

ONLINE SAFETY BILL

Supplementary memorandum from the Department for Science, Innovation and Technology to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee (“DPRRC”) to assist with its scrutiny of the Online Safety Bill (“the Bill”). It supplements the memorandum that was submitted and published on 17 March 2022 when the Bill was introduced to the House of Commons, and the memorandum that was submitted to the DPRRC on 20 January 2023 when the Bill was introduced in the House of Lords. This memorandum addresses powers contained in the Government amendments tabled at Lords Report stage.

B. PURPOSE AND EFFECT OF THE BILL

2. The DPRRC is referred to the memorandum published on 20 January 2023 for the summary of the Bill. The amendments being tabled at Report stage do not add any further Parts or Schedules to the Bill.

C. DELEGATED POWERS

3. The amendments tabled at Report stage introduce a limited number of substantive clauses to the Bill creating new delegated powers. These are:
 - a power to amend sections “Primary Priority Content That Is Harmful to Children” and “Priority Content That Is Harmful to Children”; and
 - a power to require regulated services to retain data in relation to CSEA content so that relevant agencies can prosecute offenders.
4. The proposed amendment on primary priority and priority content that is harmful to children contains a Henry VIII power. Without powers such as these, the regulatory framework could quickly become ineffective. This delegated power will allow for the Secretary of State to add ‘primary priority’ and ‘priority’ content that is harmful to children as new or additional harmful content is identified in order to quickly update and future-proof the regime. These measures will allow clearly identified harms to children to be included in the regulatory framework and be updated in response to new developments.

D. ANALYSIS OF DELEGATED POWERS BY CLAUSE

POWERS TO AMEND SECTIONS (“PRIMARY PRIORITY CONTENT THAT IS HARMFUL TO CHILDREN”) AND (“PRIORITY CONTENT THAT IS HARMFUL TO CHILDREN”)

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Draft affirmative or (in urgent cases only) made affirmative resolution procedure

Context and purpose

1. The new clause to be inserted after clause 195 (“*Powers to amend sections (“Primary priority content that is harmful to children”) and (“Priority content that is harmful to children”)*”) confers a power on the Secretary of State to make regulations amending the kinds of “primary priority” and “priority” content that is harmful to children that are set out in the new clauses (“*Primary priority content that is harmful to children*” and “*Priority content that is harmful to children*” after clause 54). This is a Henry VIII power because it allows secondary legislation to be used to amend provisions in primary legislation.
2. All providers of regulated user-to-user and search services likely to be accessed by children are required by the Bill to assess the risk of children encountering content that is harmful to children, including primary priority and priority content, by means of their services. Under clause 11(3), user-to-user services must use proportionate systems and processes designed to prevent children of all ages from encountering primary priority content and to protect children in at-risk age groups from encountering other harmful content including priority content. Under clause 25(3), search services must use proportionate systems and processes designed to minimise the risk of children of all ages encountering primary priority content, and to minimise the risk of children in at-risk age groups encountering other harmful content, including priority content.
3. The Secretary of State may only add a kind of content to the lists of primary priority or priority content under this power if they consider that there is a material risk of significant harm to an appreciable number of children in the United Kingdom presented by content of that kind.
4. To add a kind of content as primary priority content that is harmful to children, the Secretary of State must also consider it appropriate for the duties in clauses 11(3)(a) and 25(3)(a) to apply in relation to content of that kind.
5. The Secretary of State must also consult OFCOM before making regulations under these powers.

Justification for the power

6. These powers are required to ensure that the categories of content set out in primary legislation can be updated quickly and the regime is future-proofed. The online environment changes regularly and rapidly, meaning it is essential that the Online Safety framework is able to adapt to new harms faced by children. The power to amend the categories of content set out in the new clauses via secondary legislation will allow the government to respond rapidly to the changing nature of online services and the risks to children online, ensuring that children are protected from new, currently unforeseen harms as quickly as they emerge.
7. This power is restricted so that it only allows the minister to amend the list of categories when content meets the high threshold of presenting a significant risk of material harm to an appreciable number of children in the UK, and meets the further requirements set out in paragraphs 4 and 5 above. This will ensure that the minister is only able to add kinds of content to the lists that pose the greatest risk of harm to children.
8. The obligations placed on OFCOM by clause 56 will ensure that the regulatory framework benefits fully from OFCOM's expertise and research capacity on an ongoing basis. Under clause 56 OFCOM will regularly review both the incidence on Part 3 services of harmful content and the severity of harm it causes, and will publish reports on their findings, including advice and recommendations on whether and how the sections designating primary priority or priority harmful content should be changed. Delegating these powers to the Secretary of State thus allows the regulatory framework to respond quickly to OFCOM's recommendations and to changes in the online environment.

Justification for the procedure

9. Regulations under this power will be made under the draft affirmative procedure, reflecting the importance of "primary priority" and "priority" content that is harmful to children to the new regulatory framework and the duties on regulated services. It is considered appropriate that Parliament should be able to debate and approve any regulations made under this power.
10. To ensure that the regulatory framework remains flexible and can keep pace with any emerging and significant risks to children online, the Secretary of State can, in urgent cases, use the made affirmative procedure, as set out in clause 201(3) to (7). This procedure can only be used if the Secretary of State includes with the regulations a declaration that urgency makes it necessary. It is important that the regime can adapt in urgent cases. The addition of new kinds of content to these sections will deliver essential protections to children and it is therefore vital that in urgent cases the duties apply to service providers as quickly as possible. In all other cases, the draft affirmative procedure will be used.

CSEA REPORTING DATA RETENTION REQUIREMENT

Clause 60: Regulations about reports to National Crime Agency

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Negative

Context and purpose

1. Regulated services will be required to have in place systems and processes that enable reports of detected and unreported CSEA content to be made to the National Crime Agency (NCA) and that these reports meet specified requirements set out in regulations.
2. The requirement to report is a standalone requirement as services will be required to report all CSEA content that they identify irrespective of the size of service, amount of CSEA content on the service, the content, or outcome of their risk assessment. The reporting requirement will apply differently to services depending on where they are based and their existing reporting processes.
3. Regulations will set out what information should be included in reports, the format of reports and how reports should be made to the NCA. The information that can or should be reported will vary depending on the nature of the service and the offence that has occurred. However, services will be required to report all and any available information relating to instances of CSEA, including any that help identify a perpetrator or victim.
4. In practice, services will need to include information relating to the identity of any individual who is suspected of committing a CSEA offence; information relating to the geographic location of the involved individual or website, which may include the Internet Protocol address or verified address; evidence of the CSEA offence itself, such as indecent images or sexual communications between an adult and a child; and any information relating to a child who is the victim of a CSEA offence.
5. The regulations will also set out the user data and content that companies should retain when making reports to the NCA. This will include the data in reports and the associated account data of all the users included in the report. The period of time for which this data should be retained will be specified by the regulations. The regulations may also specify restrictions or requirements in relation to the retention of data.

Justification for the power

1. This approach will ensure that the NCA receives high-quality reports containing all the relevant information it needs to safeguard children, pursue offenders, and prevent re-victimisation.

2. The Secretary of State will have the power to make regulations, setting out what information should be included in reports, the format of reports and how reports should be made to the NCA. The Secretary of State must do so in consultation with the NCA, OFCOM and any other appropriate person. The NCA will provide the operational and technical expertise and OFCOM will be consulted on the appropriateness and feasibility of regulations for the purpose of enforcement.
3. Setting out the reporting standards through secondary legislation will enable the regime to respond to technological change and innovation as well as trends and user behaviour related to CSEA. The information that a service can and should report will vary depending on the nature of their service(s) and is likely to change over time, therefore it is important that the legislation can be updated to ensure it is future proofed.
4. The regulations need to include a requirement to retain data to ensure that the NCA and relevant agencies can prosecute offenders and identify and safeguard children, because reports made to the NCA are intelligence only and cannot be used as evidence. The details for this requirement will be set out in secondary legislation to allow for flexibility for different types of services and ensure the requirement can effectively keep pace with international standards.

Justification for the procedure

1. The negative procedure is considered to provide an appropriate level of parliamentary scrutiny for regulations made under this power which will simply update what should be included in reports and how they are made. The regulations will not impose additional duties on service providers but will provide guidance and clarification on how to comply with the requirement to report.
2. The Secretary of State must make regulations through a robust consultation process. Consultation will be undertaken with those organisations who have the expertise and knowledge to advise on the most appropriate way in which industry should report as well as those organisations who will be impacted by these reports such as local police forces, devolved administrations, children's services and industry. This should ensure that the regulations will be well informed, effective and fit for purpose.
3. As mandatory reporting already exists for many of the largest technology companies, the content of the regulations is unlikely to be controversial.
4. Using the negative procedure will also allow the government to respond quickly to the emergence of significant new technological changes and designs or to significant changes in data protection laws and practices. Although this is likely to be infrequent and the changes minor, it is vital that the process to make these changes is not unduly delayed by the need for Parliament to pass primary legislation.