

BIG BROTHER WATCH

DEFENDING CIVIL LIBERTIES, PROTECTING PRIVACY

Big Brother Watch's Briefing on the Social Media Service Providers (Civil Liability and Oversight) Bill 2018

October 2018

About Big Brother Watch

About Big Brother Watch Big Brother Watch is a cross-party, non-party, independent non-profit organisation leading the protection of privacy and civil liberties in the UK. We expose and challenge threats to people's privacy, freedoms and civil liberties at a time of enormous technological change in the UK.

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Summary

- **Big Brother Watch calls on Members of Parliament to oppose the Social Media Service Providers (Civil Liability and Oversight) Bill, to protect people’s rights to freedom of expression, freedom of information and privacy online.**

The Social Media Service Providers (Civil Liability and Oversight) Bill would:

- Force internet and social media platforms to take an overly censorious and restrictive approach to free expression online;
- Encourage the use of intrusive automated content monitoring and restriction systems, resulting in arbitrary and inconsistent restrictions of free speech and a chilling effect on free expression online;
- Result in private, profit-driven internet and social media companies becoming the arbiters of free speech instead of the courts;
- Give police duplicate powers to force internet and social media companies to hand over users’ information, despite this power already existing under the Regulation of Investigatory Powers Act 2000 and the Investigatory Powers Act 2016.

In anticipation of the second reading of the Social Media Service Providers (Civil Liability and Oversight) Bill on **26th October 2018** we would like to set out the significant issues it raises. If this Bill becomes law, it will have a significant effect on people’s fundamental rights to free expression and privacy online.

Background

The **Social Media Service Providers (Civil Liability and Oversight) Bill** was presented to Parliament by John Mann MP on 28th February 2018, receiving cross party support.¹

The official summary of the Bill is as follows:

“A Bill to make social media service providers liable for online publications in respect of civil proceedings in specified circumstances; to establish and confer functions upon a

¹ The following MPs supported the Bill: Ruth Smeeth MP, Luciana Berger MP, Dr Matthew Offord MP, Nicky Morgan MP, Andrew Percy MP, Anna Turley MP, Lilian Greenwood MP, Liz Saville Roberts MP, Dr Lisa Cameron MP and Mr Tanmanjeet Singh Dhesi MP.

commissioner for online safety; to make provision about the disclosure of certain information by social media service providers; and for connected purposes”²

John Mann MP stated in the First Reading of the Bill on 28th February 2018 that the Bill was needed to ensure that social media companies are liable in the same way that the broadcast media are for content on their platforms, and to ensure that the police can force internet companies to provide evidence for criminal prosecutions.³

John Mann MP argued it is a problem that social media companies cannot be held liable for “the words of third parties who use their services”, especially compared to the “broadcast media – television or radio”.⁴ He referred to the UK law which he says gives internet company liability: the E-Commerce Directive 2000,⁵ which was harmonised into UK law by the Electronic Commerce (EC Directive) Regulations 2002.

John Mann MP gave examples of online behaviour or conduct that the Bill is intended to combat. He described “a series of violent threats...directed at me and my family on Twitter” and reported that when the police needed further information about the tweets, “Twitter refuses to provide them”.⁶ He gave an example where an individual was convicted for “very aggressive internet attacks” on himself and other MPs, and the subsequent creation of a fake profile in his name which he said was “designed to incite violence against me”.⁷ This, he said, resulted in “direct and specific threats” from “extremists in [his] locality”. However, he said that Facebook “refuse[d] to assist” by providing the details of the threats to the police.⁸ He said that “it is absurd that the police in this country cannot force Twitter, Facebook, Google or any of the others to provide evidence that is required for criminal prosecutions” and that “it is done on the basis of good will”.⁹

John Mann MP also criticised the social media companies for “the spreading of fake news.”¹⁰

2 Social Media Service Providers (Civil Liability and Oversight) Bill (<https://services.parliament.uk/bills/2017-19/socialmediaserviceproviderscivilliabilityandoversight.html>)

3 John Mann MP, ‘Social Media Service Providers (Civil Liability and Oversight) Bill’, First Reading, House of Commons, 28 February 2018 ([https://hansard.parliament.uk/commons/2018-02-28/debates/18022838000002/SocialMediaServiceProviders\(CivilLiabilityAndOversight\)#contribution-151690EC-1DCA-4C1F-BE73-4F28F260A08F](https://hansard.parliament.uk/commons/2018-02-28/debates/18022838000002/SocialMediaServiceProviders(CivilLiabilityAndOversight)#contribution-151690EC-1DCA-4C1F-BE73-4F28F260A08F))

4 *Ibid*

5 Recital 15

6 John Mann MP, ‘Social Media Service Providers (Civil Liability and Oversight) Bill’, First Reading, House of Commons, 28 February 2018 ([https://hansard.parliament.uk/commons/2018-02-28/debates/18022838000002/SocialMediaServiceProviders\(CivilLiabilityAndOversight\)#contribution-151690EC-1DCA-4C1F-BE73-4F28F260A08F](https://hansard.parliament.uk/commons/2018-02-28/debates/18022838000002/SocialMediaServiceProviders(CivilLiabilityAndOversight)#contribution-151690EC-1DCA-4C1F-BE73-4F28F260A08F))

7 *Ibid*

8 *Ibid*

9 *Ibid*

10 *Ibid*

This Bill raises the significant issue of internet regulation. The internet and social media companies have become central platforms for discussion and debate, for information access, for commerce and human development. While the internet and the online forums it hosts have become characterised as places of disinformation, full of hateful messages; the internet is also a powerful democratising force. Internet platforms have enabled the open sharing of information and provided platforms for people to speak truth to power.¹¹

The status quo, whereby internet companies have the power to set standards by which society is governed online without accountability or transparency, needs to change. However, with over two billion users actively using Google and Facebook respectively, these internet companies are of a magnitude whereby they function as part of our modern communications infrastructure, much like public utilities. Therefore, any Government regulation of these companies is likely to engage people's rights to privacy, religious freedom and belief, opinion and expression, assembly and association.¹²

Making internet companies liable for user-generated content will result in the restriction of free expression

This Bill seeks to impose liability on social media companies for user-generated content - content that they themselves have not created. This would force social media companies to identify, adjudicate on and censor content created by its users.

The appeal of regulating internet content by making platforms liable for content is understandable, but imposing regulation on them involves significant risks to freedom of expression. Making social media companies liable for third party generated content on their platforms will incentivise them to be overly cautious in their approach and to over-censor content in order to avoid liability - restricting free expression online.

NetzDG

In his first reading speech in support of the Bill, John Mann MP used Germany's Network Enforcement Act (commonly known as NetzDG), which threatens a fine of up to €50 million for social media companies that fail to remove illegal content within 24 hours, as a positive example of internet regulation. However this law is extremely heavy-handed, and the imposed

¹¹ UN Human Rights Council, 'The promotion, protection and enjoyment of human rights on the Internet', 4 July 2018 (<https://documents-dds-ny.un.org/doc/UNDOC/LTD/G18/203/73/PDF/G1820373.pdf?OpenElement>)

¹² Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 6 April 2018 (<https://freedex.org/wp-content/blogs.dir/2015/files/2018/05/G1809672.pdf>)

threat of such a large fine incentivises these profit-driven social media companies to err on the side of caution – to over-censor content. Human Rights Watch has called on German lawmakers to “promptly reverse” NetzDG and explained how it is “vague, overbroad, and turns private companies into overzealous censors to avoid steep fines, leaving users with no judicial oversight or right to appeal.”¹³ Article 19 warned that “the Act will severely undermine freedom of expression in Germany, and is already setting a dangerous example to other countries that more vigorously apply criminal provisions to quash dissent and criticism, including against journalists and human rights defenders.”¹⁴ The UN Special Rapporteur on Freedom of Expression, David Kaye, warned that NetzDG “raises serious concerns about freedom of expression and the right to privacy online”, and argued that “censorship measures should not be delegated to private entities”.¹⁵ The law has also been criticised by the German broadcast media for turning controversial and censored voices into “opinion martyrs”.¹⁶

Loss of due process

Intermediaries’ technical ability to perform a quasi-policing function does not equate to a legal or even moral responsibility to do so – nor would their fulfilling such a function necessarily benefit society. Social media companies are not and should not be arbiters of the law – like any other private company, they are themselves subject to the law. Any determination of whether content produced by a user is illegal, as a determination that may result in the censorship of that content, is one which engages that user’s right to freedom of expression. Such determinations should be for an independent and impartial judicial authority, in accordance with due process standards of legality, necessity and legitimacy.¹⁷ Essential functions of the rule of law should not be outsourced to unaccountable private companies.

Social media companies should not be held liable for third party or user content on their platform that they were not involved in modifying or for failing to identify illegal content. They should only be liable for failure to adhere to lawful orders, such as court orders to remove content.

13 Germany: Flawed Social Media Law – Human Rights Watch, 14 Feb 2018:

<https://www.hrw.org/news/2018/02/14/germany-flawed-social-media-law>

14 Germany: Act to Improve Enforcement of the Law on Social Networks undermines free expression - Article 19, 1 Sept 2017: <https://www.article19.org/resources/germany-act-to-improve-enforcement-of-the-law-on-social-networks-undermines-free-expression/>

15 Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 1 June 2017: <https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL-DEU-1-2017.pdf>

16 <https://www.theguardian.com/world/2018/jan/05/tough-new-german-law-puts-tech-firms-and-free-speech-in-spotlight>

17 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 6 April 2018 (<https://freedex.org/wp-content/blogs.dir/2015/files/2018/05/G1809672.pdf>)

Making internet companies liable for user-generated content will result in closely surveilled social media networks

Furthermore, making internet companies liable for content on their platforms will likely result in the use of intrusive surveillance systems – watching users communicate to see if anything they say might incur liability for the platform. This would undoubtedly erode people’s privacy, and cause an additional chilling effect on free expression as users, knowing they are being watched and monitored online, would self-censor.¹⁸

John Mann MP said he is not seeking “to interfere with the rights of free speech or a free internet”.¹⁹ However, this Bill would undoubtedly interfere with people’s right to free speech online, as well as having serious implications for people’s privacy online.

There is already legislation that can be used to compel internet companies to assist criminal investigations

At the first reading of the Bill, John Mann MP said that “it is absurd that the police in this country cannot force Twitter, Facebook, Google or any of the others to provide evidence that is required for criminal prosecutions” and that “it is done on the basis of good will”.²⁰ He gave several examples of internet platforms failing or refusing to assist the police with investigations, detailed above.

However, this claim is inaccurate. In the UK, under the Regulation of Investigatory Powers Act 2000 and subsequently the Investigatory Powers Act 2016, police and other law enforcement agencies have the power to compel internet platforms such as Facebook, Twitter and Google to disclose a user’s communications or identifying details such as a users’ IP address, for the purposes of preventing or detecting crime. It would be completely unnecessary to duplicate this already existing power.

Upholding human rights online

Any regulation of online content on major internet platforms should be based on international human rights standards with close regard to the right to freedom of expression and the right to

¹⁸ Pen International, ‘Surveillance, Secrecy and Self-Censorship’, 2014 (<https://pen-international.org/app/uploads/Surveillance-Secrecy-and-Self-Censorship-New-Digital-Freedom-Challenges-in-Turkey.pdf>)

¹⁹ John Mann MP, ‘Social Media Service Providers (Civil Liability and Oversight) Bill’, First Reading, House of Commons, 28 February 2018 ([https://hansard.parliament.uk/commons/2018-02-28/debates/18022838000002/SocialMediaServiceProviders\(CivilLiabilityAndOversight\)#contribution-151690EC-1DCA-4C1F-BE73-4F28F260A08F](https://hansard.parliament.uk/commons/2018-02-28/debates/18022838000002/SocialMediaServiceProviders(CivilLiabilityAndOversight)#contribution-151690EC-1DCA-4C1F-BE73-4F28F260A08F))

²⁰ *Ibid*

privacy, which are particularly affected.²¹ This is the most inclusive way to host diverse communities and individuals and to foster the open exchange of ideas, the development of views, and healthy debate.

International human rights covenants to which the UK is a signatory, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Charter of Human Rights; and the UK's Human Rights Act 1998, impose a duty on the UK to ensure an enabling environment for, and to protect, people's right to freedom of expression and information and their right to privacy.²² This Bill would clearly frustrate that obligation, due to to the erosion of free expression and privacy it would incur.

CONCLUSION

The Social Media Service Providers (Civil Liability and Oversight) Bill would likely result in an environment where free speech is heavily censored by social media companies seeking to avoid liability.

It would also undoubtedly result in social media companies even more actively surveilling and scrutinising users at a mass scale.

John Mann MP claimed that this Bill is needed to compel social media companies to release information for criminal investigations. However, such powers already exist, provided for in the Regulation of Investigatory Powers Act 2000 and subsequently the Investigatory Powers Act 2016.

The Social Media Service Providers (Civil Liability and Oversight) Bill would have a chilling effect on people's right to freedom of expression and freedom of information, and would further erode privacy rights. We urge Members to oppose this Bill.

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Griff Ferris

²¹ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 6 April 2018 (<https://freedex.org/wp-content/blogs.dir/2015/files/2018/05/G1809672.pdf>)

²² Human Rights Act 1998, Schedule 1, Article 8 and Article 10