

Summary briefing for Committee Stage in the House of Lords on the Online Safety Bill – Clause 65 and freedom of expression

Spring 2023

1. This short briefing focuses on the impact of Clause 65, which was recently added to the Bill as a Government amendment, on the right to freedom of expression.

RECOMMENDATIONS:

Peers should support the amendment to clause 65, laid in the name of Lord Moylan, which reads as follows:

Page 59, line 33, leave out subsections (2) to (12)

Clause 65

2. Clause 65, “Further duties about terms of service”, imposes a duty on Category 1 services to have proportionate systems and processes in place to take down or restrict access to content, and to ban or suspend users, in accordance with their terms of service (subclause 3); and that the terms regarding the take down or restriction of access to content, and the banning or suspension of users, must be clear, accessible and sufficiently detailed (subclause 4, paragraph a) and applied consistently (paragraph b).¹ As such, cl.65 imposes a duty on widely used services to consistently apply the terms of service that deal with suppression and censorship of speech and users.

3. Whilst it is reasonable that members of the public expect that private companies uphold their terms of service on speech, that does not justify the transformation of these private agreements into statutory duties. Likewise, we would not expect the Big Tech companies’ terms of service on privacy that deal with their exploitative data collection and targeted advertising practices to be transformed into statutory duties. Rather, we look to UK

1 Online Safety Bill Amendment Paper, 8th December 2022: https://publications.parliament.uk/pa/bills/cbill/58-03/0209/amend/onlinesafety_rm_pbc_1208.pdf

regulators to protect the individual rights users have in UK domestic law on these platforms, such as the Data Protection Act, Human Rights Act and Equality Act. In reinforcing censorship policies on the digital public square that do not exist in UK law, clause 65 creates serious legal friction, unintended consequences and human rights issues.

4. In practice, major platforms' terms of service are extensive and enable companies to suppress and censor vast categories of lawful speech, as well as suspend and ban users for expressing such lawful speech.² As such, clause 65 may be considered to have some similar features to the now-removed "legal but harmful" powers, giving state regulators the role of ensuring types of lawful speech are suppressed online. However, clause 65 goes further to task OFCOM with ensuring that individuals who express lawful speech are suspended or banned from platforms where terms of service allow, thereby limiting those individuals in expressing themselves more widely beyond the speech in question, incurring a far wider interference with those individuals' right to freedom of expression.

5. The draft Online Safety Bill contained a clause (cl. 11(3)(b)) requiring that platforms' terms of service regarding "harmful" content were applied consistently.³ The revised Bill slightly narrowed the duty, requiring that all terms of service relating to "priority content that is harmful to adults" would be applied consistently.⁴ It is important to note that this "harmful" content was to be defined by the Secretary of State, whilst the terms dealing with it were up to the platform. The Government have now removed this provision, thereby removing the legal invention of speech that is "legal but harmful for adults",⁵ which we welcome, due to the clear human rights conflicts that such a construction gave rise to.

6. However, clause 65 introduces a wider duty about terms of service on platforms, with a wide interference on freedom of expression, as the duty applies to all terms of service whatever they may be regarding the platform's policies on speech suppression and censorship, and user suspensions and bans. This duty is not restricted to so-called

² For examples, see *The State of Free Speech Online* by Big Brother Watch, September 2021:

<https://bigbrotherwatch.org.uk/wp-content/uploads/2021/09/The-State-of-Free-Speech-Online-1.pdf>

³ Draft Online Safety Bill, May 2021:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/985033/Draft_Online_Safety_Bill_Bookmarked.pdf

⁴ Online Safety Bill as of December 2022, cl. 13(6)(b): <https://publications.parliament.uk/pa/bills/cbill/58-03/0209/220209.pdf>

⁵ Online Safety Bill Amendment Paper, 8th December 2022, Amendment 7:

https://publications.parliament.uk/pa/bills/cbill/58-03/0209/amend/online_safety_rm_pbc_1208.pdf

“harmful” content as per the previous Bill, but whatever content the platform wishes to suppress or censor, and whatever people the platform wishes to suspend or ban.

In clause 65 it is the duty to apply these terms of service consistently in particular which causes the freedom of expression interference and as such, **peers should support the amendment in the name of Lord Moylan which removes subsections 2 to 12 of clause 65.**

7. Platforms have no obligation to align their terms of service with freedom of expression criteria as per Article 10.2 of the European Convention on Human Rights, but must only have “regard” to “the importance of” users’ freedom of expression (cl.18). Putting the word “particular” before the word “regard”, as the Government proposes in the new amendment paper, makes little material difference to this position. As noted by leading free expression barrister, Gavin Millar KC:

“It is not clear what right is being referred to in these clauses [cl.18]. But they appear to reflect the old common law maxim that a citizen can say anything provided it is not prohibited by law. It is certainly not a reference to the Article 10 right which is fundamental, supranational human right that is not dependent on compliance with domestic laws. The value of these provisions in protecting free speech online is again extremely limited.”⁶

8. Platforms’ terms of service can, and frequently do, change according to changing management and external political trends. In general, corporate terms of service are designed to protect platforms’ business interests and legal protection, and as such give platforms absolute power over their content policies – in the case of services hosting user-generated content, that means absolute power over what users can and cannot say.

9. Category 1 services typically have terms of service that permit the suppression of speech far beyond the limitations on speech in UK law. As such, clause 65 shows a worrying lack of commitment to the UK’s laws and case law on free speech that have evolved over many years. For example:

⁶ A legal analysis of the impact of the Online Safety Bill on freedom of expression – Gavin Millar KC for Index on Censorship, May 2022 - <https://www.indexoncensorship.org/wp-content/uploads/2022/05/Legal-analysis-of-the-impact-of-the-Online-Safety-Bill.pdf>

a) under Twitter's policy against "misgendering", gender critical feminists, trans people and any other commentators can be and have been censored, suspended or banned for using words such as "cis", "TERF", "guy" and "dude"⁷ (Twitter's policy also defines the relevant protected characteristics as "gender" and "gender identity",⁸ not "sex" and "gender reassignment" as per the Equality Act 2010).

b) under Facebook's community guidelines, social or political exclusion on the basis of what the company calls "protected characteristics"⁹ is prohibited.¹⁰ This gives Facebook latitude to prohibit black-only political groups, or a social group only for black women, or other single-sex social groups.

c) under Facebook's community guidelines, generalisations about groups inferring inferiority are prohibited.¹¹ Under this policy, women can be and have been censored and suspended for quips such as "men are so stupid," whilst a black activist was censored for describing white people as "fragile"¹² (at the time, the book *White Fragility* was a New York Times bestseller).

d) under YouTube's community guidelines during the pandemic, any content that contradicted "health authorities" was prohibited. Under this policy, a speech by David Davis MP at Conservative Party conference, in which he criticised the Government's Covid pass policy, was removed from the platform.¹³ Major sections of the Labour Party, Liberal Democrats and Green Party also opposed mandatory Covid passes during the pandemic. The video was reinstated after he complained, but his viewpoint did indeed contradict authorities at the time.

7 For examples, see *The State of Free Speech Online* by Big Brother Watch, September 2021, pp.53-60: <https://bigbrotherwatch.org.uk/wp-content/uploads/2021/09/The-State-of-Free-Speech-Online-1.pdf>

8 Hateful Conduct Policy, Twitter, last accessed 8th December 2022: <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy>

9 Facebook's definition of 'protected characteristics' is out of sync with the Equality Act 2010 and UK hate crime, including not only the five protected groups of disability, race (and national origin), religion, sexual orientation and gender reassignment as per the UK's hate crime definition, but also sex, gender, caste and serious disease.

10 Hate Speech Community Standards, Facebook, last accessed 8th December 2022: <https://transparency.fb.com/en-gb/policies/community-standards/hate-speech/>

11 Ibid.

12 For examples, see *The State of Free Speech Online* by Big Brother Watch, September 2021, p.18 and p.21: <https://bigbrotherwatch.org.uk/wp-content/uploads/2021/09/The-State-of-Free-Speech-Online-1.pdf>

13 YouTube U-turns over David Davis vaccination passports clip after protest, BBC News, 14 October 2021, <https://www.bbc.co.uk/news/uk-politics-58915092>

Under clause 65, content moderation of this nature would no longer be simply a contract between the company and the user but would be brought under statute; Big Tech companies would be exercising public law functions by consistently suppressing such lawful speech; and OFCOM would be tasked with ensuring that the policies above are enforced consistently.

This displaces the UK's legal standards for permissible speech online with platforms' terms of use.

Clause 119

10. A Government amendment to clause 119 means that the clause now gives OFCOM enforcement powers where Category 1 services do not uphold these duties adequately. Such enforcement can include a financial penalty (cl. 125) of up to 10% of the service's annual revenue or £18m, whichever is greater (Schedule 13) or even a service restriction order (cl.131). Together, clauses 65 and 119 create unprecedented powers for a state regulator to impose extraordinary financial penalties and even restrict a service where millions of members of the public express themselves, if people are not consistently suppressed, censored, suspended or banned for lawful speech according to foreign companies' corporate terms of service. This is likely to result in particularly zealous speech suppression, censorship, suspensions and banning on these platforms.

11. There is no stated limitation on OFCOM's power regarding compliance with the Human Rights Act 1998 or the Equality Act 2010. The interference with the right to freedom of expression protected by Article 10 is not acknowledged at all. All public authorities have a legal duty to uphold both Acts – but given that most Category 1 companies' terms of service create speech restrictions that go far beyond the remit of the Human Rights Act and are out of sync with the UK's Equality Act,¹⁴ Clauses 65 and 119 create an inevitable clash of standards between UK laws that are of constitutional importance, and (mostly American) corporatised speech conditions.

12. In our view, it is likely that by acting as a guarantor of foreign companies' corporate speech conditions, OFCOM risks failing in its duties to protect the right to freedom of

¹⁴ *The State of Free Speech Online* by Big Brother Watch, September 2021: <https://bigbrotherwatch.org.uk/wp-content/uploads/2021/09/The-State-of-Free-Speech-Online-1.pdf>

expression under the Human Rights Act and to prevent discrimination under the Equality Act.

13. Together, clauses 65 and 119 would displace the UK's legal standards for permissible speech in favour of foreign companies' terms of service, adding the weight of a UK state regulator. This position cannot be characterised by 'reining in the Big Tech companies', but is better characterised as offering them an extra whip.

14. A statutory duty imposed on services to consistently suppress, censor, suspend and ban users on the basis of whatever rules they wish is highly unlikely to be compatible with Article 10, risks being subjected to a judicial review, and will lead to negative consequences for human rights and equality that may invite legal challenges.

RECOMMENDATIONS:

Members should support the amendment to clause 65, laid in the name of Lord Moylan.

For more information, please contact: mark.johnson@bigbrotherwatch.org.uk