



HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

28th Report of Session 2022–23

Online Safety Bill

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The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session and has the following terms of reference:

- (i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;
- (ii) To report on documents and draft orders laid before Parliament under or by virtue of:
 - (a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,
 - (b) section 7(2) or section 19 of the Localism Act 2011, or
 - (c) section 5E(2) of the Fire and Rescue Services Act 2004;

and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and

- (iii) To report on documents and draft orders laid before Parliament under or by virtue of:
 - (a) section 85 of the Northern Ireland Act 1998,
 - (b) section 17 of the Local Government Act 1999,
 - (c) section 9 of the Local Government Act 2000,
 - (d) section 98 of the Local Government Act 2003, or
 - (e) section 102 of the Local Transport Act 2008.

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Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103. The Committee's email address is hldellegatedpowers@parliament.uk.

Historical Note

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that "in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, "be well suited to the revising function of the House". As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and certain instruments made under other Acts specified in the Committee's terms of reference.

Twenty Eighth Report

ONLINE SAFETY BILL

1. This Bill was passed by the House of Commons on 17 January 2023. It was introduced in the House of Lords on 18 January and had its Second Reading on 1 February.
2. The Bill establishes a new regulatory regime to address illegal and harmful content online. It imposes legal requirements on:
 - providers of internet services which allow users to encounter content generated, uploaded or shared by other users (“user-to-user services”);
 - providers of search engines which enable users to search multiple websites and databases (“search services”); and
 - providers of internet services on which provider pornographic content (content that is published by a provider and is not user-generated) is published or displayed.

It confers powers on the Office of Communications (OFCOM) to oversee and enforce the new regulatory regime.

3. The Bill contains 12 Parts and 17 Schedules.
4. The Department for Digital, Culture, Media and Sport has provided a Delegated Powers Memorandum (“the Memorandum”)¹ for the Bill.
5. We draw the following powers to the attention of the House.

Clause 39: power of the Secretary of State to direct OFCOM to modify a draft code of practice

6. Clause 36 of the Bill requires OFCOM to prepare and issue codes of practice for providers of regulated user-to-user services and regulated search services. The purpose of the codes of practice is to describe “measures recommended for the purpose of compliance with” duties under the Bill. Those duties include:
 - the duties set out in clauses 9 and 23 (duties about illegal content) so far as relating to (a) terrorism content or offences² and (b) child sexual exploitation and abuse content or offences;³ and
 - duties relating to illegal content generally, protecting children’s online safety, empowering adult users to increase their control over content, protecting content of democratic importance and protecting journalistic content.⁴

1 Memorandum by the Department for Digital, Culture, Media and Sport, dated 18 January 2023.

2 See clause 36(1).

3 See clause 36(2).

4 See clause 36(3) and (10); and clauses 9 and 23 (illegal content), 11 and 25 (children’s online safety), 12 (user empowerment), 13 (content of democratic importance) and 15 (journalistic content).

7. The codes of practice have the following effects:
- a provider is not obliged to follow a code of practice but they will be treated as complying with a duty under the Bill if they take or use the measures described in a code of practice which are recommended for the purpose of compliance with that duty;⁵
 - a provision of a code of practice must be taken into account by a court or tribunal if it appears to the court or tribunal to be relevant to a question arising in proceedings;⁶ and
 - a provision of a code of practice must be taken into account by OFCOM if it appears to OFCOM to be relevant to a question arising in connection with their exercise of functions under the Bill.⁷
8. The Bill imposes a number of requirements relating to the production of the codes of practice:
- OFCOM must consult a range of persons, including the Secretary of State⁸, in the course of preparing a draft of a code of practice;
 - provision about the principles that OFCOM must consider when preparing a code of practice and the measures that may be described in a code of practice are set out in Schedule 4 to the Bill; and
 - when OFCOM has prepared a draft of a code of practice, it must be submitted to the Secretary of State⁹ and OFCOM may be required to modify the draft in accordance with a direction from the Secretary of State.
9. Clause 39 gives the Secretary of State power to direct OFCOM to modify a draft code of practice if the Secretary of State believes that modifications are required:
- “for reasons of public policy”; or
 - “for reasons of national security or public safety”.¹⁰
- OFCOM is required to modify a draft code of practice in accordance with any such direction.¹¹
10. The codes of practice are subject to parliamentary scrutiny. They are subject to the negative procedure¹² save where a draft is modified after the giving of a direction “for reasons of public policy”: a draft modified after the giving of such a direction is subject to the affirmative procedure.¹³

5 See clause 44.

6 See clause 45(3).

7 See clause 45(4).

8 See clause 36(6)–(8).

9 See clause 38.

10 The power to direct OFCOM to modify a code of practice for reasons of national security or public safety is only exercisable with respect to a code of practice describing measures recommended for the purpose of compliance with duties set out in clause 9 or 23 (duties about illegal content) so far as relating to (a) terrorism content or offences, or (b) child sexual exploitation and abuse content or offences (see clause 39(1)(b), (2), (3) and (12)).

11 See clause 39(6).

12 See clause 38(3), (4) and 40(3).

13 See clause 40(2).

11. The power of the Secretary of State to direct OFCOM to modify draft codes of practice is significant because the codes will play an important part in the regulatory regime. At the Bill's Second Reading in the House of Lords, a number of speakers expressed concern that this power of direction puts OFCOM's independence as a regulator at risk.
12. The Memorandum provides the following justification for the power—

“It is important that there are suitable, transparent checks and balances to ensure that the implementation of the regime by the independent regulator, OFCOM, delivers the policy intent of the democratically elected government Delegating this power is essential because it allows the Secretary of State to ensure that the codes may be modified to respond to public policy, national security, or public safety concerns.”¹⁴
13. However, the Memorandum doesn't provide a convincing explanation: it proceeds by way of assertion rather than explanation. It states that the power is “essential” but it fails to explain why. It gives no examples of the sort of public policy, national security or public safety concerns that might prompt a direction or of the sort of modifications that might be directed to address such concerns.
14. We find the power to direct modifications to a code of practice “for reasons of public policy” particularly troubling as “public policy” (which is not defined) is a vague term of broad scope.
15. The Government have recognised the concerns raised about the power and have made a commitment to make changes to it. On 7 July 2022, the Secretary of State for Digital, Culture, Media and Sport made a written Ministerial statement which included the following-

“Secretary of State's power of direction on codes of practice:

We recognise the concerns raised that the Bill allows too great a degree of executive control. These have focused in particular on the power for the Secretary of State to require Ofcom to modify a draft of a code of practice for reasons of public policy. We remain committed to ensuring that Ofcom maintains its regulatory independence, which is vital to the success of the framework. With this in mind, we have built a number of safeguards into the use of the Secretary of State's powers, to ensure they are consistent with our intention of having an independent regulator, and are only used in limited circumstances with appropriate scrutiny.

We will make two substantive changes to this power: firstly, we will make it clear that this power would only be used ‘in exceptional circumstances’; and secondly, we will replace the ‘public policy’ wording with a more clearly defined list of reasons for which the Secretary of State could issue a direction. This list will comprise national security, public safety, public health, the UK's international relations and obligations, economic policy and burden to business”¹⁵.
16. **We welcome the Government's commitment to make substantive changes to the Secretary of State's power in clause 39 to direct OFCOM to modify a draft of a code of practice. However, pending**

14 At para 63.

15 Written Statement, [HCWS193](#), Session 2022–23.

the tabling of Government amendments to that effect, we consider that clause 39, as currently drafted, should be removed from the Bill.

Clause 76: power of OFCOM to define “qualifying worldwide revenue” for the purposes of determining (a) annual fees payable by providers to OFCOM, and (b) financial penalties payable by providers

17. Clause 76 gives OFCOM power to define what is meant by the “qualifying worldwide revenue” of a provider of a regulated service. The definition is relevant for the purposes of determining—
 - annual fees charged to providers to meet the cost to OFCOM of exercising its online safety functions: a provider’s “qualifying worldwide revenue” will be a factor in determining whether the provider is required to pay a fee and, if it is so required, the amount payable; and
 - much more significantly, the level of financial penalties which OFCOM may impose on providers for failure to act in accordance with requirements under the Bill: the maximum penalty that can be imposed is the greater of (a) £18 million, and (b) 10% of a provider’s “qualifying worldwide revenue”¹⁶.
18. Before exercising the power to define “qualifying worldwide revenue”, OFCOM must consult the Secretary of State, the Treasury and such other persons as OFCOM considers appropriate¹⁷ but there is no requirement for parliamentary scrutiny: the power is exercised by published statement.
19. We consider there to be a reasonable argument for the term being defined through the exercise of a delegated power as it seems likely that the definition will involve technical detail and may need adjustment as OFCOM develops experience in operating the new regulatory regime. However, we are surprised and disappointed that the Memorandum does not explain why it is proposed that the exercise of the power should be subject to no parliamentary scrutiny whatsoever—despite the Memorandum acknowledging that “qualifying worldwide revenue” is “a key factor” in determining the penalties that may be imposed on providers and that such penalties will be “central to OFCOM’s enforcement regime”¹⁸.
20. We note with interest that the absence of parliamentary scrutiny is in stark contrast to the provision made with respect to a strikingly similar power in an Act passed only last year: the Product Security and Telecommunications Infrastructure Act 2022.
21. Section 38 of that Act gives the Secretary of State power to define exactly the same term (“qualifying worldwide revenue”) and, as in this Bill, the term goes to the level of financial penalties that can be imposed for failure to comply with statutory duties. It provides that the maximum penalty that can be imposed on a person is the greater of (a) £10 million, and (b) 4% of the person’s “qualifying worldwide revenue”.

¹⁶ See para 4 of Schedule 13.

¹⁷ See clause 76(4).

¹⁸ At para 175.

22. However, section 38 requires the meaning of “qualifying worldwide revenue” to be determined not merely by “statement” but instead by regulations subject to the affirmative procedure.¹⁹
23. In the Delegated Powers Memorandum for the Bill that became that Act, the Department for Digital, Culture, Media and Sport—the same department that is responsible for the Online Safety Bill—said the following about the power in question-
- “The affirmative procedure is considered to provide appropriate parliamentary scrutiny for any regulations made under [the power] as it is important that parliamentarians have the opportunity to debate changes to how worldwide revenue and the maximum potential penalties are calculated given the financial burden that may be placed on businesses”.²⁰
24. As the very similar power in clause 76 of the Bill to define “qualifying worldwide revenue” also goes to the highly significant matter of the level of financial penalties that can be imposed for failure to act in accordance with statutory duties, we consider that it too merits affirmative procedure scrutiny.
25. **Accordingly, we consider that-**
- **the definition of “qualifying worldwide revenue” is far too important a matter to be left to be determined merely by “statement” since it goes to the level of financial penalties that OFCOM can impose on providers for failure to act in accordance with requirements under the Bill; and**
 - **the power in clause 76 to define that term should therefore be amended so that, like the very similar power in section 38 of the Product Security and Telecommunications Infrastructure Act 2022, it must be exercised by regulations subject to the affirmative procedure.**

Clause 77(2): power of the Secretary of State to set the “threshold figure” of “qualifying worldwide revenue” that determines which providers of regulated services can be required to pay an annual fee to fund the regulatory regime

26. Under clause 75, OFCOM may require a provider of a regulated service to pay an annual fee if the provider’s “qualifying worldwide revenue” is equal to or greater than the “threshold figure” set by the Secretary of State under clause 77(2).
27. Before the threshold figure is set, OFCOM must carry out a consultation exercise to inform the setting of the figure²¹ and the Secretary of State must take advice from OFCOM.²²
28. The justification given in the Memorandum for taking the power is that it will allow the Secretary of State “to act promptly in keeping the threshold

19 See section 38(7) and (8).

20 At para 95.

21 See clause 77(1).

22 See clause 77(2).

figure under review to ensure that the online safety framework is able to meet the costs of its operations”²³. We consider this to be reasonable but we are concerned that no explanation is given for the power being exercisable simply by published statement and without any parliamentary scrutiny—despite the Memorandum acknowledging²⁴ that the threshold figure is “a key aspect of the fee regime” that “will have a significant distributive impact” on which firms meet the costs of the regulatory regime.

29. We are concerned that this appears to be another example of what we refer to in the *Democracy Denied?* report²⁵ as a power to make “disguised legislation”. It is in substance a legislative power to supplement primary legislation yet it is exercised not by legislation but by mere “statement” and without any parliamentary scrutiny. The *Democracy Denied?* report noted with concern the “increase in the number of occasions on which ministers have been given power to supplement primary legislation” by such means, including through powers to, for example, make “determinations” and issue “directions” and “notices”.²⁶
30. **The Secretary of State’s power under clause 77(2) to set the “threshold figure” of “qualifying worldwide revenue” determines which providers of regulated services can be required to pay an annual fee to fund the regulatory regime. We consider that—**
- **the power is legislative and should therefore be exercised by legislation rather than by “statement”; and**
 - **the exercise of the power is sufficiently significant to merit parliamentary scrutiny, with the negative procedure providing an appropriate level of scrutiny.**

Clause 157: power of Secretary of State to give guidance to OFCOM about the exercise of functions

31. Clause 157(1) confers a power on the Secretary of State to issue guidance to OFCOM about the exercise by OFCOM of its functions under the Bill. It also enables the Secretary of State to issue guidance about the exercise by OFCOM of connected functions under the Communications Act 2003. By virtue of clause 157(8), OFCOM is under a duty to have regard to the guidance in exercising any functions to which it relates, or in deciding whether to exercise them.
32. There are certain requirements and limitations which apply to the Secretary of State’s power to issue guidance under clause 157:
- OFCOM must be consulted before the Secretary of State issues, revises or replaces the guidance.²⁷
 - The guidance may not be revised or replaced more frequently than once every three years.²⁸

23 At para 180.

24 At para 182.

25 See paras 89–106.

26 At para 90.

27 See clause 157(3).

28 See clause 157(4). This is subject to limited exceptions, including where it is with the agreement of OFCOM.

- The guidance must be issued as one document.²⁹
33. Clause 157(6) requires the guidance to be laid before Parliament, but there is no provision for parliamentary scrutiny of the guidance. In the report, *Democracy Denied?*, we expressed the view that statutory guidance which a public authority is required to have regard to in exercising its functions should be subject to parliamentary scrutiny.³⁰ This is particularly so where the guidance is likely to be influential in the way in which the functions are exercised.

34. In explaining the power, the Department says—

“Guidance is necessary to allow the Secretary of State to provide clarity to the regulator and others by setting out how they expect OFCOM to carry out their statutory functions in order to apply the legislation.”³¹

The reference to providing “clarity” to the regulator by setting out how the Secretary of State “expect[s]” OFCOM to carry out its functions suggests that the Secretary of State sees the purpose of the guidance as being a means to influence the way in which OFCOM exercises its statutory functions.

35. There are two further points which appear to us to be relevant:
- The obligation to lay the guidance before Parliament appears to acknowledge the parliamentary interest in the guidance, although without providing any role for Parliament in scrutinising the guidance.
 - The very unusual three-year limit on when guidance may be issued appears to acknowledge that the guidance is liable to derogate from OFCOM’s independent exercise of its functions (so that the power should only be capable of being exercised rarely). As noted above,³² one of the primary concerns expressed about the Bill has been the too great degree of executive control over OFCOM. In our view, this concern lends weight to the argument that Parliament should have a role in scrutinising the guidance to enable it to scrutinise the extent to which, and the ways in which, the guidance is used to exert influence over the exercise of functions by OFCOM.
36. **In the circumstances, we consider that guidance under clause 157 should be subject to parliamentary scrutiny, with the affirmative procedure offering an appropriate level of scrutiny.**

Schedule 11, paragraph 1: power to specify the threshold conditions for Category 1, 2 and 2A regulated services

37. The Bill operates by imposing duties on the services regulated by the Bill, and in doing so different provision is made for different categories of services. There are a number of duties which apply to all user-to-user and search services. These are broadly the same across both types of service. In the case of user-to-user services, there are two specific categories where additional duties apply. These are called Category 1 and Category 2B services. The most important of these is Category 1, in terms of the number and significance of

29 See clause 157(5).

30 See paras 95 and 96.

31 See para 325 of the Memorandum.

32 See para 15.

the additional duties. In the case of search services, the only specific category is Category 2A.

38. Whether a service falls to be treated as a Category 1, 2A or 2B service depends on whether or not it has been included in the register compiled by OFCOM under clause 86, with the register split into three parts, one for each category. In deciding which services should be included in the register, OFCOM is required to make an assessment against the threshold conditions for each of the three categories.
39. The threshold conditions for these purposes are not set out on the face of the Bill but instead are to be set out in regulations made by the Secretary of State under powers conferred by paragraph 1 of Schedule 11. That paragraph requires the threshold conditions to include conditions relating to the number of users and (in the case of user-to-user services) the functionalities of the service. But the threshold conditions may also relate to any other characteristics of the service. Regulations under paragraph 1 of Schedule 11 are subject to the negative resolution procedure.
40. The determination of the threshold conditions for each of the categories is fundamental to the operation of the Bill because it determines which types of user-to-user services and search services will be subject to the additional duties imposed on the categories. The Department itself describes the power as being “central to establishing the regulatory regime”.³³ Also, there is nothing on the face of the primary legislation to limit the matters to which the threshold conditions may relate, other than provisions which require them to include conditions relating to the number of users and (in the case of user-to user services) the functionalities of the service. Given the width of the powers conferred on the Secretary of State and their significance, we consider the affirmative resolution procedure offers a more appropriate level of scrutiny.
41. The Department in explaining the choice of the negative procedure relies on what it describes as the safeguards imposed on the powers: the fact that the Secretary of State may not make regulations until OFCOM has provided advice based on the research it has carried out; and that the Secretary of State is under a duty to explain where the Secretary of State departs in a material way from OFCOM’s advice.³⁴ However, we are not convinced that these reasons are sufficient to justify the negative procedure. The fact that the proposals originate from OFCOM does not in any way affect their importance and therefore the need for a high level of parliamentary scrutiny.
42. **Accordingly, we consider that the powers conferred by paragraph 1 of Schedule 11 should be subject to the affirmative resolution procedure.**

³³ See para 512 of the Memorandum.

³⁴ See paras 518–520 of the Memorandum.

APPENDIX 1: MEMBERS' INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at <https://www.parliament.uk/hlregister>. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 1 March 2023 Members declared no interests.

Attendance

The meeting was attended by Baroness Bakewell of Hardington Mandeville, Lord Cunningham of Felling, Lord Goodlad, Lord Hendy, Baroness Humphreys, Lord Janvrin, The Earl of Lindsay, Lord McLoughlin and Lord Rooker.