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THE FREE SPEECH UNION
85 GREAT PORTLAND ST.
LONDON W1W 7LT
FREESPEECHUNION.ORG

Free Speech Union Press Release

DATE

FOR IMMEDIATE RELEASE

This briefing contains some background information on the Online Safety Bill ("OSB") and sets out some of the concerns of the Free Speech Union ("FSU") to coincide with the Bill's second reading today. For further details, please contact Alistair Thompson on 07970-162225 or email him at alistair@teambritanniapr.com.

Summary

The OSB makes welcome provisions to protect children from illegal content on the internet and ensure it is speedily removed. However, it does not give adequate protection to freedom of speech:

- Although the OSB places a duty on online providers to 'have regard' for freedom of speech for the first time, it is a weakly worded obligation, given less weight than the Bill's other duties and can easily be ignored.
- The risk of massive fines (up to 10% of a company's global turnover) will encourage providers to be overcautious in removing borderline content which is actually lawful speech – YouTube, Facebook and Twitter already censor perfectly legitimate contributions to public debate about sex-based women's rights and the origins of COVID-19 on the grounds that they are 'hate speech' or 'misinformation'. In cases where a free speech duty and a safety duty are in conflict, removing content that *might* be harmful will always be the safer option.
- Lack of definitional clarity will empower vexatious complainants and burden ordinary members of the public with the task of obtaining such clarity, and securing their speech rights, through OFCOM and the courts.
- The concept of 'content that is harmful to adults', particularly 'legal but harmful' content, infantilises citizens and is rendered unnecessary by the statutory duty on providers to offer user empowerment tools so adults can decide for themselves whether they want to be protected from 'legal but harmful' content.

Overview

No one doubts the good intentions that have brought the OSB before Parliament: users, especially children, deserve better protection from illegal content on the internet and such content should be speedily removed. In particular, the FSU welcomes:

- The repeal of the Malicious Communications Act and subsections 127 (2)(a) and (b) of the Communications Act 2003.
- Measures to hold providers legally accountable for breach of contract if they restrict content contrary to their terms of service and provisions for new user complaints systems.
- Carve-outs to protect 'content of democratic importance' and journalistic content.
- With some exceptions, user empowerment duties allowing adults to choose whether they wish to be exposed to edgy content on social media sites.
- Clearly defined categories of 'priority' harmful content reflecting a common-sense understanding of that term, i.e., content that is already illegal under UK law.

However, freedom of expression is the bedrock on which all our other freedoms rest. Viewpoint diversity in the online public sphere enriches our democracy, even when the views expressed are challenging, unorthodox or crude. The current draft of the OSB fails to adequately protect this fundamental democratic right, missing a golden opportunity to pioneer a regulatory framework making the UK not just 'the safest place in the world to go online' but also the most vibrant.

Why is the Online Safety Bill a Problem for Free Speech?

1. Ill-Defined Terminology Empowering Vexatious Complainants

The word 'harm' occurs 326 times in the current draft of the OSB but there is still a lack of clarity about how the term will be applied by the Secretary of State. It will be for the Secretary of State at DCMS to decide which 'priority harms', as set out in a Statutory Instrument, should be restricted online, including 'legal but harmful' content. Legislators must be aware that vexatious complainants will exploit any lack of definitional clarity to claim that lawful speech on topics of public concern is 'harmful' and should be subject to censorship. Attempts to prevent this through provisions included at Clause 15 (3) requiring providers to apply regulations equally to a 'wide diversity of political opinion' are wholly insufficient without an accompanying definition of what this means and who will decide. For example, Maya Forstater's belief in biological sex was initially deemed 'unworthy of respect in a democratic society' by an Employment Tribunal and therefore fell outside the purview of acceptable political opinion. This judgment has since been overturned, but if the terminology of the OSB is not clearly defined it will be left to individual citizens like Forstater to undertake gruelling regulatory and legal action in response to vexatious complaints in order to obtain the definitional clarity that should have been in the Bill.

FSU RECOMMENDATION: Legislators must provide definitional clarity and avoid burdening the general public with the need to obtain such clarity through the courts.

2. Incentivising Censorship

Earlier drafts of the OSB required platforms to 'minimise' illegal content but they are now obliged to 'prevent' users from encountering illegal content by removing it. 'Prevention' is a high bar and, in combination with financial penalties equating to 10% of a company's annual global turnover, will inevitably result in the over-cautious removal of legal speech. **What social media company would be willing to risk 10% of its annual revenue defending the speech rights of a shocking satirist or an outrageous playwright?** Pre-emptive censorship will be the order of the day.

FSU RECOMMENDATION: The freedom of expression duty in Clause 19 is too weak: it asks providers to do no more than consider freedom of expression and then move on. This duty should be strengthened. The FSU recommends a positive duty legally obliging providers to ensure that the right to freedom of expression is not unduly infringed by excessive measures to comply with the duties of care.

3. 'Content that is harmful to adults' – A Nebulous, Illiberal Concept

The current draft of the OSB gives providers four options for dealing with content deemed 'harmful to adults': remove it, restrict access to it, prevent promotion of it, *or actively promote it*. Why not a fifth, common sense option, which would be to let adults make their own choices about what content they can view? The wording of the only option that isn't fundamentally censorious is absurd – actively promoting content that a provider has identified as harmful. Even under the existing regulatory system, what social media platform would opt to recommend or promote content that it believes to be harmful?

FSU RECOMMENDATION: The user empowerment tools provided for in Clause 14 enable adults to choose what content they are exposed to. At Clause 13 (4), where providers have made provision for this choice providers should have the option to do nothing about 'legal but harmful' content. **If the users are adults and the content is not illegal and they have opted not to be protected from it, providers should have the option of allowing them to view it without incurring any penalties.** Anything else infantilises the general public.