

HOUSE OF LORDS

Select Committee on the Constitution

15th Report of Session 2022–23

Online Safety Bill

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Select Committee on the Constitution

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Lord Anderson of Ipswich	Lord Howard of Lympne
Baroness Andrews	Lord Keen of Elie
Baroness Drake (Chair)	Lord Mancroft
Lord Falconer of Thoroton	Lord Strathclyde
Lord Foulkes of Cumnock	Baroness Suttie
Lord Hope of Craighead	Lord Thomas of Gresford

Declaration of interests

See Appendix 1.

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Committee staff

The current staff of the committee are John Turner (Clerk), Rachel Borrell (Policy Analyst) and Jackie Yu Hon Lam (Committee Operations Officer).

Professor Stephen Tierney and Professor Alison Young are the legal advisers to the Committee.

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Online Safety Bill

Introduction

1. The Online Safety Bill was introduced in the House of Commons on 14 March 2022 and brought to the House of Lords, having been carried over from the previous session, on 18 January 2023. Second reading took place on 1 February 2023 and committee stage has yet to be scheduled.
2. In the Government’s words, the purpose of the Bill is to establish “a new regulatory regime to address illegal and harmful content online. It imposes legal requirements on:
 - providers of internet services which allow users to encounter content generated, uploaded or shared by other users (“user-to-user services”);
 - providers of search engines which enable users to search multiple websites and databases (“search services”); and
 - providers of internet services on which provider pornographic content (pornographic content that is published by a provider and is not user-generated) is published or displayed.”¹
3. The Office of Communications (OFCOM) is empowered to act as the online safety regulator, overseeing and enforcing the new regulatory regime.²

Definitions of “freedom of expression” and “privacy”

4. Clause 18(2) imposes a duty on those providing user-to-user services to “have particular regard to the importance of protecting users’ rights to freedom of expression within the law” when deciding on and implementing safety measures and policies.³ Clause 28(2) imposes the same duty on those providing search services.⁴ The Bill does not define “freedom of expression”.
5. In our report on the Higher Education (Freedom of Speech) Bill, which imposed duties to protect freedom of speech, we recommended:

“In the interests of legal certainty, we recommend the Higher Education (Freedom of Speech) Bill is amended to define freedom of speech more clearly by referring to Article 10 of the European Convention on Human Rights.”⁵
6. At report stage in the House of Lords on that bill a government amendment to achieve this was agreed.⁶ This was subsequently agreed by the House of Commons.⁷

1 [Explanatory Notes to the Online Safety Bill](#), para 1

2 [Explanatory Notes to the Online Safety Bill](#), para 2

3 [Online Safety Bill](#), clause 18(2)

4 [Online Safety Bill](#), clause 28(2)

5 Constitution Committee, *Higher Education (Freedom of Speech) Bill* (3rd Report, Session 2022–23, HL Paper 59), para 8

6 HL Deb, 7 December 2022, [cols 182–188 and 198](#). Following the Government amendment, the Bill was amended to state: “references to freedom of speech are to the freedom to impart ideas, opinions or information (referred to in Article 10(1) of the Convention as it has effect for the purposes of the Human Rights Act 1998) by means of speech, writing or images (including in electronic form)”. [Higher Education \(Freedom of Speech\) Bill](#), clause 1

7 HC Deb, 7 February 2023, [cols 854–879](#)

7. **The Online Safety Bill does not define “freedom of expression”. The Higher Education (Freedom of Speech) Bill was amended to provide that references to “freedom of speech” in that bill are more clearly linked to Article 10(1) of the European Convention on Human Rights. *The House may wish to consider whether, and if so how, this Bill could be amended to ensure legal certainty.***
8. The duties under clauses 18(2) and 28(2) may be interpreted differently by the courts should the Bill of Rights Bill come into force.⁸ Clause 4 of the Bill of Rights Bill directs courts to give “great weight” to freedom of speech, which that Bill defines with reference to Article 10 of the European Convention on Human Rights.⁹
9. ***In the interests of legal certainty, the House may wish to consider whether there is likely to be any difficulty with the interaction between duties on service providers under clauses 18(2) and 28(2) to “have particular regard to the importance of protecting users’ rights to freedom of expression within the law” and the direction in the Bill of Rights Bill to the courts to give “great weight” to freedom of speech. The House may wish to return to this issue should the Bill of Rights Bill be brought from the Commons.***
10. Clause 18(3) of the Bill places a duty on providers of user-to-user services to “have particular regard to the importance of protecting users from a breach of any statutory provision or rule of law concerning privacy” when deciding on and implementing safety measures and policies.¹⁰ Clause 28(3) imposes the same duty on those providing search services.¹¹
11. The duties under clauses 18(3) and 28(3) may be interpreted differently should the Bill of Rights Bill come into force. The right to privacy stems predominantly from Article 8 of the European Convention on Human Rights.¹² However, clause 3 of the Bill of Rights Bill modifies how Convention rights will be interpreted by providing that the Supreme Court is the ultimate judicial authority on questions under domestic law in connection with the Convention rights, and that domestic courts may have regard to the preparatory work of the Convention as well as the text of the Convention right. Under that bill, other than when required to give great weight to the importance of the right to freedom of expression, domestic courts would not be able to adopt an interpretation that is more expansive than that provided by the European Court of Human Rights “unless the court has no reasonable doubt that the European Court of Human Rights would adopt that interpretation if the case were brought before it.”¹³
12. The duty in the Bill of Rights Bill for courts to “give great weight” to freedom of speech may also mean that existing case law balancing freedom of expression and privacy would no longer provide authoritative guidance on the scope of the right to privacy. This may give rise to legal uncertainty.

8 The Bill was introduced in the House of Commons on 22 June 2022 and is yet to be scheduled for second reading.

9 [Bill of Rights Bill](#), clause 4(2)

10 [Online Safety Bill](#), clause 18(3)

11 [Online Safety Bill](#), clause 28(3)

12 [European Convention on Human Rights](#), Article 8

13 [Bill of Rights Bill](#), clause 3

13. Clause 36(1)–(4) requires OFCOM to prepare and issue codes of practice on the duties imposed on service providers in Part 3 of the Bill.¹⁴ This includes the duties under clauses 18(2), 18(3), 28(2) and 28(3). The codes of practice will also cover the additional duties of Category 1 providers¹⁵ to protect speech of democratic importance,¹⁶ news publisher content¹⁷ and journalistic speech.¹⁸
14. In making these codes of practice OFCOM must consult persons who have relevant expertise in equality and human rights, in particular the right to freedom of expression as set out in Article 10 of the Convention and the right to private life as set out in Article 8.¹⁹ These codes of practice are subject to the negative resolution procedure.²⁰ Clause 69 places a similar consultation requirement on OFCOM when producing guidance on transparency reports.
15. **OF COM is required to prepare codes of practice on general service providers’ duties under clauses 18(2), 18(3), 28(2) and 28(3), and on Category 1 providers’ additional duties under clauses 13 to 15 (to protect speech of democratic importance, news publisher content and journalistic speech). These codes may provide greater clarity on the definition of “freedom of expression” and “privacy”. The content of these codes will be subject to judicial review. *Given the potential significance of these codes of practice in establishing definitions of rights we recommend that their approval should be subject to the affirmative procedure.***

Disguised legislation

16. As noted above, OFCOM is required to prepare and issue codes of practice regarding the duties imposed on service providers in Part 3 of the Bill.
17. It would not be unlawful per se for a provider to fail to act in accordance with a code of practice.²¹ However, a service provider would be treated as having complied with its duties if it has followed the measures set out in a code of practice.²² Codes of practice are admissible as evidence in legal proceedings.²³ Duties under Part 3 of the Bill apply only from the day on which the relevant first code of practice comes into force.²⁴ This might provide a strong incentive for service providers to comply with these codes of practice if they wish to ensure they comply with their legal duties. These codes of practice might therefore be seen as ‘disguised legislation’.
18. We have previously criticised ‘disguised legislation’, which the Delegated Powers and Regulatory Reform Committee has defined as “instruments

14 [Online Safety Bill](#), clause 36

15 “Category 1 services will be a subset of user-to-user services that will have additional duties placed on them” [Explanatory Notes to the Online Safety Bill](#), footnote 8

16 [Online Safety Bill](#), clause 13

17 [Online Safety Bill](#), clause 14

18 [Online Safety Bill](#), clause 15

19 [Online Safety Bill](#), clause 36(f)(i) and (ii)

20 [Online Safety Bill](#), clause 38(2), (3) and (4)

21 [Online Safety Bill](#), clause 45(1)

22 [Online Safety Bill](#), clause 44(1)

23 [Online Safety Bill](#), clause 45(2)

24 [Online Safety Bill](#), clause 46

which are legislative in effect but often not subject to parliamentary oversight”.²⁵

19. In this case, there are safeguards. OFCOM must submit draft codes of practice to the Secretary of State, who must lay the draft before Parliament as soon as practicable.²⁶ As noted above, the codes of practice, and later amendments to those codes (unless they are minor), are normally subject to a procedure equivalent to the negative resolution procedure.²⁷ Codes of practice must be published.²⁸
20. OFCOM is required to keep the codes of practice under review. Modifications to codes are also subject to a procedure equivalent to the negative resolution procedure²⁹ unless the modification is in response to a direction given by the Secretary of State under clause 39 for reasons of public policy, in which case an affirmative procedure applies.³⁰ The power of direction under clause 39 has been criticised and the Government has committed to amending it to restrict its use to “exceptional” circumstances and to replace the term “public policy” with a defined list: national security, public health, the UK’s international relations and obligations, economic policy and burden to business.³¹ The government amendments have yet to be tabled.
21. **We have concluded above that an affirmative procedure would be more appropriate for certain codes. Subject to that, we welcome provisions in the Bill to ensure that OFCOM codes of practice are subject to parliamentary scrutiny.**

25 Delegated Powers and Regulatory Reform Committee, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive* (12th Report, Session 2021–22, HL Paper 106), para 89

26 *Online Safety Bill*, clause 38(1) and (2). A different procedure is followed if the Secretary of State wishes to direct OFCOM to modify a draft code of practice in certain circumstances: clauses 39 and 40.

27 *Online Safety Bill*, clause 38. Where a draft code of practice has been modified following a direction by the Secretary of State under clause 39(1)(a) (that is, the Secretary of State believes modifications are required for reasons of public policy), the draft code is subject to the affirmative procedure: clause 40(2).

28 *Online Safety Bill*, clause 41

29 *Online Safety Bill*, clause 42

30 *Online Safety Bill*, clauses 39(1)(a) and 40(2).

31 See Delegated Powers and Regulatory Reform Committee, *Online Safety Bill* (28th Report, Session 2022–23, HL Paper 160), paras 6–16; [letter](#) from the chair of the Communications and Digital Committee to the Secretary of State for Digital, Culture, Media and Sport, 30 January 2023; and Written Answer [HCWS193](#), Session 2022–23.

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Baroness Drake (Chair)
 Lord Anderson of Ipswich
 Baroness Andrews
 Lord Falconer of Thoroton
 Lord Foulkes of Cumnock
 Lord Hope of Craighead
 Lord Howard of Lympne
 Lord Keen of Elie
 Lord Mancroft
 Lord Strathclyde
 Baroness Suttie
 Lord Thomas of Gresford

Declarations of interest

Baroness Drake (Chair)
No interests declared
 Lord Anderson of Ipswich
No interests declared
 Baroness Andrews
No interests declared
 Lord Falconer of Thoroton
No interests declared
 Lord Foulkes of Cumnock
No interests declared
 Lord Hope of Craighead
No interests declared
 Lord Howard of Lympne
No interests declared
 Lord Keen of Elie
No interests declared
 Lord Mancroft
No interests declared
 Lord Strathclyde
No interests declared
 Baroness Suttie
No interests declared
 Lord Thomas of Gresford
No interests declared

A full list of members' interests can be found in the Register of Lords' Interests: <https://members.parliament.uk/members/lords/interests/register-of-lords-interests>

Professor Stephen Tierney, University of Edinburgh, and Professor Alison Young, University of Cambridge, acted as legal advisers to the Committee. They declared no relevant interests.