

8 February 2024

Honorable Minister Rekha Sharma,
Minister of Communication and Information Technology,
Singha Durbar,
Kathmandu 44600, Nepal

Subject: Industry letter on Nepal Draft Social Media (Usages and Regulation) Bill 2024

Dear Honorable Minister,

On behalf of the Asia Internet Coalition (“AIC”) and its members, we are writing to express the deep concerns of our members and advocate for extensive revisions and overhaul of the Draft Social Media Bill currently under consideration.

We acknowledge that the legislative process is intricate, and deliberations are ongoing. However, it is crucial to ensure that the Bill is not only effective but also balanced, proportionate, and practicable in its scope and approach. **The proposed legislation, in its present form, poses significant challenges that, if not addressed comprehensively, will render the Bill unworkable and could undermine the potential growth of Nepal's digital economy.** As such, please find attached the AIC’s submission on the Draft Social Media Bill. Our latest submission, which builds upon the [earlier letter shared](#) with the Honorable Minister and the Ministry of Communication and Information Technology in December 2023, outlines our continued efforts to engage constructively in the legislative process.

Regrettably, it is disappointing to note that despite our diligent efforts, the industry feedback provided on the directive has not been acknowledged by Ministry, nor have our recommendations been incorporated into the current iteration of the bill. Various areas of concern, continue to hold, including:

1. Broad, ambiguous and unclear references and definitions of unlawful content that is out of step with international human rights standards;
2. Proactive monitoring requirements that make social media platforms the adjudicators of Nepalese law, rather than an *independent* court and/or regulatory body;
3. Lack of intermediary liability protections for digital platforms which creates legal uncertainty;
4. Criminal liability on company employees that creates a hostile business environment;
5. Localisation requirements that disincentivizes business investment and growth;
6. Lack of independence, expansive and duplicative powers of multiple regulatory authorities/bodies that creates legal uncertainty, inconsistencies and inefficiencies in the application of the law;
7. Lack of procedural safeguards and due process rights for companies and users;
8. Extraterritorial application of the law to offences committed “against Nepalese or Nepali citizens living outside Nepal”;

9. Unreasonable Conditions to be followed by social media platform operators;
10. Unreasonable Terms to be followed by social media users; and
11. Concerns in the Miscellaneous provisions

As representatives of the industry, we believe that it is imperative for policymakers to create a regulatory framework that fosters a business-friendly environment in Nepal, particularly in the context of the country's burgeoning digital economy. **The current form of the bill, however, falls short of meeting this objective and threatens to deter much-needed investments in the sector.**

While we appreciate the efforts made thus far with the industry, a more comprehensive and meaningful consultation is necessary to address the complexities and nuances associated with the Bill. Rushing the Bill through without diverse input has resulted in a deeply flawed proposal raising red flags from tech companies, civil society, and other crucial stakeholders. This lack of prior consultation is a critical oversight, leaving lawmakers without a comprehensive understanding of the Bill's potential impact and ultimately leading to an unworkable draft. We would like to encourage once that, moving forward, a meaningful and comprehensive consultation process with these stakeholders is indispensable. Only through inclusive dialogue can Nepal craft a Social Media Bill that effectively addresses online harms while safeguarding fundamental rights and fostering a thriving digital economy.

As part of the industry's continued engagement with the Government of Nepal, please find attached to this letter key areas of concerns and recommendations. We firmly believe that, without extensive revisions and overhaul, the proposed legislation will be unworkable and detrimental to Nepal's digital economy and global reputation.

We kindly request the Government of Nepal's thorough consideration of the issues highlighted in this letter. We look forward to engaging in further consultations and meaningful dialogues on the Social Media Bill. Should you have any questions or need clarification on any of the recommendations, please do not hesitate to contact our Secretariat Mr. Sarthak Luthra at Secretariat@aicasia.org or at +65 8739 1490.

A handwritten signature in blue ink that reads "Paine".

Sincerely,
Jeff Paine
Managing Director
Asia Internet Coalition (AIC)

Detailed Comments on the Draft Bill

1. **Broad and ambiguous definition of unlawful content**

The Bill references a wide range of offences and unlawful content with unclear, overbroad and/or vague definitions that do not adhere to international human rights standards and fail the test of necessity and proportionality, as outlined in the [International Covenant on Civil and Political Rights \(ICCPR\)](#) which Nepal has ratified, and Article 17 (2) of the Constitution of Nepal, 2015. Such broad and ambiguous references are prone to misuse of the law by governments to suppress legitimate speech. For example, the Bill provides that user's should not 'abuse' or 'insult another person' without giving any clear, narrow, definitions to aid in interpreting such a broad category of unlawful content. Further, broad and ambiguous definitions create unpredictability and inconsistencies in the application of the law, both by courts and regulatory authorities, and prevent companies from being able to efficiently and effectively assess the legality of content. Clear, narrow, and precise definitions of prohibited content are necessary in order to enable platforms to adequately respond to legal removal requests, while reassuring tech companies and the Public that the law has been carefully crafted to target illegal content while respecting fundamental rights to freedom of expression.

In line with Nepal's international human rights commitments and the Constitution, the Bill should recognize and ensure protection and respect of human rights, including users' fundamental right to free expression. Categories and definitions of unlawful content should be carefully crafted so that it is principled, operable, intelligible and publicly defensible. Restrictions on the right to freedom of expression must be legitimate, proportionate and necessary and should take the following factors into consideration:

- Prevalence: the number of people affected or likely to be affected by the content.
- Severity: the degree of real-world harm caused or likely to be caused to the people affected.
- Urgency: the immediacy of the harm or threatened harm.
- Discrimination: whether takedown demands target particular population groups on the basis of race, religion, gender, sexual orientation or other protected categories.

2. **Proactive monitoring and removal of illegal content**

The Bill requires that platforms develop algorithms or adopt measures that "prevent the publication or transmission of information, advertisements and materials contrary to prevailing laws", as well as "prohibit the publication or transmission of material that is against Nepal's sovereignty,

geographical integrity, social and religious harmony or incites social and religious harmony.” Proactive monitoring and removal of illegal content is an extremely onerous obligation that is neither technically nor operationally feasible. Additionally, having digital platforms make determinations on the illegality of content could result in inconsistent application of the law, as the same piece of content (especially borderline content) may be determined to be illegal by one digital platform but legal by another, which would lead to confusion by users operating on different platforms. Proactive obligations for the monitoring and removal of illegal content should be removed from the Bill.

3. Lack of legal certainty on intermediary liability

The Bill does not provide for reassurances as to the limitations of liability that platforms can benefit from if they do their best to act once notified of illegal content being present on their platforms. Liability for content must remain with the author/originator or publisher/uploader. Platforms should be treated differently than the author/originator or primary publisher/uploader of the content served, linked, or hosted. Safe harbour should not be conditional upon compliance with all parts of the Bill or any rule made pursuant to the Bill. Internet intermediaries should not be considered responsible unless and until the intermediary has received notice of the illegal content.

The Bill should recognise that when intermediaries follow their removal obligations under the law, such intermediaries should be certain that they will not be held liable for the hosted content. A clear "notice-and-takedown" regime should be expressly specified, that requires intermediaries to act expeditiously on illegal content upon notice from a court or independent regulatory authority. Such a regime should, at minimum, include:

- Clear definitions that adhere with international human rights standards for the type(s) of content that may be subject to takedown requests
- Clear appeal mechanisms for notice and takedown requests to specify clearly how administrative proceedings for judicial review could apply
- An approved process through which, preferably, a single/central regulator is able to send notice and takedown requests. Benefits of having a single/central regulator:
 - Able to act on behalf of the government and act as a clearing house for requests from other departments/regulators;
 - Grow their expertise alongside industry as the policies, application and enforcement are constantly being iterated
 - Provide a single point-of-contact and clarity for service providers when they have been given effective notice
 - Allow centralised appeals and transparency
- Prioritise content which may lead to imminent harm to lives or which may cause harm both online and offline.
- Clear processes for legal notices to be submitted to intermediaries, including:

- clearly identifying the content at issue by URL and where applicable, include, video timestamp, or some other unique identifier (not a second-level domain);
- clearly stating the basis of the legal claim, including the provisions of the applicable local laws and the country in which the law applies;
- clearly identifying the sender of notice, especially where the nature of the rights asserted requires identification of the rightsholder; and
- attesting to the good faith and validity of the claim using the legal form appropriate to the jurisdiction (such as an oath under penalty of perjury)
- The law should expressly provide companies with avenues to appeal/challenge/dispute notice and takedown requests.

4. **Criminal liability**

The Bill proposes fines and criminal liability for “persons”, which includes employees of a company, firm or organisation, if found to “commit or cause any act which is considered an offence” under the Bill or other law. The criminalization of illegal content, such as false statements, is a disproportionate restriction on freedom of expression and would conflict with the assurances provided in Article 17 (2) of the Constitution of Nepal, 2015 and the ICCPR. The bill potentially criminalises all forms of unlawful content regardless of whether they are likely to result in harm, and does not provide sufficient defence to individuals or platforms accused of the offence. Further, criminal penalties on companies create a hostile environment for business and would deter foreign direct investment. Criminal liability should be removed from the Bill.

- As noted in the U.S. International Trade Commission’s [report](#) on foreign censorship, laws with criminal penalties, along with local representative requirements, are amongst the “censorship-enabling measures” that may enable or facilitate government suppression of speech. The report notes that, “While officially aimed at addressing concerns about harmful online content, these requirements, according to industry representatives, nongovernmental organisations (NGOs), and other stakeholders, instead make firms and their employees more vulnerable to government intimidation and harassment.”
- Nepal has ratified the International Covenant on Civil and Political Rights in 1991. Any proposed restriction, regulation, or criminalization of online speech must therefore reckon with these rights in order to pass international human rights scrutiny.

5. **Forced localisation**

The Bill requires social media platforms to register (and re-register every year) and submit a number of documents (which include personal and sensitive information of company employees) to the Social Media Management Center in order to operate their business in Nepal. The Bill also

requires companies to provide a point of contact, a complaint hearing officer and a compliance monitoring officer, all based in Nepal.

- Firstly, registration or licensing is usually required where resources are scarce and operators obtain something of value in return for a licence, such as spectrum for mobile, TV or radio channels. When it comes to online services, there are a number of services that can be offered which do not require the allocation of such finite resources.
- Secondly, content moderation decisions are not controlled by any one person or team, but follow a global process to ensure consistency and efficiency in decision-making. Requiring digital service providers without a physical presence in Nepal to have local points of contact based in the country to coordinate on content issues and complaints would disrupt those processes, leading to inefficiencies and delays. For instance, single points of contact can be a point of failure for content moderation processes happening at scale, particularly when the contact person is on leave or handling competing priorities.
- Thirdly, digital platforms typically have their own reporting channels and processes for the handling of unlawful content. These should be utilised in place of requiring local entities or local representatives to provide this function.
- Finally, digital platforms would be concerned if there is a possibility that any local personnel or presence may be leveraged (a) to handle content issues, or (b) to be held liable in relation to actions taken on content by offshore related entities, especially if the local presence was established for a different purpose such as commercial activities--with no responsibility for online platform services or content moderation. This would go against international trade norms and practices as well as principles of company law, respected in Nepal and internationally, that recognize the independent status of legal entities.

While many governments see localization policies as simple solutions to the challenges of a complex global economy, the truth is that the drawbacks for a country and its companies far outweigh the benefits. Instead, local registration efforts reduce that country's competitiveness across all local economic sectors and undermine the health of the global economy by raising the cost of doing business internationally. A study conducted by European Centre for International Political Economy on [forced localization](#) found that the negative economic impact of such policies on GDP for these seven countries/regions were as follows: Brazil -0.2%; China -1.1%; EU -0.4%; India -0.1%; Indonesia -0.5%; Korea -0.4%; Vietnam -1.7%. For these reasons, requirements for registration and local points of contact should be removed from the Bill.

Rather than require local points of contact, the Bill should instead require platforms to provide a point of contact that can be based inside or outside Nepal and/or a reporting channel for the SMC, if the purpose of the requirement is to ensure that the regulator is able to contact platforms and that queries and requests from the SMC are received and handled appropriately.

6. Lack of independence, expansive and duplicative powers of multiple regulatory authorities/bodies

The Bill provides expansive and unchecked powers to the Social Media Management Council (“Council”), the Social Media Management Center (“Center”), and Associated Bodies, including the Police.

- The Council is formed by members of the Ministry of Communication and Information Technology and the Nepal Telecommunication Authority, with extensive powers to make policies and “determine the conditions” for “the operation and use of social media”, as well as give instruction to the Center. There is no independent oversight of the Center, nor are any of the Council members independently appointed.
- The Center, including its members, would be formed and decided by the Council, and is subject to the instruction of the Council. It has powers to monitor and inspect social media platforms and instruct them to remove content which the Center deems is “unsuitable” or illegal, as well as identify and make recommendations to shut down social networks. As such, the Center may unilaterally decide the legality of content and social networks, without review by an independent body, such as the judiciary.
- Associated Bodies – which include the Department of Information and Broadcasting, Advertisement Boards, Press Council, Telecommunication Authority, and Police – may also issue requests directly to social media platforms in the case of an investigation of a complaint.
- The Police have investigative powers, which include, with permission from the Court, search and seizure powers. The Police may “search places and seize electronic equipment, or information that may be used as evidence of the commission of the offence”. This includes obtaining access to platforms’ systems.

Firstly, the governance structure of the Bill is overly complex and subjects tech companies to the authority of all four bodies, without any procedural safeguards, independent oversight or transparency on how these bodies make decisions and on the instructions they issue. Having multiple authorities that may directly issue instructions to social media platforms also creates legal uncertainty, inconsistencies and inefficiencies in the application of the law. Moreover, these entities are not authorized to carry out such activities by their respective parent Acts.

The Bill should instead identify an *independent* single, central regulator responsible for coordinating across the government that would be responsible for the management and enforcement of the Bill.

Secondly, the expansive powers of these bodies raise concerns about accountability and potential misuse. The exercise of powers and functions by institutions lacking independence from political interference threatens freedom of speech and expression. Regulators should enjoy structural independence to reduce the possibility of political interference and to ensure that it is accountable to a broad spectrum of stakeholders. People should have confidence that decisions are objective and transparent. The regulator should have a formal requirement to consult with a wide variety of stakeholders (including companies, NGOs, academics) and to give due regard to their input in developing new rules. This will encourage the regulator to build rules that reflect the broad interests of society as a whole rather than those of particular individuals or entities. Further to this, the powers of the regulator should be subject to principles of proportionality, constitutionality and due process. Appointment of members should be conducted through an appointment mechanism that guarantees its political independence. The regulator should not be vested with quasi-judicial powers, nor with powers to block social media platforms.

Thirdly, there are other laws already existing in Nepal, such as the National Criminal Code, that would provide the Police with the powers of search and seizure. As such, the provisions for searches and seizures are duplicative with relevant requirements in other laws and should therefore be removed from the Bill.

7. Lack of procedural safeguards and due process rights for companies and users

The Bill lacks procedural safeguards that ensures due process rights for companies and users are respected. It does not set out clear processes through which affected parties can be heard by a court of law during an investigation, or a process for appeal to an independent body against legal removal notices. The Bill should provide individuals and companies an opportunity to be heard or appeal when a legal removal notice is issued.

8. Extraterritorial application

The Bill appears to have extraterritorial application as it "shall also apply to persons who commit offences under this Act against Nepalese or Nepali citizens living outside Nepal". Different countries may have conflicting laws and legal systems. Applying one country's laws extraterritorially can lead to conflicts and confusion about which laws should take precedence. Imposing extra-territorial application is not a global practice, thus may put Nepal businesses at a disadvantage since this is applied unilaterally by the government, and may prompt reciprocal measures from other governments. The Bill should be limited to people in Nepal and content created or viewed by people in Nepal.

9. Unreasonable Conditions to be followed by social media platform operators

The Bill raises multiple concerns, including vague language and subjective criteria in conditions like "making reasonable arrangements", "contrary to laws" and "social and religious harmony," allowing for arbitrary and potentially inconsistent enforcement. While small platforms are exempted from mandatory registration, the imposed conditions could still burden those with limited resources. The bill lacks clear guidelines for assessing adherence to the Santa Clara Principles, introducing ambiguity. Privacy concerns arise with the proposed fact-checking mechanism, necessitating careful implementation. Mandating a fact-checking mechanism in the Bill poses practical challenges for social media platforms, requiring significant resources and infrastructure for effective implementation. Real-time fact-checking is complex due to the rapid and extensive sharing of content on these platforms. Establishing a standardised and impartial process for uniformly addressing complaints is challenging, given the subjective nature of content interpretation. While fact-checking is vital for accuracy, the feasibility and practicality of implementing such a mechanism require careful consideration, particularly considering the dynamic and diverse nature of content on social media platforms. Mandated algorithm development against "illegal" content raises censorship concerns, and the bill's potential for government overreach poses risks to free expression. Compliance requirements, including fact-checking and local officers, create additional challenges for platforms.

10. Unreasonable Terms to be followed by social media users:

Concerns regarding the Bill's provisions centre on several key issues. First, the vagueness in conditions and subjective definitions, like "other conditions as specified," "offensive," "misinformation," and "harm to social harmony," raises risks of inconsistent enforcement and potential misuse. Second, there is worry about potential censorship through broad restrictions that may suppress legitimate criticism, dissent, and free speech, especially impacting marginalised groups. Third, anticipated challenges in implementation, such as enforcing provisions on "anonymous identity" and content moderation across diverse platforms, could be resource-intensive and difficult. Additionally, holding users liable for activities like "sharing, liking, reposting" may lead to an overburden and restrict online expression. Lastly, concerns arise regarding potential deterrents to active participation and critical discussions on social media due to fears of prosecution or punishment.

Additional concerns include a lack of clarity in mechanisms for handling complaints and ensuring fair enforcement, the potential stifling of online creativity, entrepreneurship, and diverse voices, and the possibility of conflicts with existing legal frameworks, leading to confusion and challenges.

11. Concerns in the Miscellaneous provisions:

Concerns include potential subjectivity in handling complaints, highlighting the need for clear guidelines on priority determination. The authority to instruct immediate content removal raises worries about potential overreach, demanding clear criteria and safeguards against misuse. The

effectiveness of mandated awareness programs depends on their design, reach, and collaboration with stakeholders. Clear criteria and transparency are needed in the process of removing obstacles to prevent misuse of government authority. Ambiguous terms like "sexual minorities" lack clear definitions, leading to potential misinterpretation and exclusion. Broad powers to remove content without judicial oversight raise concerns about censorship and freedom of expression. Vague terms like "appropriate action" and "immediately" leave room for arbitrary decisions. Questions arise about the help desk's capacity to handle sensitive cases and the effectiveness of planned awareness programs. Broad rule-making powers and the ability to issue instructions without parliamentary review may undermine transparency and accountability. The lack of defined criteria for removing obstacles could be misused for political or personal gain. Clarification and detailed consideration of evaluation plans, independent monitoring, and engagement with civil society are essential aspects.

Asia Internet Coalition Member Companies

