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OFCOM's DRAFT VAWG GUIDANCE: FREEDOM OF EXPRESSION AND OTHER HUMAN RIGHTS

This detailed analysis by Prof Lorna Woods OBE looks at the approach Ofcom has taken to freedom of expression in its draft guidance on A Safer Life Online for Women and Girls in the context of the related Articles of the European Convention on Human Rights (ECHR) and the relevant jurisprudence from the Strasbourg Court.

Introduction

In its draft guidance on *A Safer Life Online for Women and Girls*, Ofcom summarises the position regarding human rights (specifically freedom of expression and privacy) as follows:

> "Any interference with these ECHR rights must be prescribed by law; pursue a legitimate aim and be necessary in a democratic society. The interference must be proportionate to the legitimate aim pursued and corresponding to a pressing social need." (A1 (Legal Annex), para 2.115)

The purpose of this discussion is to demonstrate that, while the three-stage test Ofcom refers to is a starting point for analysis of freedom of expression (as for other rights such as the right to private life) and has been re-stated by the Court in many cases (eg *Delfi* (App no 64569/09), para 131), it is not the totality of the Strasbourg Court's approach. The Court's jurisprudence consistently emphasises the importance of freedom of expression in a democratic society, which is based on pluralism, tolerance and broadmindedness, but it is not the only right and - as a starting point - all rights are equal.

While the Legal Annex and the Impact Assessment (Annex A2) recognise that there needs to be a balance between conflicting rights, and that one person's exercise of a right may lead to an interference with another person's rights, it is not clear how Ofcom has gone about this balancing process. The jurisprudence of the Strasbourg Court is far more nuanced and multi-factoral than the brief summary in the Annex to the Consultation on the Guidance suggests and probably allows for greater freedom of action to protect women and girls from online gender based violence than an initial reading implies.

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This note makes reference to the jurisprudence of the Court of Human Rights given that the judgments, according to the Court, "serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties" (*Ireland v United Kingdom* (App No 5310/71), para 154) and the "shared responsibility between the States Parties and the Court, and that national authorities and courts must interpret and apply domestic law in a manner that gives full effect to the Convention" (*Grzęda v. Poland* (App no 43572/18), para 324).

Three aspects of the case law need elaborating here, which are taken in turn below:

1. is all content protected expression?;
2. even within Article 10, is all speech equal?; and
3. how to balance conflicting human rights.

1 Protected Expression

The assessment of freedom of expression assumes that all communicative acts constitute protected expression, but this is not the case. Article 17 ECHR deals with abuse of rights. It specifies that:

> "Nothing in [the] Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

This means that expression and expressive activities which trigger Article 17 do not get the protection of Article 10 – limitations on this type of speech do not have to be justified under the Convention framework.

Article 17 was initially used in relation to speech that sought to support totalitarian regimes. It is now used more generally where the action in issue is incompatible with democracy and/or other fundamental values of the Convention or contrary to the text and spirit of the Convention and, if allowed, would contribute to the destruction of Convention rights and freedoms. Thus,

> "a political organisation whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the

> Convention's protection against penalties imposed on those grounds." (*Kasymakhunov and Saybatalov v. Russia* (App nos 26261/05 26377/06), para 105)

In this case, the Court further noted that the party's draft Constitution would:

> "promote differences in treatment based on sex, for example providing that women cannot take up high-ranking official positions. These provisions are hard to reconcile with the principle of gender equality, which has been recognised by the Court as one of the key principles underlying the Convention and a goal to be achieved by member States of the Council of Europe." (para 110)

The activities of this organisation were thus found to fall outside the protection of Articles 9, 10 and 11 by virtue of Article 17. Promoting gender inequality, and the exclusion of women from the public sphere, would therefore seem to be incompatible with the fundamental values of the Convention.

More generally, promotion of hatred and violence and the various forms of discrimination can also trigger Article 17, even if masquerading as artistic or humorous content (*M'Bala M'Bala* (App no 25239/13)). Many of the Article 17 cases concern hate speech. In determining whether Article 17 applies, the Court considers the aim of the expression as well as its main content and general tenor which should be understood in the light of the circumstances as a whole. The Court has recognised the particular impact of the Internet and its possibilities to reach a wide audience, especially when we consider the impact of service functionalities in promoting problematic content – particularly where the speaker has influence or authority.

In *Lenis* (App no 47833/20), at a time the Parliament was debating legalising same sex marriage, the applicant – a senior official in the Greek Orthodox Church - had posted a blog under the title "THE SCUM OF SOCIETY HAVE REARED THEIR HEADS! Let's be honest SPIT ON THEM"; the article was reported widely. In it, he described homosexual people as "criminals", "people of the dark", "mentally ill people", "defective" and "humiliated", while homosexuality was described as "social felony" and "a deviation from the laws of nature". In addition to calls to action and dehumanising speech, the Court noted the status of Lenis and his potential to influence; and that his remarks were disseminated via the Internet and were therefore available widely. The Court also takes into account who is in the targeted group and particularly whether the group requires protection because of victimisation to which such a group has historically been, and continues to be, subjected. The Court's case law expressly recognises gender and sexual minorities in this context (*Lenis*, para 51; but see also *Lilliendahl v. Iceland* (App no 29297/18), para 45).

The Grand Chamber of the Court in *Perinçek* (*Perinçek v Switzerland* [GC] (App no 27510/08)) concerning the penalties imposed on the applicant in relation to his denial of the Armenian genocide, summarised the position:

- recourse to Article 17 is exceptional;
- in relation to Article 10, it should be used if it is immediately clear that the impugned statements sought to deflect this Article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention; and
- the applicant's statements sought to stir up hatred or violence, and by making them he attempted to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it.

A direct incitement to violence is not required to trigger Article 17. In *Norwood v UK* (App no 23131/03) Norwood complained of a prosecution in relation to a sign in his window with the words "Islam out of Britain – Protect the British People" and a symbol of a crescent and star in a prohibition sign. This the Court characterised as: "a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism," and "incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination".

On this basis it could be argued that some of the content relevant to the Guidance - where it aims at inciting violence or hatred or destroying the rights and freedoms of others - would not receive the protection of Article 10. Indeed, some of the misogynistic speech dehumanising women (eg that they belong to men), especially where those comments are widely available (eg on the Internet) or targeted at audiences open to influence (see, for example, the recent case of Kyle Clifford) could cross the threshold to be considered outside the protection of Article 17. It would seem likely that death threats could do so, especially when combined with other aspects (eg encouraging a pile on or with doxxing). While referring to women as vermin may not be sufficient, phrases like "they're just all sheep and should be slaughtered" and "they all need to die" may cross the line; these examples came from Digital Action's recent report *Clicks, Code, and Consequences: Big Tech's Gamble with Human Lives and Election integrity in the 2024 Year of Democracy* (21 March 2025, p 15).

It should be emphasised that a wide use of Article 17 is not recommended because of the risks to the claimed right – here, freedom of expression, which in principle extends to protecting the shocking and offensive. In *Lilliendahl* (para 25), the Court remarked,

> "[i]n cases concerning Article 10 of the Convention, it should only be resorted to if it is immediately clear that the impugned statements sought to deflect this Article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention".

The Court emphasised that this is a high standard. So, in general, offensive content which does not have the aim of undermining Convention values would likely be considered under Article 10 (see eg *Smajić* (App no 48657/16)). Article 17 applies only to the most serious cases; its use is exceptional (*Perinçek* [GC] (App no 27510/08)).

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One final point is that there is no necessary connection between the question of whether a communicative act triggers Article 17 and that of whether it should be criminalised. Some criminal content can be speech for the purposes of Article 10 and some content that is not criminalised may trigger Article 17.

2 Is all expression equal?

The proximity of the content to Article 17 terrain can, however, influence the Court's reasoning under Article 10 and can lead to an interference with an Article 10 right being justified – in a number of these cases, the Court has dealt with the matter briefly or rejected the application as manifestly inadmissible. The Court has described its rulings on hate speech falling in this category (as opposed to hate speech triggering Article 17) thus:

> "[i]nto this second category, the Court has not only put speech which explicitly calls for violence or other criminal acts, but has held that attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for allowing the authorities to favour combating prejudicial speech within the context of permitted restrictions on freedom of expression." (*Lilliendahl v. Iceland* (App no 29297/18), para 36)

Lilliendahl concerned posts which the national authorities considered to constitute publicly threatening, mocking, defaming and denigrating a group of persons on the basis of their sexual orientation and gender identity.

The Court also noted that other speech which does not call for criminal acts can also fall within this category depending on context – including the sensitivity of the audience, the breadth of the audience and the speaker's status. In *Féret v. Belgium* ((App no 15615/07) para 75), which concerned racist comments by a politician during a political campaign (linking non-European immigrant communities with damage to property, noise, rubbish and violent altercations), the Court noted the speaker's position as a politician, the objective of reaching the population at large and the exacerbating context of an election. In the Grand Chamber decision of *Sanchez* (App no 45581/15), a politician's conviction for failing to remove third party racist posts railing against the prevalence of kebab shops and mosques and linking the immigrant community with drug dealers and prostitutes on his Facebook wall, the Court found no violation. This is despite the fact that political speech "attaches the highest importance to freedom of expression in the context of such a debate", especially for elected officials (*Sanchez*, para 146-7). Nonetheless, response to speech encouraging intolerance or violence enjoys a broader margin of appreciation. In another example, *Šimunić* (App no 20373/13), the Court took into account the fact that the speaker, as a footballer, was a role model for many fans. Arguably, influencers, at least those with a significant following, could fall into a similar category.

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Further, focus on the three-part test does not include some of the different techniques that the Convention Court has developed to provide different levels of protections to expression in different contexts. The Court applies different levels of scrutiny and approaches to justification depending on context. A key point is that there are different types of speech and they are not equal. Interference with political speech attracts a high level of scrutiny from the Court. Contrast the position for commercial speech (*Sekmadiensis* (App no 69317/14) paras 73 and 76) or speech which does not contribute to a debate of public interest, when a State will have a greater margin of appreciation in how it balances societal interests. In the context of press reporting, the Court has emphasised that, "the focus must be on whether the publication is in the interest of the public and not whether the public might be interested in reading it" (*Mosley v UK* (App no 48009/08), para 114). While the media is highly protected in Convention case law, the Court's jurisprudence also recognises that the freedom of expression is subject to duties and responsibilities – in the context of the media (both journalists and publishers – eg *Chauvy v France* (App no 64915/01), para 79), this finds expression through the idea of responsible journalism (see eg *Stoll v Switzerland* (App no 69698/01), *Pentikäinen v. Finland* (App no 11882/10), *Bédat v. Switzerland* (App no 56925/08)).

This emphasis ties back to the concerns the Court identifies in giving a broad protection to freedom of expression in terms of shocking and offensive content – that of a plural, democratic society – but also explains the lower level of protection for speech (even if it is not hate speech) that does not relate to this concern. In the *Pirate Bay case* (*Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay)* (App no 40397/12)), which concerned a peer-to-peer site facilitating the mass violation of copyright, the Court took into account the economic interest of the site operator as a factor in determining that this speech received a low level of protection.

In *C8 (Canal 8)* (App nos 58951/18 and 1308/19) the Court found there had been no violation of Article 10 in relation to regulatory sanctions of €3,000,000 imposed by the broadcasting regulator in relation to the programme *Touche pas à mon poste* – an entertainment show covering news interspersed with comedy segments. One segment involved the host causing one of the show's female pundits who had her eyes closed to place her hand on his trousers, over his genitals, without visibly being warned or giving consent. Another involved the host speaking to callers replying to a fake ad he had placed on a dating website, the voices of the callers being left unaltered. In its judgment, the Court emphasised that none of the segments which provoked complaints had anything to do with a matter of public interest; rather the show was entertainment-orientated seeking to attract a wide audience for commercial gain (para 84). The Court re-iterated that humour is not a "get out of jail free" card and that freedom of expression always brings with it duties and responsibilities (para 85). The Court also noted that the "joke" returned to a stereotyped and degrading image of women, reducing the pundit to the status of a sexual object, and this was particularly problematic given the impact of the footage on younger people. It reiterated that progress towards gender equality is an important goal of Council of Europe Member States. In this context, it is noteworthy that some influencers

seem to try to make money out of commodifying misogyny (and misusing academic research to frame and validate their beliefs) not just through revenue sharing models (though misogynistic content is promoted via at least some services' content curation tools).

These considerations seem applicable to much content that falls with the four categories identified by Ofcom (online misogyny, pile-ons and online harassment, online domestic abuse and image-based sexual abuse). Indeed, given the nature of the content, as already noted some may fall outside Convention protections, while much of the rest (if not all of it) would allow States significant leeway in protecting the rights of others should they so choose. It is also worth noting that many of the measures do not require the removal of content and are therefore less intrusive responses and more proportionate. For example, requiring governance mechanisms and providing user empowerment tools do not directly affect speech. Reviews of recommender tools might limit reach but they do not stop speech. Of course, stringent measures can be justified where there is a gross intrusion into another's rights. There is then considerable space for restrictive measures to be taken against such speech – though the extent of those measures should distinguish between different levels and types of content.

3 Balancing Rights

There is an oft-repeated tripartite framework for balancing a non-absolute right (such as freedom of expression) in an individual case against other interests. But the position is less clear when multiple human rights conflict, especially where there are positive obligations in play and also in the light of the obligation in Article 14 ECHR. That provision specifies:

> "[t]he enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

So, in addition to the State's obligation to respect rights (ie not to violate rights themselves), they also have obligations to protect individuals' rights (from the actions of other private bodies) and to facilitate the exercise of rights by all. Rather than just having the space in which to act, here the State could be obliged to act.

The first question is whether such rights are in issue here. Many of the content and behaviour types identified by Ofcom would interfere with women's and girls' right under the Convention, notably Article 8 (right to a private life) and Article 3 (freedom from torture) as well as Article 10 and – sadly – Article 2 (right to life). In looking at these issues, the Court often takes the Istanbul Convention and the work of GREVIO as a touchstone (see eg *M.G v Turkey* (App no 646/10); *Buturugă v. Romania* (App no 56867/15)). Gender-based violence also raises discrimination issues (*Opuz* (App no 33401/02)). In *Opuz*, the Court held that "the State's failure to protect

women against domestic violence breaches their right to equal protection of the law and that this failure does not need to be intentional." (para 191). In this case, the Court recognised the seriousness and viciousness of the crime of domestic violence.

In *Eremia* (App no 3564/11), the Court held that the assaults, as well as the fear of further ill-treatment, caused the applicant to experience suffering and anxiety amounting to inhuman treatment within the meaning of Article 3. While Article 3 envisages a minimum level of severity, this must take into account all the circumstances. Inhuman treatment includes that which was pre-meditated or carried on for a long period and caused either actual bodily injury or intense physical and mental suffering. Treatment has been considered "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority, capable of humiliating and debasing them and possibly breaking their physical or moral resistance.

In *Volodina v. Russia* (App no 41261/17), the ECtHR held that the prohibition of ill-treatment found in Article 3 covers all forms of domestic violence, and even a single blow may arouse feelings of fear and anguish in the victim, and seek to break her moral and physical resistance. *Volodina* involved violence, stalking/tracking, publication of private photographs. While the physical aspect in *Volodina* was sufficient to trigger Article 3, the psychological aspects of domestic violence were also noted. The Court further noted that a vulnerable victim might experience fear regardless of the objective nature of such intimidating conduct. The case law of the Court has also recognised that domestic violence need not result in physical injury but can include psychological or economic abuse (including coercive control) (see *Volodina* (App no 41261/17), para74 and 81) and that this is not trivial harm (*Valiulienė v. Lithuania* (app no 33234/07), para 65). Psychological aspects can on their own trigger Article 3 (*Tunikova v Russia* (App no 27484/18) paras 75-76). (For a discussion as to whether domestic abuse is torture for the purposes of Article 3 see here).

Not all actions will reach the level of severity required to trigger Article 3. Nonetheless, they may trigger Article 8. *Buturugă* (App no 56867/15) makes clear that illicitly monitoring, accessing or saving a partner's correspondence (including Facebook accounts) can constitute forms of domestic violence. The Court noted:

> "cyberbullying is currently recognised as one aspect of violence against women and girls, and can take a variety of forms, including breaches of cyberprivacy, intrusion into the victim's computer and the capture, sharing and manipulation of data and images, including private data." (para 74)

Stereotyping can also trigger Article 8, as can be seen in the case of *Aksu* (App nos 4149/04 and 41029/04) which concerned the negative stereotyping in a book of the Roma people as "thieves, pickpockets, swindlers, robbers, usurers, beggars, drug dealers, prostitutes and brothel keepers". While this case was unsuccessful, the Court noted that Article 8 can "embrace multiple aspects of the person's physical and social identity" and:

> "any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group." (para 58)

More recent decisions concerning anti-Roma and anti-Semitic speech found violations of Article 8, re-emphasising the protections to social or ethnic groups – but presumably also groups based on other factors such as sexuality or sex. This is different from mere insults or intrusions which do not reach the required severity threshold (see eg *Vučina v Croatia* (App no 58955/13) in which the applicant was misidentified in a photograph taken at a public event as the wife of the then Mayor of Split and subsequently people approached her in public as though she was the Mayor's wife). It seems that the status of those insulting and those being insulted is significant for the Court, with the Court seeking to protect vulnerable or historically stigmatised groups. One might suggest that this approach to Article 8 is the mirror image to the Court's approach to Articles 17 and 10 in regards to hate speech.

There is then a question as to how the Court can assess whether the State (including public authorities) have appropriately balanced rights to freedom of expression (in so far as they apply) and other rights. The Court has developed principles to allow the balancing of Article 10 and Article 8 (seen as a privacy right), usually in the context of press intrusion – as seen in *Axel Springer* [GC] (App no 9954/08) and *von Hannover (No 2)* (App nos 40660/08 and 60641/08). Where conflicting rights are in issue, the answer should not depend on whether the matter is framed as an Article 8 or Article 10 issue – thus it is not possible to analyse these situations as seeing one right as an exception to another.

Moreover, it is generally within the State's margin of appreciation to decide how to secure compliance with Article 8 in the context of relationships between private parties (but note implications of positive obligations discussed below). In the Grand Chamber judgment in *Delfi*, the Court noted that the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is higher than that posed by the press – the speed with which information travels, the geographic spread as well as the length of time for which content remains available (if indeed, it can actually be entirely removed - this is a particular problem in relation to NCII). In the particular case (which concerned the liability of the platform for users' comments), the Court considered: the context of the comments; the measures applied by the applicant company in order to prevent or remove defamatory comments; the liability of the actual authors of the comments as an alternative to the applicant company's liability; and the consequences of the domestic proceedings for the applicant company. No violation was found in this case; the principles were applied in a subsequent Chamber decision where a violation on the facts there was found (*Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*

(App no 22947/13)). In another Grand Chamber judgment, *Sanchez*, the Court in reviewing its case law on hate speech specified:

> "[i]n striking a fair balance between an individual's right to respect for his or her private life under Article 8 and the right to freedom of expression under Article 10, the nature of the comment will have to be taken into consideration, in order to ascertain whether it amounted to hate speech or incitement to violence, together with the steps that were taken after a request for its removal by the person targeted in the impugned remarks." (para 166)

In a doxxing case, where a man accused of sexual assault revealed the identity of his victim, the Court dismissed his claim as to interference with his right to freedom of expression as manifestly unfounded (*Ramadan v France* (App no 23442/23)).

Another right that may conflict with someone's communication is freedom of expression. As Ofcom has recognised, particularly harassment (including pile-ons, NCII and the like) and hate speech, have the potential to have a chilling effect. In *Ismayilova* (App nos. 65286/13 and 57270/14), covert films of a female journalist were posted on a couple of websites. In addition to violations under Article 8, the Court found that Article 10 was engaged, and the State was even under positive obligations (*Ismayilova*, para 164). This has been particularly noticeable for women in public life (journalists and MPs for example), but the problem is not limited to the arena of civic discourse; it operates generally.

For circumstances beyond that traditional balancing of Articles 10 and 8, the methodology of the Court – or the factors that will be relevant - is somewhat hard to predict, an issue seen also in the ICCPR (see Keller and Walther, Balancing Test: United Nations Human Rights Bodies, para 15). In general, it seems that the Court is looking for a fair balance to be struck (see eg *von Hannover*, paras 57-58 – and see earlier case of *Schüssel v. Austria*, (App no. 42409/98) concerning stickers with the photograph of a politician on them). Context is important and – as Bjarnadóttir suggested -

> "[t]he dissemination of expression such as a photo depicting a naked person can be a perfectly valid action that deserves the full protection of the freedom of expression. But the context that such dissemination takes place in is of utmost importance when examined from a human rights perspective. In the context of revenge porn, the rights of others (the person depicted) weighs heavily against the disseminator's freedom of expression."

It is also interesting to note that in cases involving NCII and online harassment the Court has not considered Article 10 of the abuser as a relevant factor.

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The question as to the extent to which a State not only may take action, but is rather required to do so as part of its obligations to ensure protection of rights leads to a different conception of State responsibilities from the traditional conception as protection from an intrusive state (see eg Fredman *Human Rights Transformed: Positive Rights and Positive Duties)*. Looking at the rights impacted by online gender based violence (above), Articles 2 and 3 have positive aspects: to have an appropriate internal legal mechanism for protection (in fact to provide criminal offences); for it to work in practice; for the State to take action in a particular case (and this has been recognised by the Supreme Court in *DSD v Commissioner of Police of the Metropolis,* it found that the women's rights under Article 3 were violated because of the police's systemically flawed investigation into Worboys' crimes). The Court has required that State assessments should focus specifically on the risks associated with domestic violence, including controlling and coercive behaviour (eg *De Giorgio v Italy* (App no 23735/19) in which the applicant claimed her husband had threatened to kill her, struck her, placed recording devices in her house, stalked her and monitored her movements, harassed her in front of her home, interfered unlawfully in her private life, stolen her mail, failed to pay maintenance and ill-treated their children).

In the context of violence against journalists, the Court has said the State should ensure a safe environment in which people may speak (*Dink* (Apps no. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09), para 137). As noted above, the Court has suggested that women, specifically those subject to domestic violence, are vulnerable (though that labelling may bring its own problems). Girls – as children – would also be considered vulnerable. Under the case law of the Court vulnerability can lead to increased obligations for public authorities (see eg *Đorđević v. Croatia* (App no 41526/10) concerning the failure of the State to protect a mentally and physically disabled man from physical and verbal harassment from neighbourhood children over a period of four years). It affects the level of due diligence for public authorities and limits the margin of appreciation for authorities (*Đorđević*, para 148). In *Volodina*, the Court re-stated the *Osman* test evaluating the state's positive obligation to prevent and protect, notably in preventing recurring violence, emphasising the importance of taking account of the domestic context. Admittedly, these obligations fit better in the context of investigation of an individual case rather than the setting up of a regulatory regime but the case law underlines the importance of ensuring that regulatory systems are working sufficiently well.

There is some uncertainty as to the scope and applicability of positive obligations in this context. However, the Court has suggested that where an intimate aspect of a person's private life is engaged, the State has a narrower margin of appreciation and deterrents must be effective. While this seems clear in the context of NCII , the balance may be more difficult because much of this occupies the terrain "where "typical" and "aberrant" male behaviours shade into one another" (Suzor et al, p 88). And while the Court has recognised the psychological damage that domestic violence in all its manifestations may cause, there are still questions as to whether "small things" are always fully recognised as a problem – what Hague

described as the "ceaseless flickering hum of low-level emotional violence". Nonetheless, some commentators have criticised the Court suggesting that it is reconfiguring the boundaries of protection for shocking and offensive speech – particularly bearing in mind the jurisprudence on Article 17 and on stereotypes.

In sum, while the summary of the approach to fundamental rights reflects the Court's approach, it does not go far enough into the detail of the jurisprudence. There is a considerable amount of balancing to be done and - given that much of the speech falling into the four categories will be speech attracting little protection (if any), and the matters that Ofcom seeks to protect go to the core of Article 8 - a stronger statement, not just about the space available to Ofcom to work in, but also about the positive obligations, would have been desirable. While freedom of expression should never be cavalierly dismissed, there is space here for Ofcom to be more courageous in its protection of the Article 8 rights of women and girls.

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