opens up unprecedented reach for artists at all stages of their careers and brings into play, not only the rights of artists and audience to free expression and the free exchange of ideas without interference from the state, but also the economic rights of the artists.** Unfortunately, the recommendations in this White Paper could render multiple platforms, currently available to artists, useless and could be in violation of multiple rights, if artistic content was to be removed. **To build trust with the arts and cultural sector, transparency reporting should ensure that companies are implementing regulations in a way that takes human rights, and in particular, rights to freedom of expression, cultural and economic rights, into account.**

**Balance between safety and freedom**

We believe that, in the bid to make the UK the safest place in the world to be online, **the White Paper has lost a proportionate sense of balance and more work needs to be done to create a more nuanced and flexible solution**.

**Respecting rights and international law**

We would like to draw attention to the international legal instruments that should be taken into account when drafting this legislation: [The International Covenant on Economic, Social and Cultural Rights](https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx) article 15 (3) under which States *‘undertake to respect the freedom indispensable for…creative activity’* and in article 19 (2) of ICCPR*, which states that ‘the right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds “in the form of art’.*

**Existing guidance on rights-based approach**

We are concerned that the current proposals don’t take a **strong enough stance to protect and promote existing legislation and rights framework. We therefore promote the important role of the rights approach to regulation as put forward by David Kaye, U.N. Special Rapporteur on Freedom of Expression**, in the [first-ever U.N. report](https://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/ContentRegulation.aspx) that examines the regulation of user-generated online content. The Special Rapporteur examines the role of States and social media companies in providing an enabling environment for freedom of expression and access to information online.

We draw attention to the recommendation from U.N. Special Rapporteur, David Kaye’s, report on regulation of user-generated online content:

‘*States should refrain from adopting models of regulation where government agencies, rather than judicial authorities, become the arbiters of lawful expression. They should avoid delegating responsibility to companies as adjudicators of content, which empowers corporate judgment over human rights values to the detriment of users.’*

**Transparency reporting**

On transparency reporting, Kaye’s report recommends: *‘States should publish detailed transparency reports on all content-related requests issued to intermediaries and involve genuine public input in all regulatory considerations.’* The transparency reporting would, in the context of this report, aim to demonstrate how the regulator had not acted in violation of rights and international law.

**Accountability and Artificial Intelligence**

Given the massive volume of text and imagery that is uploaded every hour on larger platforms, **the task of moderating content unavoidably falls to AI**. There is a growing body of evidence of AI’s failure to effectively manage the legal, subtle, ironic, provocative and satirical language and images created by artists. There is also evidence of the in-built bias within many of the algorithms that are used to manage these processes. **Human accountability is needed to differentiate between the use of harmful subject matter to explore and expose difficult content, and harm itself**. The White Paper should, at the earliest stage, take properly into account how regulation would be delivered - whether by DCMS, Big Tech, the Police, the proposed regulator, or other; and to ensure that there is capacity and associated resource to deliver an agreed, effective and proportionate level of regulation.

**Lack of clarity in the regulation could lead to lack of accountability**

Attention needs to be paid to ensuring clarity, which is challenging given the complexity of the task. Rather than reinventing the wheel, the Bill could make use of the excellent work already done by UN Special Rapporteur, David Kaye - see below. **We are extremely concerned that ‘harm is not defined within the Paper**. We believe this ambiguity is a significant and highly problematic issue.

**What protection for freedom of expression is set out by the white paper?**

We welcome the report’s assurance that:

*The regulator will also have an obligation to protect users’ rights online, particularly rights to privacy and freedom of expression. It will ensure that the new regulatory requirements do not lead to a disproportionately risk-averse response from companies that unduly limits freedom of expression, including by limiting participation in public debate. Its regulatory action will be required to be fair, reasonable and transparent.*

However, we strongly believe thatthe statement needs to go further and would need to **take full and explicit account of artistic expression that deals with harmful content. Some kind of ‘fair use’ style exemption** that acknowledges the multiple legitimate, if provocative and challenging, ways that artists use ‘harmful’ content.

**Recommendations**

More time is needed to develop this policy and legislation to ensure that the proposals deliver on **trust, transparency and accountability**.

We recommend:

* **MORE TIME:** for more careful and comprehensive navigation of the implications for artists, art, artistic expression and all related and ensuing debate and discussion pertaining to it
* **MORE CONSULTATION:** to engage directly with artists and arts organisations to ensure that transparency, trust and accountability can be developed at this policy making stage. This would include the development of additional user-friendly consultation tools which young people and artists can engage with directly.
* **MORE BALANCE:** to engage with those whose livelihoods and legal expression are at risk of being affected by the scope of the legislation; ensuring that penalties against excessive censorship are not unfairly applied. We would like to see a much more detailed rationale behind the need for any new legislation in this area, as we feel that the current provision would be adequate if properly interpreted and applied.
* **MORE CLARITY:** a clearer and more precise definition of harm needs to be arrived at that targets harm in a proportionate and legal manner. We would also like further clarity on the capabilities and capacity of both Big Tech and the government in making these proposals a reality.
* **MORE ASSURANCE:** that the government will adopt measures that will specifically protect artistic freedom and to ensure that the measures do not encourage disregard for freedom of expression
* **MORE EVIDENCE:** to create clear evidence base for the need for regulations
* **MORE RIGHTS BASED APPROACH:** to take a rights based approach to regulation as laid out in the UN Special Rapporteur’s report on regulations relating to user-generated online content.

**CASE STUDY**

**Drill and Grime Music**

Imagine a 15 year old black boy living on a rough housing estate in South East London, surrounded by poverty and drugs. He has very little going for him except he can spit bars. And what does he rap about? Like Dr Dre, Eminem, IceCube before him he raps about the violence and crime that surrounds him. It is his chance to escape poverty and become like Eminem or Stormzy; the internet is his gateway to his audience, to get his story out to a bigger audience and possibly a record deal.

**Removing content without any legal imperative**

The White Paper premise that social media is used to promote and glamourise gang culture and incite violence, would, we suggest, include Drill music. We have already seen a precursor to the proposals that the White Paper puts forward because police and politicians both asked Google to remove Drill videos without any legal imperative. The proposals in the White Paper will make it much easier to remove content by Drill artists.

**Removing Drill is not the answer (**[**“Banning Drill Makes Things Worse”**](https://www.bbc.co.uk/news/entertainment-arts-48627409) **BBC)**

[Lawyers corroborate the view expressed by artists (see below)](https://www.indexoncensorship.org/2018/06/kill-drill-the-death-of-freedom-of-expression/) that there is a misconception about Drill and Grime: rather than glamorising gang life, it is used by young black men as a route out of gang life. The argument that this genre of music / poetry is inciting violence does not take into account that the music is the expression of the lived experience of the artists. By censoring it and removing it from digital platforms, an avenue for marginalised young people to express themselves (and earn a living) will be closed. Measures taken against sharing Drill music online will simply drive it underground.

**Art and storytelling is a legitimate escape route from poverty.**

Drill is a popular part of a lucrative artistic genre that is integral to the music industry. Songs are featured extensively BBC 1Xtra.

**Taking their case to parliament**

* In response to the first case in British history of an artist being convicted of a crime for performing a song, Drill artists have taken their [case to parliament](https://www.clashmusic.com/news/krept-konan-just-spoke-in-support-of-drill-in-the-uk-parliament.). Artist Krept commented:  *“There was violence before Drill. If we stop Drill right now, is it going to end? Drill is being used as a scapegoat. We need to tackle the situation with alternative routes. We need support. We need to invest in our communities. Invest in things that will help these young kids, teach them new things, how to do other things. Stopping them from doing things they like, when music is a way out, is not going to help the situation.”*

**Short film has 1,250,000 views on YouYube**

* [**Ban Drill**](https://www.youtube.com/watch?v=nuwcr-M37Do)a short film made by Drill artists, d**r**aws attention to the negative impact of banning young black men’s artistic creativity: closing down a route out of the drug economy and gang violence.

**Petition**

* artists have launched a petition, which lays out the social and economic problems that underpin the Drill genre, asking the Police to stop banning Drill music by using the Serious Crime Act to prosecute artists.

**Risking discrimination**

Where legislation would seem to discriminate disproportionately against one racial group in society, in this case young, black men, we would like to draw attention to the following relevant international law: *Provisions are to be implemented without any discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, as stated in article 2 of International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights. Article 5 (e) (vi) of the International Convention on the Elimination of All Forms of Racial Discrimination stress that all persons, irrespective of their specific situation or status have the right to freedom of artistic expression and creativity.***End of case study**

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

**Balanced approach**

The government should take a balanced approach to this issue: clearly safeguarding, championing and respecting the rights of artists and audiences to a free exchange of ideas.

It is important that the regulations do not focus solely on penalties associated with failure to take down genuinely harmful content, in line with existing legislation. They must also give due regard to the consequences for platforms that remove legal content, or misinterpret or misconstrue content. To ensure that it is not a one way process, **Parliament must ensure that the regulator issues sanctions against platforms that censor or take down legal expression too readily.**

**Qualified to take artistic expression taken into account**

It is essential that the regulator is qualified to manage artistic content responsibly. Too often artistic expression is given low status in the offline world, and is removed or cancelled without due recognition of the artists rights. [A spate of recent cancellations or removal of work on police advice shows](https://www.indexoncensorship.org/campaigns/artistic-freedom/) evidence of a trend in which the police advise the removal of provocative work in order to dispel, or avoid protest. We do not want this trend to be mirrored in online regulation.

**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?**

**‘Proportionate’ is a relative term**

Whilst many of the measures set out in the White Paper appear to be directed at the ‘Big Tech’ companies with the greatest influence, it will apply to all platforms with user-generated content. **It will be extremely difficult for small organisations to comply and we are concerned that they will not have the capacity or capability to deliver their roles or responsibilities. Significant training and support will be needed.**

**Disproportionate limitations on online expression**

During our consultation sessions the group asserted that **we have sufficient existing legislation that criminalises certain forms of speech offline, without needing to introduce a whole new level of penalty or criminality for online speech.**

**Disproportionate concerns about safety versus freedom**

**We are unconvinced by the government’s vision to make the UK the ‘safest country in the world to go online’ - if this is at the expense of freedom of expression**. We do not believe that the State should protect people from the world, or from the imaginative universe, nor should we try to. Whilst we believe that every effort should be made to make age-appropriate safeguards, the White Paper has focused its attention on responding to the needs of people who have been harmed by online content: based on a very broad definition of harm. More attention needs to be paid to artists who conduct their legal business and expression online, and who will be impacted negatively by an overprotective environment.

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

**Privacy is essential to the development of artistic material and content.**

**We strongly oppose the idea of any private communications being in scope of this Bill.** The ability to communicate freely in private about artistic ideas in development, to research into complex and potentially harmful areas of society in order to understand motivations, experiences, expression, use of language and imagery of people who might have been perpetrators or victims of harmful practice, in other words all the things that constitute well-informed, credible and professional artistic practice would be jeopardised by bringing private communications in scope.

**Question 7: Which channels or forums that can be considered private should be in scope of the regulatory framework?**

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

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

**Avoid targeting legal artistic expression**A clear statement that acknowledges the use of harmful content as legal subject matter for artistic expression.

**Developing a methodology**

To develop a methodology, in consultation with artists and arts organisations that helps platforms identify the ways in which artists use harmful content as an integral part of artistic practice.

**Making an appeals process manageable and accessible**

**A clearly stated appeals process** will ensure that artists whose expression has been inappropriately or wrongly targeted can have easy and expedient recourse.

**Question 9: What, if any, advice or support could the regulator provide to businesses, particularly start-ups and SMEs, comply with the regulatory framework?**

As above - significant training and support will be needed.

**We also believe that there should be a significant investment into education**, with young people given the tools and information to keep themselves safe and access all their rights in the digital environment.

**We support** [**5Rights**](https://5rightsfoundation.com) in their work taking the existing rights of children and young people (under 18), and articulating them within the digital world. We believe that they should be supported to access digital technologies creatively, knowledgeably and fearlessly.

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

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

**Question 11: A new or existing regulator is intended to be cost neutral: on what basis should any funding contributions from industry be determined?**

**We believe that there is a clear risk to independence and accountability if those who are regulated fund the regulator.** This has been an issue with regards to IPSO, which is funded by the major news publications. [Critics have questioned the independence of this body](http://www.transparencyproject.org.uk/press-regulation-why-we-are-unimpressed-by-ipso/) and its ability to make robust decisions because of the funding model. To date, some media organisations, including the Guardian, refuse to join IPSO in large part due to how it is funded.

**Question 12: 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?**

**Creating a culture of risk aversion**

Our concern is that the more punitive this system is, the more likely it is to create a risk averse culture which is antithetical to the freedom of artistic expression. **We would like to suggest that the regulator concentrates its powers on creating an enabling digital environment where everyone (including children and vulnerable people), can access their rights.**

**Question 13**: **Should the regulator have the power to require a company based outside the UK and EEA to appoint a nominated representative in the UK or EEA in certain circumstances?**

**Question 14**: **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?**

**There should be a separate statutory mechanism for appeal in addition to judicial review (JR**). JR is a remedy of last resort; as a result the criteria are strictly defined by case law. For example an individual seeking JR must do so promptly and in any event within 3 months of the act complained of. There is also a strictly imposed condition to resort to alternative remedies before using JR. It is submitted therefore that **there should be a separate system of appeal with longer time limits and with a wider remit e.g. not only available to companies but to interested parties affected by the regulators decision.**

**Question 14a: If your answer to question 14 is ‘yes’, in what circumstances should companies be able to use this statutory mechanism?**

Judicial Review principles plus the overall and individual merits of the case.

**Question 14b**: **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?**

**Question 15: 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?**

**Question 16: What, if any, are the most significant areas in which organisations need practical guidance to build products that are safe by design?**

**Question 17: Should the government be doing more to help people manage their own and their children’s online safety and, if so, what?**

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

**APPENDIX**

**EXAMPLES OF CONTEMPORARY ARTWORK USING HARMFUL CONTENT**

<https://www.theguardian.com/stage/2018/dec/07/vicky-featherstone-mark-ravenhill-british-theatre-royal-court-the-cane>

**SUICIDE, MENTAL HEALTH**

* **4:48 Psychosis**, Sarah Kane (first performed, 2000)
* **Blasted**, Sarah Kane, 1995
* **Cleansed**, Sarah Kane, 1998
* **Attempts on her life** Martin Crimps, 1997 ("17 scenarios for the theatre" offer us multiple perspectives on the dead, shape-shifting figure of Anne. She may have been an urban terrorist, a tourist hostess, a pornographic movie star, or an artist whose subject matter was her own serial suicide-attempts.)
* **Dust**, Milly Thomas, 2018 <https://www.bbc.co.uk/news/av/entertainment-arts-43217423/what-drove-milly-thomas-to-write-a-play-about-suicide>
* **Who wants to play games with suicide?** Roland Reynolds, 2016
* <https://www.thecalmzone.net/2016/07/theatre-who-wants-to-play-games-with-suicide/>
* **Goodbye Cruel World**, Robert Ross Parker (produced 2017)
* **The 4th Graders Present an Unnamed Love-Suicide**, Sean Graney

**PAEDOPHILIA**

* **Five Easy Pieces**, Milo Rau <https://thetheatretimes.com/the-use-of-children-in-milo-raus-five-easy-pieces-exploitation-or-confrontational-theatre/>
* **The Nether,** Jennifer Haley, 2014 <https://www.theguardian.com/stage/2014/jul/22/the-nether-online-paedophilia-computer-game-theatre-royal-court>
* **Downstate**, Bruce Norris, 2019
* **Grace and Ecstasy**, James Martin Charlton, 2001 <https://www.theguardian.com/uk/2001/feb/25/vanessathorpe.theobserver>

**YOUNG PEOPLE AND ONLINE PORN**

* **We Want You to Watch**, Alice Birch, <http://www.bbc.com/culture/story/20150617-how-is-porn-changing-society>
* **Punching the Sky**, Lizzi Patch <http://www.bbc.com/culture/story/20150617-how-is-porn-changing-society>
* **Credible Likeable Superstar Role Model**, Bryony Kimmings

<http://www.bbc.com/culture/story/20150617-how-is-porn-changing-society>

**VIOLENCE**

* **When We Have Sufficiently Tortured Each Other**, Martin Crimp, 2019
* **Saved**, Edward Bond, 1965
* **Trash Cuisine**, Belarus Free Theatre
* **Shopping and Fucking,** Mark Ravenhill
* **Romans in Britain,** Howard Brenton, 1980

<https://opinionator.blogs.nytimes.com/2016/03/14/the-theater-of-violence/>

**TERRORISM**

* **Believers are but Brothers,** Javaad Alipoor, 2017
* **Bismillah, an ISIS Tragicomedy**, Martin Greenough, 2018
* **Trojan Horse**, Lung Theatre, 2018
* **Art and Terrorism** - Tate, 2015
* **Art in the Age of Terror** - IWM, 2018

<https://www.theguardian.com/us-news/gallery/2016/sep/02/september-11-art-photos>

<http://www.parisglobalist.org/je-suis-art-talks-terrorism/>