A Lord Chamberlain for the internet? Thanks, but no thanks.

This summer marked the fiftieth anniversary of the Theatres Act 1968, the legislation that freed the theatres from the censorious hand of the Lord Chamberlain of Her Majesty's Household. Thereafter theatres needed to concern themselves only with the general laws governing speech. In addition they were granted a public good defence to obscenity and immunity from common law offences against public morality.

The Theatres Act is celebrated as a landmark of enlightenment. Yet today we are on the verge of creating a Lord Chamberlain of the Internet. We won't call it that, of course. The Times, in its leader of 5 July 2018, came up with the faintly Orwellian "Ofnet".

Speculation has recently renewed that the UK government is laying plans to create a social media regulator to tackle online harm. What form that might take, should it happen, we do not know. We will find out when the government produces a promised white paper.

When governments talk about regulating online platforms to prevent harm it takes no great leap to realise that we, the users, are the harm that they have in mind.

The statute book is full of legislation that restrains speech. Most, if not all, of this legislation applies online as well as offline. Some of it applies more strictly online than offline. These laws set boundaries: defamation, obscenity, intellectual property rights, terrorist content, revenge porn, harassment, incitement to racial and religious hatred and many others. Those boundaries represent a balance between freedom of speech and harm to others. It is for each of us to stay inside the boundaries, wherever they may be set. Within those boundaries we are free to say what we like, whatever someone in authority may think. Independent courts, applying principles, processes and presumptions designed to protect freedom of speech, adjudge alleged infractions according to clear, certain laws enacted by Parliament.

But much of the current discussion centres on something quite different: regulation by regulator. This model concentrates discretionary power in a state agency. In the UK the model is to a large extent the legacy of the 1980s Thatcher government, which started the OF trend by creating OFTEL (as it then was) to regulate the newly liberalised telecommunications market. A powerful regulator, operating flexibly within broadly stated policy goals, can be rule-maker, judge and enforcer all rolled into one.

That may be a long-established model for economic regulation of telecommunications competition, energy markets and the like. But when regulation by regulator trespasses into the territory of speech it takes on a different cast. Discretion, flexibility and nimbleness are vices, not virtues, where rules governing speech are concerned. The rule of law demands that a law governing speech be general in the sense that it applies to all, but precise about what it prohibits. Regulation by regulator is the converse: targeted at a specific group, but laying down only broadly stated goals that the regulator should seek to achieve.

As OFCOM puts it in its recent discussion paper 'Addressing Harmful Online Content': "What has worked in a broadcasting context is having a set of objectives laid down by

Parliament in statute, underpinned by detailed regulatory guidance designed to evolve over time. Changes to the regulatory requirements are informed by public consultation."

Where exactly the limits on freedom of speech should lie is a matter of intense, perpetual, debate. It is for Parliament to decide, after due consideration, whether to move the boundaries. It is anathema to both freedom of speech and the rule of law for Parliament to delegate to a regulator the power to set limits on individual speech.

It becomes worse when a document like the government's Internet Safety Strategy Green Paper takes aim at subjective notions of social harm and unacceptability rather than strict legality and illegality according to the law. 'Safety' readily becomes an all-purpose banner under which to proceed against nebulous categories of speech which the government dislikes but cannot adequately define.

Also troubling is the frequently erected straw man that the internet is unregulated. This blurs the vital distinction between the general law and regulation by regulator. Participants in the debate are prone to debate regulation as if the general law did not exist.

Occasionally the difference is acknowledged, but not necessarily as a virtue. The OFCOM discussion paper observes that by contrast with broadcast services subject to long established regulation, some newer online services are 'subject to little or no regulation beyond the general law', as if the general law were a mere jumping-off point for further regulation rather than the democratically established standard for individual speech.

OFCOM goes on that this state of affairs was "not by design, but the outcome of an evolving system". However, a deliberate decision was taken with the Communications Act 2003 to exclude OFCOM's jurisdiction over internet content in favour of the general law alone.

Moving away from individual speech, the OFCOM paper characterises the fact that online newspapers are not subject to the impartiality requirements that apply to broadcasters as an inconsistency. Different, yes. Inconsistent, no.

Periodically since the 1990s the idea has surfaced that as a result of communications convergence broadcast regulation should, for consistency, apply to the internet. With the advent of video over broadband aspects of the internet started to bear a superficial resemblance to television. The pictures were moving, send for the TV regulator.

EU legislators have been especially prone to this non-sequitur. They are currently enacting a revision of the Audiovisual Media Services Directive that will require a regulator to exercise some supervisory powers over video sharing platforms.

However broadcast regulation, not the rule of general law, is the exception to the norm. It is one thing for a body like OFCOM to act as broadcast regulator, reflecting television's historic roots in spectrum scarcity and Reithian paternalism. Even that regime is looking more and more anachronistic as TV becomes less and less TV-like. It is quite another to set up a regulator with power to affect individual speech. And it is no improvement if the task of the regulator is framed as setting rules about the platforms' rules. The result is the same: discretionary control exercised by a state entity (however independent of the government it may be) over users' speech, via rules that Parliament has not specifically legislated.

It is true, as the OFCOM discussion paper notes, that the line between broadcast and non-broadcast regulation means that the same content can be subject to different rules depending on how it is accessed. If that is thought to be anomalous, it is a small price to pay for keeping regulation by regulator out of areas in which it should not tread.

The House of Commons Media Culture and Sport Committee, in its July 2018 interim report on fake news, recommended that the government should use OFCOM's broadcast regulation powers, "including rules relating to accuracy and impartiality", as "a basis for setting standards for online content". It is perhaps testament to the loss of perspective that the internet routinely engenders that a Parliamentary Committee could, in all seriousness, suggest that accuracy and impartiality rules should be applied to the posts and tweets of individual social media users.

Setting regulatory standards for content means imposing more restrictive rules than the general law. That is the regulator's raison d'etre. But the notion that a stricter standard is a higher standard is problematic when applied to what we say. Consider the frequency with which environmental metaphors – toxic speech, polluted discourse – are now applied to online speech. For an environmental regulator, cleaner may well be better. The same is not true of speech. Offensive or controversial words are not akin to oil washed up on the seashore or chemicals discharged into a river. Objectively ascertainable physical damage caused by an oil spill bears no relation to a human being evaluating and reacting to the merits and demerits of what people say and write.

If we go further and transpose the environmental precautionary principle to speech we then have prior restraint – the opposite of the presumption against prior restraint that has long been regarded as a bulwark of freedom of expression. All the more surprising then that The Times, in its July Ofnet editorial, should complain of the internet that "by the time police and prosecutors are involved the damage has already been done". That is an invitation to step in and exercise prior restraint.

As an aside, do the press really think that Ofnet would not before long be knocking on their doors to discuss their online editions? That is what happened when ATVOD tried to apply the Audiovisual Media Services Directive to online newspapers that incorporated video. Ironically it was The Times' sister paper, the Sun, that successfully challenged that attempt.

The OFCOM discussion paper observes that there are "reasons to be cautious over whether [the broadcast regime] could be exported wholesale to the internet". Those reasons include that "expectations of protection or [sic] freedom of expression relating to conversations between individuals may be very different from those relating to content published by organisations".

US district judge Dalzell said in 1996: "As the most participatory form of mass speech yet developed, the internet deserves the highest protection from governmental intrusion". The opposite view now seems to be gaining ground: that we individuals are not to be trusted with the power of public speech, that it was a mistake ever to allow anyone to speak or write online without the moderating influence of an editor, and that by hook or by crook the internet genie must be stuffed back in its bottle.

Regulation by regulator, applied to speech, harks back to the bad old days of the Lord Chamberlain and theatres. In a free and open society we do not appoint a Lord Chamberlain of the Internet – even one appointed by Parliament rather than by the Queen - to tell us what we can and cannot say online, whether directly or via the proxy of

online intermediaries. The boundaries are rightly set by general laws.

We can of course debate what those laws should be. We can argue about whether intermediary liability laws are appropriately set. We can consider what tortious duties of care apply to online intermediaries and whether those are correctly scoped. We can debate the dividing line between words and conduct. We can discuss the vexed question of an internet that is both reasonably safe for children and fit for grown-ups. We can think about better ways of enforcing laws and providing victims of unlawful behaviour with remedies. These are matters for public debate and for Parliament and the general law within the framework of fundamental rights. None of this requires regulation by regulator. Quite the opposite.

Nor is it appropriate to frame these matters of debate as (in the words of The Times) "an opportunity to impose the rule of law on a legal wilderness where civic instincts have been suspended in favour of unthinking libertarianism for too long". People who use the internet, like people everywhere, are subject to the rule of law. The many UK internet users who have ended up before the courts, both civil and criminal, are testament to that. Disagreement with the substantive content of the law does not mean that there is a legal vacuum.

What we should be doing is take a hard look at what laws do and don't apply online (the Law Commission is already looking at social media offences), revise those laws if need be and then look at how they can most appropriately be enforced.

This would involve looking at areas that it is tempting for a government to avoid, such as access to justice. How can we give people quick and easy access to independent tribunals with legitimacy to make decisions about online illegality? The current court system cannot provide that service at scale, and it is quintessentially a job for government rather than private actors. More controversially, is there room for greater use of powers such as 'internet ASBOs' to target the worst perpetrators of online illegality? The existing law contains these powers, but they seem to be little used.

It is hard not to think that an internet regulator would be a politically expedient means of avoiding hard questions about how the law should apply to people's behaviour on the internet. Shifting the problem on to the desk of an Ofnet might look like a convenient solution. It would certainly enable a government to proclaim to the electorate that it had done something about the internet. But that would cast aside many years of principled recognition that individual speech should be governed by the rule of law, not the hand of a regulator.

If we want safety, we should look to the general law to keep us safe. Safe from the unlawful things that people do offline and online. And safe from a Lord Chamberlain of the Internet.