

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, the memorandum from 20 January 2023 when the Bill was introduced in the House of Lords and the supplementary memorandum that was submitted on 6 July for amendments at House of Lords Report. This memorandum addresses powers contained in the further 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 further amendments being tabled at Report stage do not add any further Parts or Schedules to the Bill.

C. DELEGATED POWERS

3. These further amendments tabled at Report stage introduce a limited number of substantive clauses to the Bill creating new delegated powers. These are:
 - a power for the Secretary of State to make regulations placing a requirement on Category 1 services to arrange for and engage in an impartial alternative dispute resolution procedure for the resolution of complaints, following Ofcom’s report about reporting and complaints procedures. Such regulations may also require Ofcom to produce and publish guidance in relation to the ADR duty; and
 - a delegated power for the Secretary of State to impose duties on app stores to minimise or mitigate the risk of harm to children presented by harmful content on app stores, or encountered by means of regulated apps available in app stores.
4. The proposed amendment on app stores contains Henry VIII powers. This delegated power is necessary to allow the Secretary of State to add details to the duties informed by Ofcom’s report. This report will not be published until between two to three years after the child safety duties come into force. It will establish the necessary evidence base for the regulations, including a consideration of how effective the duties imposed by the online safety framework are in protecting children, and the potential added value of additional duties on app stores. The Power to impose duty about alternative dispute resolution procedure, allows the Secretary of State to amend the Bill in connection with the imposition of the ADR duty on providers of Category 1 services using secondary legislation and is as such a Henry VIII power.

D. ANALYSIS OF DELEGATED POWERS BY CLAUSE

SECRETARY OF STATE'S POWER TO IMPOSE DUTY ABOUT ALTERNATIVE DISPUTE RESOLUTION PROCEDURE

New Clause: Power to impose duty about alternative dispute resolution procedure

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Draft affirmative

Context and purpose

1. The Online Safety Bill imposes a duty on regulated user-to-user and search services to operate easy content reporting procedures and operate easy-to-use, accessible and transparent complaints procedures. The complaints procedure must provide for appropriate action to be taken by the provider in relation to the complaint.
2. The Power to impose duty about alternative dispute resolution procedure is a power for the Secretary of State to make regulations to place a requirement on Category 1 companies to arrange for, and engage in, an out of court, impartial alternative dispute resolution procedure.
3. This requirement will offer a supplementary means of redress for users and others in relation to the largest services - Category 1 providers.
4. The Secretary of State will have the power to specify when such procedures must be offered in relation to complaints that relate to a Category 1 service, the power to specify if certain cross-cutting duties in the bill apply to the power to impose the duty about alternative dispute resolution procedure, and the power to make consequential amendments to ensure coherence across the bill.
5. If the power is exercised, the regulations must also require Ofcom to produce guidance for providers of Category 1 services in order to assist them in complying with the ADR duty. This guidance will allow Ofcom to set out in detail how providers of Category 1 services can meet the ADR duty. This guidance is not legislative and will not contain mandatory requirements, it is to help companies if the power to impose duty about alternative dispute resolution procedures is made by regulations. In preparing such guidance, Ofcom must consult the Secretary of State, the Information Commissioner and such other persons as Ofcom considers appropriate.
6. These regulations cannot be made by the Secretary of State until they have published their response to Ofcom's report about reporting and complaints procedures, which will take place within two years of the commencement of that provision. The Ofcom report will include advice as to whether the Secretary of State should make these regulations. Prior to making the regulations, the Secretary of

State must also consult with Ofcom, the Information Commissioner's Office, and such other persons as they consider appropriate.

7. This is a Henry VIII power in that it allows the Secretary of State to amend the bill in connection with the imposition of the ADR duty on providers of Category 1 services using secondary legislation.

Justification for the power

8. Including a power to allow the Secretary of State to make regulations requiring Category 1 to arrange for and engage in ADR procedures will ensure that, if Ofcom's user redress report finds that such systems would strengthen the handling of complaints under the regulatory framework, the requirement can be quickly added to the framework. This is necessary because complaints handling is an important part of the framework. Where users and others make complaints for example, in relation to illegal content, content that is harmful to children or in relation to a provider's non-compliance with their applicable online safety duties it is important that the provider's complaints procedures provide for appropriate action to be taken in relation to such content and failures. Should Ofcom's report (that must take into account the experiences of users and others) find that the existing provisions are insufficient, it will be important that the Secretary of State can, in the interests of users of such services and others, speedily deploy a solution against the largest Category 1 providers.
9. It is possible that the existing requirements on services in relation to complaints will be found by Ofcom's report to be effective in ensuring that providers take appropriate action in response to complaints. If so, introducing this additional requirement would be a disproportionate burden on service providers. Therefore, it is necessary that Ofcom's report is completed to give the regime time to bed in, and for the wider complaints provisions to take effect, before their effectiveness is reviewed.
10. Accordingly, it is necessary to provide the Secretary of State with the power to make regulations specifying when ADR procedures must be offered and engaged in to ensure that the findings of the review can be effectively and efficiently actioned for the benefit of users of such services.

Justification for the procedure

11. Regulations made under clause [x] Power to impose duty about alternative dispute resolution procedures are subject to the draft affirmative procedure.
12. This is a Henry VIII power and as such the draft affirmative procedure is considered appropriate. The addition of new requirements on Category 1 providers will affect the regulatory framework. It is important that Parliament has the opportunity to debate such changes to the regulatory framework.

APP STORES

New clause: Power to Regulate App Stores

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Draft affirmative

Context and purpose

1. App stores can play a significant role in children accessing in-scope services, and could be a gateway through which children can encounter harmful content on apps of regulated services.
2. This power will enable the Secretary of State to impose duties on app stores for the purpose of minimising or mitigating the risk of harm to children presented by harmful content on app stores, or encountered by means of regulated apps available on app stores (*Power to regulate app stores: supplementary (2)*).
3. The regulations may not be made until Ofcom have published their report about the use of app stores by children, and may only be made if, having considered the report, the Secretary of State considers there is a material risk of significant harm to children on or by means of the app store (*Power to regulate app stores (3)*).
4. The regulations may make provision to exempt certain types of app stores, or to specify threshold conditions that app stores must meet in order to be regulated by this Act (*Power to regulate app stores: supplementary (4)*). Ofcom's report will assist the Secretary of State in identifying which types of app stores pose the greatest risk of harm to children, and which are low-risk and could therefore be exempt from the duties.
5. The regulations may impose specific duties on providers of app stores corresponding or similar to a number of existing duties in the Bill, such as the child safety duties for user-to-user or search services, those relating to regulated provider pornographic content, and duties relating to fees (*Power to regulate app stores: supplementary (6)(a-c)*). The specific details of the duties that could be imposed on app store providers will be informed by Ofcom's report, which will consider if and which measures, including age assurance, could improve children's protections on app stores.
6. The regulations may also impose on Ofcom duties in relation to app stores corresponding or similar to the Bill's existing duties relating to Ofcom's register of risks and risk profiles. They may also confer on Ofcom functions in relation to app stores regarding information-gathering, enforcement and the production of guidance or a code of practice relating to regulating app stores (*Power to regulate app stores: supplementary (6)(d-f)*). Such duties on Ofcom will be dependent on if their report finds provisions on app stores to be necessary, and therefore if Ofcom will need the

relevant powers as regulator to supervise and oversee app store providers' compliance with duties.

7. The Secretary of State will not have the power to make regulations or amend regulations corresponding or similar to existing regulations in the Bill for reporting CSEA content, notices for terrorism or CSEA content or the communication offences (*Power to regulate app stores: supplementary (8)*).
8. The regulations may make provision having the effect that app stores provided from outside the United Kingdom are regulated by the Bill and may not have the effect that any body other than Ofcom is the regulator in relation to app stores.

Justification for the power

9. The Bill as it stands imposes duties on internet services that the Government has identified as posing the greatest risk of harm to users, especially children. As the online environment is constantly evolving, it is vital that the Government retains the flexibility to bring new types of internet service into the scope of the regulatory framework. App stores have been identified by the Government and Parliament as a crucial gateway in the online ecology and thus a type of internet service via which harm may occur to children. Given that app stores are different in a number of ways to the services already regulated by the Bill, it is important that the Government is able to use regulations to set out the best way to regulate such services in a proportionate and targeted manner. A delegated power is therefore required to enable the Secretary of State to set out in regulations the detail of these duties, following Ofcom's report on app stores.
10. Following a government amendment, the Bill places a duty on Ofcom to research and publish a report on app stores, no sooner than two and no later than three years after the child safety duties come into force. This report will consider how effective the duties imposed by the online safety framework are in protecting children, and whether children's online safety would be better protected by the greater use of age assurance or particular kinds of age assurance by app store providers, or by other measures.
11. Once this report is published there will be an adequate evidence base to inform the specific requirements that could be placed on app stores. The Secretary of State will only be able to make regulations using this power once this report has been published and provided the Secretary of State assesses there is a material risk of significant harm to an appreciable number of children presented by app stores.
12. This new and important evidence base will mean that the Secretary of State is able to use the regulations to set out detailed duties on app stores in a number of areas.

Justification for the procedure

13. Should the threshold be met for such duties, the provisions specified in regulations made by the Secretary of State will determine what duties will be imposed on which app stores and Ofcom, and what functions Ofcom will have. These regulations will therefore have a significant effect on businesses as well as Ofcom. The draft

affirmative procedure is considered appropriate, as this will provide a suitable degree of Parliamentary oversight for the new provisions and will provide the opportunity for Parliament to debate the requirements of the provisions.