

CHILDREN'S WELLBEING AND SCHOOLS BILL

Supplementary Memorandum from the Department for Education to the Delegated Powers and Regulatory Reform Committee (for Commons Consideration of Lords Amendment round 1)

A. INTRODUCTION

1. The Government has tabled further amendments to the Children's Wellbeing and Schools Bill ("the Bill") for Commons Consideration of Lords Amendments that, if agreed with in Ping Pong, would introduce new delegated powers. This supplementary memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Children's Wellbeing and Schools Bill. It explains for each amendment that confers new delegated powers on the Government, the nature of the powers and the reasons for selecting the affirmative parliamentary procedure to ensure parliamentary scrutiny about these important powers.
2. Abbreviations
 - a. OSA 2023: Online Safety Act 2023

B. DELEGATED POWERS

Clause 65: Powers to prevent or restrict access by children to specified internet services

Power conferred on: the Secretary of State

Power exercisable by: Regulations

Parliamentary Procedure: Affirmative

Context and Purpose

3. Clause 65 consists of a power conferred on the Secretary of State to regulate internet services by subordinate legislation. The Online Safety Act 2023 (the "OSA 2023") brought in some of the most robust protections for children globally. The powers in clause 65 are intended to complement the regulation already made by the OSA 2023 and to deliver the results of the consultation on Children's Digital Wellbeing, if this is appropriate and supported by the evidence. The clause is tabled as an amendment in lieu of Lords amendments 37 and 38, which contain regulation making powers to prevent children's access to VPNs and "user-to-user" services respectively.

4. Responses to the consultation are not expected to be available before the Children's Wellbeing and Schools Bill is expected to complete all Parliamentary stages and recommendations emerging from the consultation cannot be known in advance.
5. Clause 65 enables the Secretary of State to make regulations to restrict or prevent children of certain ages from accessing specified internet services and/or specific features and functionalities of specified internet services. Internet services are defined as services made available by means of the internet or by a combination of the internet and an electronic communications network in section 228 of the OSA 2023. The delegated power will enable restrictions on both "regulated user-to-user services" and "search services" as well as other internet services such as "VPNs" and "AI chatbots" which are not regulated by the OSA 2023 or only regulated incompletely.
6. Clause 65 permits provision to be made about the steps that must or may be taken by the providers of specified internet services. This may for example include requirements about the amount of time per day, or the times of day at which, children may access a service or a specified feature or functionality of a service.
7. It permits provision to be made about the enforcement of requirements imposed by the regulations, including by making any new requirement an "enforceable requirement" under section 130 of the Online Safety Act 2023.
8. To ensure the effective integration of new requirements within the existing regulatory structure of the OSA 2023, the power permits the application of any provision of that Act with or without modifications to requirements made by the new regulations. The power will permit guidance and codes of practice to be created by Ofcom to support the new regulations.
9. A "one size fits all" approach will be ineffective as the variety of internet services and their features and functionalities means that different regulatory solutions will be required. An effective and proportionate approach may require tailoring requirements to the degree of risk posed by specified internet services or their features and functionalities. Based on the measures adopted, it will be necessary to set criteria which determines which services that these measures should apply to, for example by considering which have features or functions that pose the highest risk of harm to children as well as considering the size, reach and influence on child users. To provide the necessary flexibility, clause 65 permits different provision to be made for different purposes.
10. Clause 65 permits consequential, supplementary, incidental and transitional, transitory or saving provision, and permits the amendment, repeal or revocation of primary legislation for this purpose only. This provision is necessary to ensure the effective integration of any new requirements in the regulatory framework of the Online Safety Act 2023.

Justification for the power

11. The power to make regulations in clause 65 will enable the government to press ahead with regulations swiftly, following the consultation, if the evidence supports this course of action, rather than the government preparing additional primary legislation. Until the consultation process concludes, the evidence about the effectiveness of proposed measures is not expected to be available. This precludes the inclusion of detailed provision about those measures on the face of this Bill.
12. Given the rapid pace of technological change, and the emergence of both harmful new types of internet services and specific features and functionalities of those internet services which are developed iteratively, this is an area where there is an inherent need for regulatory flexibility to ensure that regulations are not routinely made obsolete. The scope of the power is no wider than necessary to permit effective regulation.
13. Use of the power would be based on the available evidence, against an assessment of the risks posed to children by specified internet services, taking into account the findings of the consultation. In particular, evidence about children's use of VPNs is still emerging, so the Government is commissioning research to further the evidence base in addition to consulting on the issue. The additional evidence would be available before the power is used.
14. There is precedent in the OSA 2023 for the delivery of a significant policy change through secondary legislation. Section 154A of the OSA 2023 confers a power on the Secretary of State to make regulations which require providers of regulated internet services to provide information for purposes related to the carrying out of independent research into online safety matters. This power permits inclusion of the substantial detail of the framework and the necessary procedural provision through secondary legislation. The power in section 154A includes many of the same features as the power in clause 65. For example, it allows regulations to apply other provisions of the OSA 2023 with or without modifications (s 154A(4)(c)) and to make different provisions for different descriptions of services, researchers, research or information (s 154A(5)).
15. Sections 215 and 216 of the OSA 2023 also contain wide-ranging powers to make provision for or in connection with the regulation of "app stores", another internet service. The power in section 215 was also inserted to permit effective regulation once the evidence base about the risk posed by app stores had been developed through a report by Ofcom. It contains a power to amend provisions of the OSA 2023 for the purpose of the regulation of app stores. The powers in section 215 and 216 also contain powers to make different provision with regards to app stores of different kinds, analogous to the provision to make different provision for different purposes in clause 65.

Justification for the procedure

16. The affirmative resolution procedure is appropriate for the use of the regulation making power introduced by clause 65 because it may be used to enact substantial policy change for which affirmative parliamentary scrutiny is necessary.

Clause 66: New Article 8(2A) of the UK GDPR: Power to change the minimum age of consent in relation to processing of personal data by information society services

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary Procedure: Affirmative

Context and Purpose

17. The UK's Data Protection legislation (the UK GDPR and the Data Protection Act 2018) sets out a series of principles on how personal data should be processed by data controllers, including online platforms. Under the UK GDPR, all organisations must identify a legal ground for processing personal data. Different grounds will be available to different organisations depending on the nature and purposes of their processing activity. Where online platforms are processing personal data for optional purposes outside of the core services they offer to customers, such as profiling for micro-targeted advertising, seeking an individual's consent is likely to be the most appropriate legal ground for the processing.
18. This new power relates to Article 8 of the UK GDPR, which is relevant to online services that are relying on consent as their legal ground for processing personal data. Article 8 is concerned with the age at which children can legally grant their own consent to the use of their personal data by 'Information Society Services'. These are defined as services that are normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient. In practice, this includes most online services, such as search engines, social media platforms, online messaging, content streaming services, online games, news or educational websites, but not counselling or preventative services.
19. Specifically, Article 8(1) provides that processing by providers "information society services") may only be carried out on the basis of the child's consent where the child is at least 13 years old. Parental consent is needed for such processing if the child is under 13.
20. Clause 66 inserts a new paragraph (2A) into Article 8 of the UK GDPR which will enable the Secretary of State to make regulations (i) changing the age of consent specified in Article 8(1) of UK GDPR from any age between 13 and 16 inclusive, and/or (ii) specifying that different ages apply for different services.
21. As these regulations would amend the data protection legislation, the Information Commissioner would regulate and enforce any changes.
22. Regulations under these new powers will be subject to Article 91A UK GDPR, including power to make consequential, supplementary, incidental, transitional, transitory and saving provisions in paragraph (4). The Secretary of State will need to consult with the Information Commissioner's Office (ICO) and any other relevant persons before

exercising the power and the Department for Science, Innovation and Technology are already engaging with the ICO on this basis as in line with Article 36 UK GDPR.

Justification for the powers

23. The government considers that wider public consultation would be appropriate before changing the age in Article 8(1) of the UK GDPR so it would not be appropriate to change the age through primary legislation at this point in time. The new regulation-making power in new Article 8(2A) of the UK GDPR will enable the government to act quickly on key consultation findings. Use of the powers would take into account the evidence collected through the consultation about the risks that the current age of consent poses to children and whether different ages should apply to different types of information society services. In addition, the new regulation-making power reflects the fact that the appropriate digital age of consent, and whether different ages should apply to different types of information society services, may need to be revisited over time as children's online behaviours, services, and associated risks evolve.

Justification for the procedure

24. Changing the age in Article 8(1) could have a significant impact on children's use of the internet and represent a substantial policy change which is worthy of further parliamentary scrutiny. The Department therefore considers that the affirmative resolution procedure will ensure an appropriate level of scrutiny.

Clause 66: New Article 8ZA UK GDPR – Power to require age verification; child's consent in relation to information society services

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary Procedure: Affirmative

Context and Purpose

25. Article 8(2) of the UK GDPR already requires Information Society Services to make "reasonable efforts" (taking into consideration available technology) to verify that consent is given or authorised by a person with parental responsibility of a child who is under 13. At present, data protection legislation does not impose a specific requirement on controllers to verify the age of service users who are 13 and above, but ICO guidance notes this is the implication of Article 8. In practice, the ICO will consider whether a Service has made reasonable efforts to verify that the data subject is old enough to provide their own consent, taking into account the risks inherent in the processing and the available technology.

26. Clause 66 inserts new Article 8ZA into the UK GDPR which provides a power for the Secretary of State to make regulations imposing new requirements or making provision

about the steps that Information Society Services must or may take to verify the age of a person who gave their consent to the processing of their personal data. The age of consent is currently set at 13 in Article 8(1) of the UK GDPR but could be amended using the regulations described above under new Article 8(2A).

27. This power could be used to make provisions that complement provisions in Article 8(2) UK GDPR. Those provisions already require controllers to make “reasonable efforts” (taking into consideration available technology) to verify that consent is given or authorised by the holder of parental responsibility where Article 8(1) applies.
28. As any regulations made using this power would amend the data protection legislation, the Information Commissioner would regulate and enforce the changes.
29. Regulations under this new power will be subject to Article 91A UK GDPR, including power to make consequential, supplementary, incidental, transitional, transitory and saving provisions in Article 91A(4). The Secretary of State will need to consult with the Information Commissioner and any other relevant persons before exercising the power.

Justification for the powers

30. The government considers that wider public consultation would be appropriate before introducing requirements relating to steps relevant controllers must take to verify the age of a person consenting to the processing, so it would not be appropriate to introduce such requirements through primary legislation at this point in time. A power to do so through secondary legislation will enable the government to respond promptly following consultation if it decides that it would be appropriate to introduce such requirements. In addition, understanding of the steps that online services should take to effectively verify a user’s age may change over time as technology develops, and secondary legislation would allow the government to respond quickly when required.

Justification for the procedure

31. Introducing a requirement to take steps to verify the age of individuals accessing relevant online services could have a significant impact for the use of such services and on the providers of such services - e.g. additional costs - and represent a substantial policy change which is worthy of further parliamentary scrutiny. The Department therefore considers that the affirmative resolution procedure will ensure an appropriate level of scrutiny.