

Written evidence submitted by Free Speech Union (OSB41)

Evidence to the Online Safety Bill Committee

Introduction

1. The Free Speech Union is a non-partisan, mass-membership public interest body that stands up for the speech rights of its 9,000 members and champions the cause of free speech.
2. We believe that the Online Safety Bill ('OSB'), as currently drafted, is a danger to our liberal democracy. The right to lawful freedom of expression includes the right to impart and receive information and any restriction must be subject to a high level of scrutiny. As currently drafted the OSB allows for arbitrary and blanket interference with this most precious and hard-won right within our modern public square.
3. Our amendments (see annex) primarily seek to establish safeguards to promote a better balance between protection from harmful content for adults using social media platforms (otherwise known as category one, user-to-user services) and protecting the right to freedom of speech.
4. In several clauses there is a gap between the Department's stated policy intention and the likely impact of the Bill due to current drafting. Our proposed amendments seek to close this gap and clarify that providers are not required to remove lawful content.

Suggested Amendments

5. In order to ensure the Bill does not unduly infringe the right to freedom of expression we recommend:
 - a. Amendments to Clause 13 (safety duties protecting adults);
 - b. Amendments to Clause 18 (duties about complaints procedures);
 - c. Amendments to Clause 19 (duties about freedom of expression and privacy);
 - d. Amendments to Clause 29 (duties about freedom of expression and privacy);
 - e. Amendments to Clause 52 ("illegal content etc");
 - f. Amendments to Clause 55 (regulations under sections 53 and 54);
 - g. Amendments to Clause 66 ("pornographic content", "provider pornographic content", and "regulated provider pornographic content"); and
 - h. Amendments to Clause 83 (OFCOM's register of risks, and risk profiles of Part 3 services).

Explanation

Amendments to Clause 13

Analysis of problem

Clause 13 sets out a choice of actions which category 1 providers must take in order to 'protect' adults from 'legal but harmful' content. As currently drafted the choices providers have is to either take down the content, restrict or limit circulation of it or actively promote it. We find these options inadequate as none allow SMPs to simply respect the choice made by adults users themselves to decide what 'legal but harmful' content they do or do not want to engage with according to the 'user empowerment' clause (14). 'Taking down' the content fully takes away any agency a user may wish to exercise in respect of the impugned content.

We find this oversight inconsistent with the fundamental liberal-democratic principle of meaningful autonomy, as well as inconsistent with clause 14 of the Bill. More generally, it contradicts the stated intent of the Bill to give users '[more control over the types of harmful content they can see](#)'.

Solution

We propose amending the wording to make clear that, in accordance with the policy of the Bill as stated by ministers, providers are free, if they wish, to commit to taking *no* action in response to content that is harmful to adults. Further, we propose removing the option of 'taking down' impugned content and instead urging providers to restrict content only in accordance with adult users' stated preferences, as registered using the tools provided for at clause 14.

Amendments to Clause 18

Analysis of problem

Clause 18 sets out which type of complaints can be levied by users against providers. As currently drafted it could be a standing invitation to the vexatious, rather than a means of allowing providers to concentrate on the most questionable content.

Solutions

Our first amendment seeks to narrow the general type of complaint that can be brought by users regarding content on providers. Ensuring that complaints can only be brought with regard to 'priority' content that is harmful to adults ensures that providers won't be overloaded with subjective complaints of 'harm' which providers will be compelled to spend time and resources resolving. It is better that providers focus on serious complaints of 'priority' harms and respond to these appropriately.

Our second amendment concerns the complaints which may be levied against providers for not adhering to their obligations ('duties' in the language of the OSB). This includes, for example, complaints by persons whose content has been taken down on the basis that it is 'legal but harmful' to adults. Providers have duties in relation to the protection of freedom of

expression, however, no complaint is specified for the user who feels their right to freedom of expression has been unduly curtailed. Our amendment seeks to rectify this oversight.

Rectification is important for the overall consistency of the Bill and to ensure that the right to freedom of expression, which includes the right to receive information, is duly upheld. It is further important to rectify the balance of priorities in the Bill. As currently drafted, this points decisively towards removal of content over ensuring the free flow of information. This is because providers risk high fines and other sanctions for failing to tackle 'harmful content', but are unlikely to face such risks for removal of content that infringes on freedom of expression as the process duty at clause 19 will be comparatively easy to comply with. Adding a right to complain to clause 18 will force providers to be aware of and reckon with their duty to protect free expression.

Amendments to Clause 19

Analysis of problem

Clause 19 sets out the duties placed on providers in relation to freedom of expression and privacy. However it does not go far enough.

Solutions

Our first amendment (19(2)) simply seeks to strengthen the position of free expression in relation to competing duties by labelling the protection of free expression as having 'paramount' importance. As argued above (with regard to clause 18), this is direly necessary as the current draft of the OSB is heavily skewed in favour of overly-censorious behaviour. Our amendment does not make free expression a 'trump card', rather, it gives it appropriate weight within our legal framework. This is not new – the Human Rights Act 1998 similarly highlighted the key role of free expression in our democracy by way of section 12(4).

Our second amendment at 19(7) is, again, aimed at inducing providers to exercise restraint when removing/restricting 'legal but harmful' content. We do this by stating that when they do restrict/remove content it should only be because they are required to do so by legislation or it is otherwise reasonable and proportionate to do so. Importantly, we ask that providers commit to this in their terms of service. This is key: if it is not included in their terms of service there is no remedy in contract for any general infringement of freedom of expression by providers. This means providers would be able to simply nod and ignore any provision related to the protection of freedom of expression within the OSB.

Beyond the obvious detriment to the state of our liberal democracy and the negative implications for the pursuit of truth and progress that this would have, we believe, , that this was never the intention of the drafters of the OSB. Not only is the protection of free expression specifically stated as a purpose of the OSB, it already demands that providers commit to the protection of content of 'democratic importance' and 'journalistic content' within their terms of service. This shows an intention for remedies in contract if free expression is unduly infringed. We believe the government did not intend for providers only to provide *some*

people and *some* content a contractual guarantee to free expression while everyone else only has an empty (unenforceable) promise of free expression.

The final amendment relating to clause 19 is at 19(11). This amendment is, again, concerned with ensuring a user has an effective remedy in contract which will incentivise providers to abide by the provisions enshrined in the OSB. Damages for breach of contract are usually only for financial loss. As financial loss will hardly ever be claimable in cases relating to free expression (including the removal of 'content of democratic importance', for example), the provision must be amended to ensure claims are of sufficiently high value to be viable. Our amendment will ensure that a court can issue a remedy as he or she considers appropriate in the particular case regardless of whether the complainant suffered financial loss. This is essential to ensure that large swathes of the OSB are not, in essence, a dead letter.

Amendments to Clause 29

Analysis of problem

Clause 29 sets out the duties placed on providers of search services in relation to freedom of expression and privacy. However it does not go far enough.

Solution

This amendment emulates our amendment to clause 19(2) with regard to the 'paramount' importance of protecting the right to free expression but with application not only to SMPs but also to search services (e.g. Google).

Amendments to Clause 52

Analysis of problem

Clause 52 establishes what is meant by 'illegal content'. It specifies that expressions such as words, images, sounds and speech will be deemed illegal content if they amount to a 'relevant offence'. A 'relevant offence', we are told, are offences previously listed in the Bill including (but not limited to) terrorism offences and offences related to child sexual exploitation as well as other 'priority offences' such as encouraging/assisting suicide. Recall that the concept of 'priority offences', was introduced to the Bill as a way of ensuring that the most serious offences relating to the online sphere could be swiftly dealt with by providers.

In listing priority offences, terrorism and child exploitation offences as 'relevant offences', the draft OSB is specific as to what type of content attracts criminality and, thereby, what type of content providers should prioritise removing. This corresponds with the principle of legal certainty: those who transgress the law must be reasonably aware that their conduct is, in fact, unlawful. However, this principle, and the concept of 'priority offences' is undermined by the catch-all proviso of 52(4)(d), which states that any offence (whether priority or not) of which the intended victim is an individual qualifies as a 'relevant offence'. As a result, SMPs will likely over-remove content (to avoid the above-mentioned fines and sanctions) and users will be afraid that any online content they produce (including something offensive or distasteful) will attract the same level of criminality as a 'priority offence' (i.e. a chilling effect is born).

Solution

We propose removing this catch-all provision.

Amendments to Clause 55

Analysis of problem

Clause 55 sets parameters as to how the Secretary of State may exercise his or her power to set out regulations that correspond to this Bill. The aim is to prevent the arbitrary exercise of power.

Solutions

Our first amendment under this clause (55(3)) seeks to ensure that, when the Secretary of State demands action by providers regarding content that is ‘harmful’ to adults he or she reasonably considers this content to be ‘harmful’ to a significant amount of people within a group (‘each of an appreciable number of adults’) as opposed to a mere minority within a group.

Our second amendment seeks to establish a high level of democratic scrutiny on the Secretary of State as he or she goes about enshrining relevant regulations by having him or her consult broadly before the drafting process even begins, including with Parliament and members of the public.

Amendments to Clause 66

Analysis of problem

Clause 66 seeks to define ‘pornographic content’ but needs to be clarified to minimise the chance of art, academic pursuits and political campaigns being affected

Solution

Our amendment seeks to avoid the removal of pieces of art or political campaigns/expressions which, viewed in isolation, it may be reasonable to assume was produced ‘solely or principally for the purpose of sexual arousal’ but taken as a whole does not fit this criteria.

Amendments to Clause 83

Analysis of problem

Clause 83 imposes on OFCOM a duty to carry out ‘risks of harm’ relating to the OSB. Currently OFCOM is asked to provide a risk assessment regarding harm caused by illegal content, content that is harmful to children and content that is harmful to adults. But there is no requirement for OFCOM to carry out a risk assessment on freedom of expression.

Solution

We propose that OFCOM also provide a risk-assessment on the undue infringement on freedom of expression by any and all service providers taken in pursuit of fulfilling their obligations under the OSB. This amendment could mitigate the risk of SMPs (and search

engines) over-removing content to the detriment of our hard-won values and freedoms.

Appendix – suggested amendments

13 Safety duties protecting adults

- (1) This section sets out the duties to protect adults' online safety which apply in relation to Category 1 services.
- (2) A duty to summarise in the terms of service the findings of the most recent adults' risk assessment of a service (including as to levels of risk and as to nature, and severity, of potential harm to adults).
- (3) A duty to include provisions in the terms of service specifying, in relation to each kind of priority content that is harmful to adults that ~~the provider decides is to be treated~~ in a way described in subsection (4), which of those kinds of treatment is to be applied.
- (4) ~~These are~~ The kinds of treatment of content referred to in subsection (3) ~~include but are not limited to—~~
 - ~~(a) taking down the content;~~
 - (b) restricting users' access to the content ~~to the extent that such restriction is consistent with features which adult users have used or applied in order to increase their control over harmful content;~~
 - (c) limiting the recommendation or promotion of the content;
 - (d) recommending or promoting the content.

...

18 Duties about complaints procedures

- (1) This section sets out the duties about complaints procedures which apply in relation to all regulated user-to-user services.

...

Category 1 services

- (6) The following kinds of complaint are relevant for Category 1 services—
 - (a) complaints by users and affected persons about content present on a service which they consider to be **priority** content that is harmful to adults;
 - (b) complaints by users and affected persons if they consider that the provider is not complying with a duty set out in—
 - (i) section 13 (adults' online safety),
 - (ii) section 14 (user empowerment),
 - (iii) section 15 (content of democratic importance),
 - (iv) section 16 (journalistic content), or
 - (v) section 19(5), (6) or (7) (freedom of expression and privacy);

(c) complaints by a user who has generated, uploaded or shared content on a service if that content is taken down, or access to it is restricted, on the basis that it is content that is harmful to adults;

(d) complaints by a user of a service if the provider has given a warning to the user, suspended or banned the user from using the service, or in any other way restricted the user's ability to use the service, as a result of content generated, uploaded or shared by the user which the provider considers to be content that is harmful to adults.

(e) complaints by any person that the provider of a user-to-user service has infringed the right to freedom of expression by taking excessive measures in pursuit of the duties of care.

19 Duties about freedom of expression and privacy

(1) This section sets out the duties about freedom of expression and privacy which apply in relation to regulated user-to-user services as indicated by the headings.

All services

(2) When deciding on, and implementing, safety measures and policies, a duty to have regard to the paramount importance of protecting users' freedom of expression within the law.

(3) When deciding on, and implementing, safety measures and policies, a duty to have regard to the importance of protecting users from a breach of any statutory provision or rule of law concerning privacy that is relevant to the use or operation of a user-to-user service (including, but not limited to, any such provision or rule concerning the processing of personal data).

(4) A duty to include clear and accessible provisions in the terms of service informing users about their right to bring a claim for breach of contract if content which they generate, upload or share is taken down, or access to it is restricted, in breach of the terms of service.

Additional duties for Category 1 services

(5) A duty—

(a) when deciding on safety measures and policies, to carry out an assessment of the impact that such measures or policies would have on—

(i) users' right to freedom of expression within the law, and

(ii) the privacy of users; and

(b) to carry out an assessment of the impact of adopted safety measures and policies on the matters mentioned in paragraph (a)(i) and (ii).

(6) A duty to—

(a) keep an impact assessment up to date, and

(b) publish impact assessments.

(7) A duty to include clear provision in the terms of service that the provider will not take down, or restrict access to content generated, uploaded or shared by a user save where it reasonably concludes that—

(a) the provider is required to do pursuant to the provisions of this Act, or

(b) it is otherwise reasonable and proportionate to do so.

(8) A duty to specify in a publicly available statement the positive steps that the provider has taken in response to an impact assessment to—

(a) protect users' right to freedom of expression within the law, and

(b) protect the privacy of users.

Interpretation

(9) In this section—

“impact assessment” means an impact assessment under subsection (5);

“safety measures and policies” means measures and policies designed to secure compliance with any of the duties set out in—

(a) section 9 (illegal content),

(b) section 11 (children's online safety),

(c) section 13 (adults' online safety),

(d) section 17 (content reporting), or

(e) section 18 (complaints procedures).

(10) Any reference in this section to the privacy of users or steps taken to protect the privacy of users is to be construed in accordance with subsection (3).

(11) In any claim for breach of contract brought in relation to the provisions referred to in subsection (7), where the breach is established, the court may make such award by way of compensation as it considers appropriate for the removal of, or restriction of access to the content in question.

29 Duties about freedom of expression and privacy

(1) This section sets out the duties about freedom of expression and privacy which apply in relation to all regulated search services.

(2) When deciding on, and implementing, safety measures and policies, a duty to have regard to the **paramount** importance of protecting the rights of users and interested persons to freedom of expression within the law.

(3) When deciding on, and implementing, safety measures and policies, a duty to have regard to the importance of protecting users from a breach of any statutory provision or rule of law concerning privacy that is relevant to the use or operation of a search service (including, but not limited to, any such provision or rule concerning the processing of personal data).

52 “Illegal content” etc

(1) This section applies for the purposes of this Part.

- (2) “Illegal content” means content that amounts to a relevant offence.
- (3) Content consisting of certain words, images, speech or sounds amounts to a relevant offence if—
- (a) the use of the words, images, speech or sounds amounts to a relevant offence,
 - (b) (in the case of a user-to-user service) the use of the words, images, speech or sounds, when taken together with other regulated user generated content present on the service, amounts to a relevant offence,
 - (c) the possession, viewing or accessing of the content constitutes a relevant offence, or
 - (d) the publication or dissemination of the content constitutes a relevant offence.
- (4) “Relevant offence” means—
- (a) an offence specified in Schedule 5 (terrorism offences),
 - (b) an offence specified in Schedule 6 (offences related to child sexual exploitation and abuse), or
 - (c) an offence specified in Schedule 7 (other priority offences).
- ~~(d) an offence, not within paragraph (a), (b) or (c), of which the victim or intended victim is an individual (or individuals).~~
- ...
- (8) An offence is not to be regarded as a relevant offence within subsection (4)(d) if—
- (a) the offence concerns—
 - (i) the infringement of intellectual property rights,
 - (ii) the safety or quality of goods (as opposed to what kind of goods they are), or
 - (iii) the performance of a service by a person not qualified to perform it; or
 - (b) it is an offence under the Consumer Protection from Unfair Trading Regulations 2008 (S.I. 2008/1277).

55 Regulations under sections 53 and 54

- (1) The Secretary of State may specify a description of content in regulations under section 53(2) (primary priority content that is harmful to children) only if the Secretary of State considers that, in relation to Part 3 services—
- (a) there is a material risk of significant harm to an appreciable number of children presented by content of that description that is regulated user generated content or search content, and
 - (b) it is appropriate for the duties set out in sections 11(3)(a) and 26(3)(a) (duty in relation to children of all ages) to apply in relation to content of that description.
- (2) The Secretary of State may specify a description of content in regulations under section 53(3) (priority content that is harmful to children) only if the Secretary of State considers that, in relation to Part 3 services, there is a material risk of significant harm to an appreciable number of children presented by content of that description that is regulated user-generated content or search content.

- (3) The Secretary of State may specify a description of content in regulations under section 54(2) (priority content that is harmful to adults) only if the Secretary of State **reasonably** considers that, in relation to regulated user-to-user services, there is a material risk of significant harm to **each of** an appreciable number of adults presented by content of that description that is regulated user-generated content.
- (4) The Secretary of State may not specify a description of content in regulations under section 53 or 54 if—
 - (a) any content of that description is illegal content (see section 52), or
 - (b) the risk of harm presented by content of that description flows from—
 - (i) the content’s potential financial impact,
 - (ii) the safety or quality of goods featured in the content, or
 - (iii) the way in which a service featured in the content may be performed (for example, in the case of the performance of a service by a person not qualified to perform it).
- (5) The Secretary of State must consult OFCOM, **Parliament and members of the public in a manner the Secretary of State considers appropriate** before making regulations under section 53 or 54.
- (6) In this section references to children or adults are to children or adults in the United Kingdom.

66 “Pornographic content”, “provider pornographic content”, “regulated provider pornographic content”

- (1) This section applies for the purposes of this Part.
- (2) “Pornographic content” means content, **taken as a whole**, of such a nature that it is reasonable to assume that it was produced solely or principally for the purpose of sexual arousal.

...

83 OFCOM’s register of risks, and risk profiles of Part 3 services

- (1) OFCOM must carry out risk assessments to identify and assess the following risks of harm presented by Part 3 services of different kinds—
 - (a) the risk of harm to individuals in the United Kingdom presented by illegal content;
 - (b) the risk of harm to children in the United Kingdom, in different age groups, presented by content that is harmful to children;
 - (c) the risk of harm to adults in the United Kingdom presented by content that is harmful to adults present on regulated user-to-user services.
 - (d) the risk of undue infringement of freedom of expression by excessive measures taken in pursuit of the duties of care.**

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25 May 2022