RANKING DIGITAL RIGHTS

September 24, 2021

Honorable members of the Department of Canadian Heritage:

Ranking Digital Rights (RDR) welcomes this opportunity for public consultation on the Canadian government's proposed approach to regulating social media and combating harmful content online. We work to promote freedom of expression and privacy on the internet by researching and analyzing how global information and communication companies' business activities meet, or fail to meet, international human rights standards (see www.rankingdigitalrights.org for more details). We focus on these two rights because they enable and facilitate the enjoyment of the full range of human rights comprising the Universal Declaration of Human Rights (UDHR), especially in the context of the internet.[1]

RDR broadly supports efforts to combat human rights harms that are associated with digital platforms and their products, including the censorship of user speech, incitement to violence, campaigns to undermine free and fair elections, privacy-infringing surveillance activities, and discriminatory advertising practices. But efforts to address these harms need not undermine freedom of expression and information or privacy. We have long advocated for the creation of legislation to make online communication services (OCSs) more accountable and transparent in their content moderation practices and for comprehensive, strictly enforced privacy and data protection legislation.[2]

We commend the Canadian government's objective to create a "safe, inclusive, and open" internet. The harms associated with the operation of online social media platforms are varied, and Canada's leadership in this domain can help advance global conversations about how best to promote international human rights and protect users from harm. As drafted, however, the proposed approach fails to meet its stated goals and raises a set of issues that jeopardize freedom of expression and user privacy online. We also note that the framework contradicts commitments Canada has made to the Freedom Online Coalition (FOC)[3] and Global Conference for Media Freedom,[4] as well as previous work initiating the U.N. Human Rights

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[1] https://www.un.org/en/about-us/universal-declaration-of-human-rights.
[2] https://rankingdigitalrights.org/index2020/recommendations.
[3] https://freedomonlinecoalition.com/aims-and-priorities/;
[4] https://www.international.gc.ca/campaign-campagne/media_freedom-liberte_presse-2020/global_pledge-engagement_mondial.aspx?lang=eng.

Council's first resolution on internet freedom in 2012.[5] As Canada prepares to assume the chairmanship of the FOC next year, it is especially important for its government to lead by example. Online freedom begins at home. As RDR's founder Rebecca MacKinnon emphasized in her 2013 FOC keynote speech in Tunis, "We are *not* going to have a free and open global Internet if citizens of democracies continue to allow their governments to get away with pervasive surveillance that lacks sufficient transparency and public accountability."[6]

Like many other well-intentioned policy solutions, the government's proposal falls into the trap of focusing exclusively on the moderation of user-generated content while ignoring the economic factors that drive platform design and corporate decision-making: the targeted-advertising business model. In other words, restricting specific types of problematic content overlooks the forest for the trees. Regulations that focus on structural factors—i.e., industry advertising practices, user surveillance, and the algorithmic systems that underpin these activities—are better suited to address systemic online harms and, if properly calibrated, more sensitive to human rights considerations.[7]

In this comment we identify five issues of concern within the proposal and a set of policy recommendations that, if addressed, can strengthen human rights protections and tackle the underlying causes of online harms.

Issues of Concern and Recommendations

1. **Proposed regulatory bodies have expansive powers and limited oversight.** RDR is concerned with the sweeping authority vested in the new regulators of online content moderation (Module 1(C): Establishment of the new regulators; Module 1(D): Regulatory powers and enforcement). Particularly troubling are the provisions that empower regulators to define new categories of harmful content for future inclusion under the framework (Module 1(A) #9) and the rule that enables the government to order country-wide ISP blocking of non-compliant OCSPs (Module 1(D) #120). Such broad regulatory powers are inconsistent with the principles of necessity and proportionality that must underlie restrictions on fundamental human rights.[8] While Canadians can take comfort in the strength of their democratic institutions, all countries are but one election away from democratic decline and a slide into authoritarianism. Our recent experience in the United States has been a sobering one, reinforcing the importance of balanced institutional powers, good governance, and oversight mechanisms.

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[5]
https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/internet_freedom-liberte_internet.aspx?lang=eng;
https://documents-dds-ny.un.org/doc/UNDOC/LTD/G12/147/10/PDF/G1214710.pdf?OpenElement.
[6] https://consentofthenetworked.com/2013/06/17/freedom-online-keynote/.
[7]
https://rankingdigitalrights.org/wp-content/uploads/2020/07/Its-the-Business-Model-Executive-Summary-Recommendations.pdf.
[8] https://www.ohchr.org/documents/issues/privacy/electronicfrontierfoundation.pdf

Recommendation: **Engage civil society for guidance on how to implement provisions that protect human rights.** As numerous public critiques of the Government's framework have made clear,[9] strong civil society involvement is necessary to help define appropriate statutory limitations and bolster human rights protections in the proposed legislation. Specifically, an independent body of civil society stakeholders should be consulted by the government to provide direct input on appropriate reforms. These consultations should themselves be public and transparent.

Recommendation: **Ensure effective and independent oversight.** Any government bodies empowered to flag content for removal by companies, or empowered to require the blockage of services, or to compel network shutdowns, must be subject to robust, independent oversight and accountability mechanisms to ensure that the power to compel companies to restrict online speech, suspend accounts, or shut down networks is not abused in a manner that violates human rights.

2. **Little attention given to human rights considerations**. Despite a stated desire to safeguard "fundamental freedoms and human rights" (Module 1(A) #1(h)), the Technical paper does not enumerate the specific values being protected, the mechanisms by which this might occur, nor the tradeoffs involved in securing some rights at the expense of others (i.e., protecting users from online harm versus limiting online expression).

   Recommendation: **Evaluate the human rights impacts of the proposed legislation.** Both state and non-state actors have human rights obligations. Protecting these rights must start with the Canadian government, which should conduct and publish an independent Human Rights Impact Assessment (HRIA) of the proposal.

   Recommendation: **Require companies to undertake independent assessments of the human rights impacts of their content moderation practices.** As part of new reporting obligations (Module 1(B) #14, #20), OCSs should be obligated to conduct independent assessments of potential human rights impacts that could occur in relation to the operation of their platform, service, or devices and to take the findings of such assessments into account when making business decisions. The process for conducting these assessments and acting on them should be made public. Human Rights Impact Assessments accord with the UN Guiding Principles on Business and Human Rights, which detail the human rights responsibilities of governments and companies alike.[10]

3. **24-hour takedown requirements for content will lead to unnecessary censorship.** The obligation that OCSs must take action on content flagged as infringing (Module 1(B), #10-12) within 24 hours is particularly onerous and harmful to freedom of expression. This provision is similar to those found in other efforts to regulate online speech, most

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https://ablawg.ca/2021/09/13/the-federal-governments-proposal-to-address-online-harms-explanation-and-critique/; https://www.michaelgeist.ca/2021/07/onlineharmsnonconsult/
[10] https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

notably, Germany's Network Enforcement Act (NetzDG). NetzDG has become a model for internet regulations in more authoritarian states,[11] inspiring laws and proposals in places such as Russia, Venezuela, Vietnam, and Turkey.[12] Timed takedown mandates have received broad criticism from academic experts[13] and civil society groups[14] for their likelihood to censor lawful speech.

Recommendation: Remove 24-hour takedown requirements. In addition, complainants requesting content removals should provide additional information, including justification for the removal, the Internet identifier and an explanation of the content, inclusion of possible defenses open to the user content provider, and a statement that the request was made in good faith. These guidelines are drawn from the Manila Principles for intermediary liability standards.[15]

4. **Proactive content monitoring threatens user privacy.** The current structure of the proposal all but ensures that OCSs will implement proactive monitoring tools (i.e., algorithmic filtering software) to moderate illegal content (Module 1(B) #10).[16] Proactive filtering regimes of this kind have been identified by the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression as "inconsistent with the right to privacy and likely to amount to pre-publication censorship."[17] Moreover, automated content moderation systems have been found to disproportionately burden marginalized communities.[18] Belief in the magic of artificial intelligence (AI) to solve harmful content problems at scale is deeply problematic. Algorithmic moderation approaches are subject to significant limitations[19] due to their inability to comprehend contextual elements of speech, biased datasets that

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http://justitia-int.org/en/the-digital-berlin-wall-how-germany-created-a-prototype-for-global-online-censorship/.

[12] https://www.eff.org/deeplinks/2020/07/turkeys-new-internet-law-worst-version-germanys-netzdg-yet.

[13] https://www.ivir.nl/publicaties/download/NetzDG_Tworek_Leerssen_April_2019.pdf;
https://www.hiig.de/wp-content/uploads/2018/07/SSRN-id3216572.pdf;
https://www.lawfareblog.com/rushing-judgment-examining-government-mandated-content-moderation.

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https://www.article19.org/wp-content/uploads/2018/07/Germany-Responding-to-%E2%80%98hate-speech%E2%80%99-v3-WEB.pdf;
https://edri.org/our-work/eu-action-needed-german-netzdg-draft-threatens-freedomofexpression/;
https://www.hrw.org/news/2018/02/14/germany-flawed-social-media-law;
https://blog.mozilla.org/netpolicy/2019/03/07/one-hour-takedown-deadlines-the-wrong-answer-to-europes-content-regulation-question//

[15] https://manilaprinciples.org/principles.html.

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https://techpolicy.press/five-big-problems-with-canadas-proposed-regulatory-framework-for-harmful-online-content/.

[17] https://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/ContentRegulation.aspx.

[18] https://aclanthology.org/P19-1163.pdf;
https://cdt.org/wp-content/uploads/2017/12/FAT-conference-draft-2018.pdf;
https://www.newamerica.org/oti/reports/everything-moderation-analysis-how-internet-platforms-are-using-artificial-intelligence-moderate-user-generated-content/the-limitations-of-automated-tools-in-content-moderation/

[19] https://www.ivir.nl/publicaties/download/AI-Llanso-Van-Hoboken-Feb-2020.pdf.

discriminate against users and their content, and inaccuracies associated with predictive models.[20]

Recommendation: Eliminate broad obligations to monitor for harmful content. The government should consult with civil society stakeholders to craft an approach that is narrower in scope and more proportionate to the desired aim. (See the Manila Principles for guidance on the creation of intermediary liability standards that align with international human rights standards.)[21]

Recommendation: Require companies to demonstrate algorithmic accountability. Algorithmic systems are integral to the operation of OCSs' content moderation and content delivery functions. Yet, these tools remain largely hidden from public scrutiny and oversight. At a minimum, the government should mandate that companies follow international human rights standards in developing and using algorithms (see the recommendations from our 2020 Corporate Accountability Index for further guidance on this issue).[22] In addition, they should require OCSs to make public comprehensive and comprehensible policies describing how algorithms are developed and used across their services, especially in relation to the moderation of user and advertising content. As we found in our 2020 Corporate Accountability Index, only four digital platforms provided any information about the human rights impacts of their automated systems[23] and no services offered user access to algorithmic system development policies.[24]

5. **Regulating specific content overlooks how business models facilitate online harms.** Content restrictions, without substantive consideration of the economic and technical systems that facilitate content delivery, are inadequate solutions to combat online harms. Instead, legislative attention must center on business models based on the mass collection and monetization of user data for targeted advertising.[25] These industry practices facilitate a range of human rights abuses, most immediately those related to privacy, freedom of expression and information, and protection from discrimination.[26]

Recommendation: Focus regulation on the targeted-advertising business model. In particular, companies should be required to disclose information that demonstrates they are tracking the social impact of their targeted-advertising and algorithmic systems, taking necessary steps to mitigate risk and prevent social harm. Additionally, company

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https://www.newamerica.org/oti/reports/everything-moderation-analysis-how-internet-platforms-are-using-artificial-intelligence-moderate-user-generated-content/.
21   https://manilaprinciples.org/principles.html.
22 https://rankingdigitalrights.org/index2020/recommendations.
23 https://rankingdigitalrights.org/index2020/indicators/G4d.
24 https://rankingdigitalrights.org/index2020/indicators/P1b.
25 https://datasociety.net/wp-content/uploads/2018/10/DS_Digital_Influence_Machine.pdf.
26 https://rankingdigitalrights.org/its-the-business-model/;
https://www.amnesty.org/en/documents/pol30/1404/2019/en/;
https://www.ohchr.org/Documents/Issues/Business/B-Tech/B_Tech_Foundational_Paper.pdf.

transparency and reporting obligations should be expanded to cover content moderation practices for advertisements (see the recommendations from our 2020 Corporate Accountability Index for further guidance on this issue).[27] Our research in 2020 concluded that although most companies provide at least partial disclosure about their advertising content and targeting policies,[28] the majority do not disclose any information about changes to these policies nor changes to their advertising targeting policies.[29]

Recommendation: Require disclosure about data inference used for advertising purposes. Algorithms require large amounts of user data to make decisions related to various platform services. However, service users know little about how their personal data informs such processes, particularly for targeted advertisement purposes. The government should require that companies provide users with access to this information, including any information used to make inferences or predictions about them, in a structured format. As we determined in our 2020 Index, many digital platforms fail to disclose what information they infer and how.[30] The material for the ones that do is extremely limited.

Recommendation: Strengthen legal provisions for data-minimization, purpose limitation, and personal control—and enforce them. Privacy regulations should protect users from the harmful effects of OCSs' targeted advertising practices by prohibiting companies (as well as other actors, including government agencies) from collecting information that is not strictly necessary to provide the service requested by the user, absent user consent. Using such information for a different purpose than that for which it was collected without the consent of the affected individual should likewise be prohibited. Moreover, individuals should not be able to opt-in to discriminatory advertising or to the collection of data that would enable it. Our research shows that across the online ecosystem, companies provide little transparency about how users can control and limit the ways their data are used.[31]

The nature and severity of harms stemming from the operation of online communication services grows increasingly problematic. This requires the state to play a stronger role overseeing industry activities. But governments must establish a modern regulatory approach marked by transparency, civil society engagement, heightened concern for human rights, and other ingredients consistent with best practices in the governance field. Without these guidelines, efforts to safeguard freedom of expression, user privacy, and other rights and freedoms will inevitably fall flat.

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[27] https://rankingdigitalrights.org/index2020/recommendations.
[28] https://rankingdigitalrights.org/index2020/indicators/F1b;
https://rankingdigitalrights.org/index2020/indicators/F1c.
[29] https://rankingdigitalrights.org/index2020/indicators/F2b;
https://rankingdigitalrights.org/index2020/indicators/F2c.
[30] https://rankingdigitalrights.org/index2020/indicators/P3b.
[31] https://rankingdigitalrights.org/index2020/indicators/P7.

We strongly caution against further content regulation. Such approaches will always be an imperfect solution for the problem of harmful material online, one that is neither comprehensive in scope, nor free from error and possible corruption. They also set a troubling precedent as a template that countries with less respect for human rights may choose to emulate, with grave consequences for free expression and other rights. Instead, as we have recommended, regulations should target the underlying economic systems—targeted advertising business models, indiscriminate user surveillance, and unaccountable algorithms— that have contributed to some of the worst abuses of online speech.

Canada's strong history of support for civil liberties and internet freedom well positions it to chart a new global path on these issues. In doing so the government can uphold its obligation to protect the fundamental human rights of its own citizens and residents, establish new standards of democratic accountability and transparency over social media platforms, and become a champion for internet users around the world.

Thank you again for the opportunity to participate in this consultation. We look forward to engaging further with the Canadian government and its representatives on these matters. We can be reached by email at policy@rankingdigitalrights.org.

Sincerely,

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