



FSU
FREE SPEECH UNION

The Free Speech Union
85 Great Portland St.
London W1W 7LT
[FreeSpeechUnion.org](https://www.FreeSpeechUnion.org)

The Online Safety Bill: FSU Briefing

The Free Speech Union has been monitoring the government's plans for an Online Safety Bill since last year. Most recently, we outlined the dangers of the plans in our paper [You're On Mute: The Online Safety Bill and what the government should do instead](#), co-authored by the Free Speech Union's Dr Radomir Tylecote and Dr Bryn Harris, with Victoria Hewson of the Institute of Economic Affairs and Matthew Lesh of the Adam Smith Institute.

Yesterday the government released the [draft text](#) of its Online Safety Bill, following the announcement of the Bill in the Queen's Speech (it has also explained its intentions in a [press release](#)).

We note that there have been some improvements to the Bill since the government's last consultation response of December 2020, with more protections for journalistic content and content of democratic importance. However, the Bill remains a serious threat to online free speech and will need to be amended if the government is to avoid creating a censors' charter.

Ofcom and the "duty of care"

The Bill empowers Ofcom, the state broadcast regulator, to regulate online companies that provide "user-to-user" services – social media companies like Facebook, Twitter and Instagram – and those that provide search services. The Bill will impose a "duty of care" on these providers, making them responsible for protecting their users from being harmed by content on their platforms. Perhaps the most controversial aspect of the Bill is the requirement that these providers act quickly to remove content that is "lawful but still harmful", such as "misinformation". The Free Speech Union is concerned that the Bill will require Ofcom to decide what is information and what is misinformation and force social media companies to censor content that falls on the wrong side of that line, even if it's lawful. Surely, if speech isn't prohibited offline it shouldn't be prohibited online? In a democratic society, citizens should be free to make up their own minds about whether they trust what they're reading. Asking a state regulator to decide what information is trustworthy comes with a variety of risks, not the least of which is that it will sometimes get it wrong, or deliberately suppress accurate information at the behest of powerful political forces.

Under the new regulatory regime created by the Bill, providers in scope will be required to remove "harmful content" that will have "a significant adverse... psychological impact on an adult of ordinary sensibilities".

Unfortunately, “ordinary sensibilities” isn’t defined in the Bill. Will that mean social media companies and search engines have to remove content that a majority of people find upsetting or offensive? When Copernicus and Galileo proposed that the earth went around the sun, many adults who heard the claim presumably felt they had just experienced a significant “adverse psychological impact”, since the “ordinary sensibilities” of 500 years ago included the belief that the sun revolved around the earth. Isn’t the point of a good deal of free debate precisely to “impact” people’s “ordinary sensibilities”, however unsettling they might find it?

Ministers state that MPs will decide more specifically what “lawful but still harmful” material Ofcom will be required to police. One suggestion in the government’s press release is “hate”, but that, too, isn’t defined and we know from experience that that phrase can be manipulated to rule perfectly reasonable points of view out of bounds.

For instance, one of our members, Posey Parker, started a petition on Change.org, an American social media company, urging the Oxford English Dictionary to keep its definition of “woman” as “adult human female” rather than replace it with something less “trans exclusionary”. Change.org removed her petition, claiming that defining a woman as an adult human female was “hate speech”.

If the new Bill requires social media companies to remove hate speech from their platforms – and to protect users from “harassment”, which is also mentioned in the press release – it is easy to imagine this being exploited by political activists to censor their opponents on the grounds that expressing a different point of view to them is “hate speech”.

The Bill isn’t all bad. The government has stated that the duty of care will include the need to “have regard to importance of... users’ right to freedom of expression within the law” and to take “positive steps” in this regard. The references to causing “offence”, which were included in the Online Harms White Paper, have gone. But other threats have appeared.

One of these is the body the Bill proposes as the internet speech regulator: Ofcom. Given Ofcom’s mixed track record when it comes to upholding free speech, this is worrying. This year, Ofcom enlarged the number of “protected characteristics” in its broadcasting code from four to 18, with broadcasters told that “hate speech” in their programmes means “all forms of expression which spread, incite, promote or justify hatred based on intolerance on the grounds of disability, ethnicity, social origin, sex, gender, gender reassignment, nationality, race, religion or belief, sexual orientation, colour, genetic features, language, political or any other opinion, membership of a national minority, property, birth or age”.

Ofcom’s CEO, Dame Melanie Dawes, has said that on gender and transgender issues broadcasters should “steer their way through these debates without causing offence and without bringing inappropriate voices to the table”. Does that mean Ofcom would silence the voices of gender critical feminists like Posey Parker on social media? Many trans activists would claim that defining a woman as an adult human female is offensive.

Appeals

Social media companies will have a duty to put in place an appeals process for users whose content they take down. But the threat of these takedowns happening in the first place will cause users to self-censor, sanitising online debate. For users, the opportunity to have a contentious comment put back online after a debate has moved on – assuming they win their appeal – will likely have little value. Furthermore, this duty implies that all social media sites will need to possess something like Facebook’s [Oversight Board](#), which recently proved itself unwilling to make a decision one way or the other about the company’s censorship of Donald Trump.

In addition, the Bill says that “[users will also be able to appeal to Ofcom](#)” (if companies have removed their content unfairly). We know from the complaints of our own members just how many people are unhappy about the removal of their content from social media platforms. If Ofcom is going to become what Rory Cellan-Jones has called an Oversight Board for the entire British population, the estimated cost of creating this new regulatory regime – £2.1 billion – may be an underestimate.

Journalistic content

On journalism and news content, the websites of “recognised news publishers” like newspapers won’t be covered by the Bill – meaning their journalistic content and below the line comments won’t be in scope.

The Bill includes various protections for journalistic content, as well as “content of democratic importance” – and those protections are welcome – but an important line has been crossed nevertheless. The state has no business regulating the work of journalists, whether it’s in a newspaper or on Facebook. Furthermore, why should journalists and other citizens have different online speech rights?

“Democratically important” content

The difficulty with granting various protections to “content of democratic importance” is, again, empowering Ofcom to decide what content is and isn’t “democratically important”. The government said in its press release this would include “content promoting or opposing government policy or a political party ahead of a vote in Parliament, election or referendum, or campaigning on a live political issue”. When moderating content, companies will be obliged by Ofcom to “take into account the political context”, giving it “a high level of protection if it is democratically important”. But what does that mean? And why should social media companies rather than their users decide what’s “democratically important”?

Lord Bingham, in a [famous judgement](#), described why it’s essential in a democracy to let people decide for themselves what is important – what information is trustworthy and what untrustworthy: “Democratic government means government of the people by the people for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions... government is not an activity about which only those professionally engaged are entitled to receive information and express

opinions. It is, or should be, a participatory process. But there can be no assurance that government is carried out for the people unless... the issues [are] publicly ventilated.”

That means that all information and debate is democratically important. So while these protections for journalistic and “democratically important” content at first glance appear beneficial, they move the country in an authoritarian direction, as the state empowers itself to make these judgements.

Burdensome regulation

Meanwhile there is a Punch and Judy element to the “government vs. big corporates” claims being made about this Bill. The U.S. social media giants will presumably be quite happy with the new regulations. They can easily afford the compliance costs, the “complaint monitoring units” and floors of enforcers monitoring our jokes to ensure they’re not “inappropriate”. But their smaller competitors won’t be able to, and there will probably now be little chance of a U.K. competitor emerging. (This is example of how burdensome regulation protects incumbents, stops new competitors emerging, and slows the innovation on which economic growth depends.)

What needs to happen now

The Free Speech Union will release a more detailed briefing once it has had an opportunity to properly scrutinise the Bill. But protection of free speech should be an overriding objective: the government should state explicitly that this means providers in scope won’t be required to remove speech that’s protected under common law and are under no obligation to remove content that some find “offensive” or psychologically unsettling, even if they’re in the majority.

The protections that have been given to journalistic content and content of democratic importance should be extended to all lawful content, including that which some people regard as “misinformation”. Other necessary revisions will include removing all reference to the need to remove “lawful but still harmful” content for adults.

Despite welcome attempts to improve it, the Online Safety Bill remains a serious threat to free speech online and is in need of serious revisions.

Radomir Tylecote
Director of Research, Free Speech Union