

Associate Professor Damian Tambini—supplementary written evidence (FE00124)

Note on the Online Safety Bill

<https://committees.parliament.uk/writtenevidence/21122/pdf/>

Dear Committee Members,

My chief concern about the Online Safety Bill is that it proposes a structure of self, co and statutory regulation that is insufficiently independent of government. There are in my view too many ways in which the Secretary of State is empowered to interfere with freedom of expression, freedom of the media and Ofcom, and the structure thus departs both from established principles of UK media regulation and international standards that the UK has signed up to.

In the Draft Online Safety Bill the Secretary of State has a very long list of powers, including to:

- approve Ofcom codes of conduct (s32)
- set content rules by defining what is harmful to adults (s46) and children by setting regulations (s47)
- give directions to Ofcom about its internal committees (s111), emergency directions (s112) and multiple other areas of internal operation (s113)
- require Ofcom to review codes of practice (s34(6))
- set rules to define the categorisation of a communications service (schedule 4).

The operation of these duties is complex of course, and there are lots of limitations and stipulations of matters that the SOS has to take into account. In many cases the SOS role is a way of resolving a complex difficulty when someone needs to take a decision or apply a standard. But in my view some of the issues raised relate to censorship functions that raise too many conflicts of interest and media freedom challenges for a minister to be responsible, and the public needs absolute clarity on the boundaries between media and government that the legislation blurs.

If you compare the OSB with the 2003 Communications Act it is clear that whilst there is some scope for SOS involvement (CA 2003 s9, s2a, s24 and s29 for example), there is a real attempt in that legislation to separate the independent regulator from the minister. The minister has no involvement in sensitive content issues or broadcast licensing for example, for obvious reasons.

The European Union published a Digital Services Act in November which sets out a similar 'Duty of Care' framework to the OSB. S39.2 states quite simply that:

“When carrying out their tasks and exercising their powers in accordance with this Regulation, the Digital Services Coordinators shall act with complete independence. They shall remain free from any external influence, whether direct or indirect, and shall neither seek nor take instructions from any other public authority or any private party.”

(The Digital Services Coordinators are the equivalent to Ofcom in the EU wide scheme.)

The UK has in the past had a wise culture of executive restraint in relation to these matters, and has been ahead of the game on broadcaster independence and regulatory independence, but there is no guarantee this will continue. Perceptions of independence matter, and the UK needs to take a leadership role in showing how democracies can balance accountability with liberty. Undermining independence of communications regulators has been a key way in which authoritarians have undermined democracy in Hungary, Poland and elsewhere. I don't need to point out that Ofcom independence and leadership continues to be a controversial issue, and a politicisation of a regulator that is about to take on a more important and sensitive role would be a disaster.

This committee could recommend that (i) the Bill should include explicit guarantees of media independence and enhanced independence for Ofcom and (ii) that the structure as a whole should be audited against existing standards such as the Council of Europe guidelines on independence of media regulators:

<https://www.coe.int/en/web/freedom-expression/media-regulatory-authorities>

I mention some of the issues in this report

<https://rm.coe.int/cyprus-2020-new-media/16809a524f>

Info on the Council of Europe Committee on Freedom of Expression and Digital is here:

<https://www.coe.int/en/web/freedom-expression/msi-dig>

As ever I would be happy to discuss these matters with the committee.

11 June 2021