

BIG BROTHER WATCH

**Big Brother Watch Briefing on
Regulation and prevention of
online harms for backbench
business debate in the House
of Commons**

November 2020

About Big Brother Watch

Big Brother Watch is a civil liberties and privacy campaigning organisation, fighting for a free future. We're determined to reclaim our privacy and defend freedoms at this time of enormous technological change.

We're a fiercely independent, non-partisan and non-profit group who work to roll back the surveillance state and protect rights in parliament, the media or the courts if we have to. We publish unique investigations and pursue powerful public campaigns. We work relentlessly to inform, amplify and empower the public voice so we can collectively reclaim our privacy, defend our civil liberties and protect freedoms for the future.

Contact

Silkie Carlo

Director

Email: silkie.carlo@bigbrotherwatch.org.uk

Mark Johnson

Legal & Policy Officer

Email: mark.johnson@bigbrotherwatch.org.uk

Overview

We welcome the opportunity to brief MPs ahead of the backbench business debate in the House of Commons on Thursday 19th November.

In April 2019, the UK Government published the Online Harms White Paper which set out its ambition for the UK to become “the safest place in the world to go online and the best place to start a business”.

Making the UK a safe place to go online relies significantly on authorities utilising existing powers proportionately and effectively in order to ensure that what is illegal offline is also illegal online, not only in theory but in practice. Whilst some clarifications and reforms via new legislation may be useful, the UK’s legal framework around communications offences is already expansive.¹ The Law Commission found in its scoping report on abusive communications that “The broad terms used in the (existing) offences also means that they are generally flexible enough to cover the huge variety of offensive and abusive online communications, and provide scope to adapt to future developments.”²

However, the White Paper was targeted at the nebulous and undefined concept of “harms” online and specifically identified categories of so-called legal “harms” to restrict which included (but are not limited to) “trolling”, “intimidation” and “disinformation.” In introducing this legislation, the UK would be the first country in the world to introduce a regulatory system which couples both illegal and legal “harms” together. While welcoming the need to tackle illegal activity online, in an editorial, the Times newspaper described the proposed legislation as a “blunt instrument” which “may threaten free speech and an independent press”.³ We share these concerns. In our July 2019 response to the White Paper, we urged for a root and branch rethink of the proposals and warned that they would result in “companies tasked with policing the speech of millions, far beyond existing legal boundaries, leading to a wave of privatised monitoring and censorship.”⁴

1 The UK already has expansive laws governing speech-related offences that can be used to prosecute violent, hateful and harmful forms of speech and behaviour online. This includes laws prohibiting speech that causes harassment, alarm, distress, or fear (Protection from Harassment Act 1997; Public Order Act 1986); speech that is deemed grossly offensive and purposefully annoying or distressing (Malicious Communications Act 1988; Communications Act 2003); and speech that incites hatred on the basis of race, religion or sexual orientation (Crime and Disorder Act 1998; Race and Religious Hatred Act 2006).

2 Summary of Scoping Report: Abusive and Offensive Online Communications – Law Commission, 1 November 2018, p.5

3 The Times view on internet regulation: Blunt Instrument – 2 July 2020, <https://www.thetimes.co.uk/article/the-times-view-on-internet-regulation-blunt-instrument-mlff392n6>

4 Big Brother Watch’s response to the Online Harms White Paper Consultation – July 2019, p.5: <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/02/Big-Brother-Watch-consultation-response-on-The-Online-Harms-White-Paper-July-2019.pdf>

Provisions

- According to the White Paper “the regulatory framework should apply to companies that allow users to share or discover user-generated content or interact with each other online.”
- The White Paper states that online harms legislation would mean that online platforms have a “duty of care” over their users.
- The Government would appoint a regulator to ensure platforms’ terms of use are enforced. The Government have said that they are “minded” to appoint Ofcom as the new regulator.
- The regulator would also be responsible for upholding transparency online and have the power to mandate annual transparency reports from the companies in scope.
- The regulator would have the ability to impose large fines on platforms where they have failed to fulfil their duty of care. Initially, the Government wanted the regulator to have the power to attribute individual liability to executives at the platforms but this proposal is now under review⁵

Our concerns

It is our view that these proposals could inhibit freedom of expression and threaten privacy online. Our key concerns are as follows:

- Online platforms’ terms of use restrict free expression significantly more than is set out in UK law. Should a Government-backed regulator work to ensure platforms’ terms of use are enforced, this would amount to state-mandated censorship online far beyond the limits on the right to freedom of expression under UK law..
- Regulation which puts an undefined concept of “legal harms” in scope could result in the censorship of lawful and legitimate content.
- Online harms legislation could effectively privatise the policing of content online, outsourcing this role to social media companies themselves. Rather than holding platforms to account, these proposals would empower them and lead to greater reliance on algorithmic speech policing, removing due process and inevitably leading to the removal of lawful expression.
- We believe that the threat of hefty fines from the regulator could also have the unintended consequence of overzealous policing of content online from platforms who are threatened by the risk of incurring penalties.

⁵ Online Harms White Paper - Initial consultation response – Home Office and DCMS, February 2020, para. 19: <https://www.gov.uk/government/consultations/online-harms-white-paper/public-feedback/online-harms-white-paper-initial-consultation-response>

- The protection of free expression is not set out as a legal duty of the regulator in the White Paper.
- The Government proposes a sweeping application of these misguided policies, with the framework applying to “companies that provide services or use functionality on their websites which facilitate the sharing of user generated content or user interactions, for example through comments, forums or video sharing.”⁶ The specific inclusion of non-profit organisations’ websites and “public discussion forums” in the White Paper⁷ would include spaces used by political and religious groups, minority groups and campaigners. This all-encompassing approach combined with the subjective notion of policing “harm” is heavy-headed, impractical and would have a chilling effect.
- The online harms proposals would seriously undermine the right to privacy online – not only by requiring companies to conduct mass monitoring of up to billions of users, but by encapsulating encrypted services. We are also concerned about how the proposals would impact upon the privacy of private spaces such as private Facebook groups whose content is not intended for public consumption.

A democratic, rights-based approach

Big Brother Watch believes a root and branch rethink of this fatally flawed policy approach is required.

The rule of law must be upheld online. There must not be a dichotomy between the lawfulness of expression offline and online. This means that the powers provided by existing communications laws should be utilised and law enforcement should be appropriately resourced to deal with online crimes – but also that a two-tier system under which expression online is penalised more than offline, especially by tech companies and without due process, cannot be tolerated.

Digital constitutionalism: an alternative vision for a free and safe internet

The proposals risk eroding free speech and due process norms; creating an impossible two-tier system of rights online and offline that would in practice erode decades of case law and rights protections; and set a disastrous international example that would result in human rights abuses.

We would like to see Government use its power and influence to work with companies online to first adopt frameworks that reflect our constitutional and democratic values: namely, to

⁶ Online Harms White Paper - Initial consultation response – Home Office and DCMS, February 2020, para. 7: <https://www.gov.uk/government/consultations/online-harms-white-paper/public-feedback/online-harms-white-paper-initial-consultation-response>

⁷ Online Harms White Paper –DCMS and The Home Office, April 2019, p.4

adopt human rights and domestic law principles in their content standards, and to model enforcement on rule of law principles.

Government should encourage companies to reflect human rights principles in their approach to content regulations

Major internet intermediaries need digital constitutions that reflect the foundational values of the democracies they serve. This means content policies should reflect human rights principles and avoid limiting expression beyond the limitations of the law.

There is an evolving acknowledgement of the role businesses should play in protecting human rights. In 2008, the UN Human Rights Council in approved the “protect, respect and remedy” framework for business and human rights, resting on three core principles:

- the state duty to protect against human rights abuses by third parties, including business;
- the corporate responsibility to respect human rights; and
- greater access by victims to effective remedy, judicial and non-judicial.⁸

This means that whilst States are the primary duty bearers in securing the protection of human rights, corporations have the responsibility to respect human rights - and both entities are joint duty holders in providing effective remedies against rights violations.

In 2015, the Internet Governance Forum delivered recommendations on Terms of Service and Human Rights, defining due diligence standards for platforms with regard to three components: privacy, freedom of expression and due process. When considering internet platforms and freedom of expression, those recommendations acknowledged that

“certain platforms should be seen more as “public spaces” to the extent that occupy an important role in the public sphere”

and that

“online platforms increasingly play an essential role of speech enablers and pathfinders to information”.⁹

Clearly, major online platforms are now among the most widely used public squares. The Online Harms White Paper also acknowledged, “privately-run platforms have become akin to public spaces” and have a “responsibility to be guided by norms and rules developed by democratic societies.”¹⁰ As such, Big Brother Watch believes major platforms should not censor content

⁸ <https://www.business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework-and-guiding-principles>

⁹ <https://www.intgovforum.org/cms/documents/igf-meeting/igf-2016/830-dcpr-2015-output-document-1/file>

¹⁰ Online Harms White Paper – DCMS and The Home Office, April 2019, pp.6-7

beyond the extent to which it would be censored under the law, which respects human rights frameworks. This position is also promoted by the Internet Governance Forum's recommendations of Terms of Service and Human Rights, which say:

when platforms offer services which have become essential for the enjoyment of fundamental rights in a given country, they should not restrict content beyond the limits defined by the legitimate law.¹¹

Platforms should model enforcement on rule of law principles

Platforms have to yield some power to more democratic forces, because their exercise of power requires limitation if it is to be fair. Currently, the terms of service model effectively gives most platforms absolute power and complete discretion as to their application of it. This needs to change.

We believe that major internet platforms should adopt rule of law principles for enforcement. Government should be promoting rule enforcement that centres transparency of rules, foreseeability of their application, fairness of processes, the right to appeal, and equal and consistent application of the rules.

Government should also work to establish processes for law enforcement to better work with companies online so that policing is not effectively privatised to unaccountable companies in Silicon Valley, but rather is a co-operative process that ultimately protects due process for citizens.

The importance of user empowerment

Unlike the physical world, users can exercise considerable control of the information and views they are exposed to online by blocking others, muting key words, controlling news feeds, and using age-appropriate controls. User control helps people to mitigate the subjective "harm" they might otherwise be exposed to. We believe companies should work to further expand and simplify user controls over the information they see, the people they are exposed to, and the recommendations they are shown. This approach protects freedom of expression in our online public squares whilst allowing people to create diverse experiences that reflect their own preferences, interests and needs.

We welcome initiatives to promote digital literacy – although we believe this is a role for our national education system rather than for tech companies. Digital literacy, combined with more effective user controls, would allow individuals to take better control of their online experiences.

¹¹ <https://www.intgovforum.org/cms/documents/igf-meeting/igf-2016/830-dcpr-2015-output-document-1/file>

Conclusion

The Government's proposals for internet regulation will set norms for new modes of social interaction; inscribe limitations on people's freedom; influence power relationships between businesses, citizens and the state; and write enduring rules into a changing world. Internet content regulations are modern speech controls that will set the parameters for the everyday interactions of billions of people. We must get it right. Unfortunately, the Government's online harms framework is a fundamentally flawed approach – a new approach is needed.

To regulate the internet is to shape the contemporary world and the democratic rights we have within it. If this country is to demonstrate leadership, innovation and the unwavering commitment to modern democracy we expect, we must transmit the essential principles of human rights and the rule of law to the online realm. These digital constitutional values are the vital underpinnings online democratic spaces built to last.