



HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

38th Report of Session 2022–23

Online Safety Bill: Government Response

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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.

Membership

Baroness Bakewell of Hardington

Lord Carlile of Berriew

Lord Cunningham of Felling

Lord Goodlad

Lord Hendy

Baroness Humphreys

Lord Janvrin

The Earl of Lindsay

Lord McLoughlin (Chair)

Lord Rooker

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Publications

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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 hlddelegatedpowers@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.

Thirty Eighth Report

ONLINE SAFETY BILL: GOVERNMENT RESPONSE

1. We considered this Bill in our 28th Report of this Session.¹ The Government have responded by way of a letter from Lord Parkinson of Whitley Bay, Minister for Arts and Heritage at the Department for Culture, Media and Sport. The response is printed at Appendix 1.

1 Delegated Powers and Regulatory Reform Committee, *28th Report*, (Session 2022–23, HL Paper 160)

APPENDIX 1: ONLINE SAFETY BILL: GOVERNMENT RESPONSE

Letter from Lord Parkinson of Whitley Bay, Minister for Arts and Heritage at the Department of Culture, Media and Sport, to the Rt Hon. the Lord McLoughlin CH, Chair of the Delegated Powers and Regulatory Reform Committee

I am pleased to follow up on your Committee's report on the Online Safety Bill published on 7 March 2023. As always, I am grateful for the Committee's expert scrutiny, and constructive recommendations. I have outlined below how we have sought to respond to the recommendations outlined in your report.

Recommendation 1: "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 the tabling of Government amendments to that effect, we consider that clause 39, as currently drafted, should be removed from the Bill."

Ofcom's independence will be vital to the success of the regime, but it is also important that the Secretary of State is able to retain oversight of those issues genuinely beyond Ofcom's remit, such as national security or public safety, which this power provides. It is important that we get this balance right to ensure effective implementation of the framework.

We are keen to ensure that we address the concerns of the Committee in this area, and will be bringing forward amendments which will clarify its scope and the exceptional nature of its intended use.

We will:

- clarify in the Bill that the power can only be used in 'exceptional circumstances'; and
- replace the 'public policy' reason for the use of the power with a more defined list of reasons, comprising: national security, public safety, public health, and the UK's international relations and obligations.

In a Written Ministerial Statement on 7 July 2022 we proposed replacing the 'public policy' reason with a broader list than set out above. After listening to concerns raised by peers we have refined this further, removing 'economic policy' and 'burden to business' from the list of reasons.

This change aligns the power with existing powers in section 5 of the Communications Act 2003 for the Secretary of State to direct Ofcom, and ensures that the use of the power is restricted to topics which are clearly outside of Ofcom's remit, where it is appropriate for the Secretary of State to retain a proportionate level of oversight.

We will also go further to increase the transparency of the power by requiring the Secretary of State to publish the exchange of letters with Ofcom in the event that the power of direction is used except where doing so would be against the interests of national security or against the interests of relations with the government of a country or territory outside the United Kingdom. This is also in line with precedent in section 5 of the Communications Act.

We hope that these amendments will satisfy the Committee that the power has appropriate safeguards to ensure its effective use, without compromising the independence of the regulator.

Recommendation 2: “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.”**

and

Recommendation 3: “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.”**

We recognise the concerns of the Committee in relation to both of the recommendations and the importance of ensuring that the necessary parliamentary scrutiny is in place. We intend to amend the Bill to ensure that qualifying worldwide revenue and the threshold decisions will be made via affirmative and negative regulations respectively. In doing this, we aim to increase the level of parliamentary scrutiny available in both definitions.

Recommendation 4: “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.”

We recognise the Committee’s concerns about ‘to have regard to’ guidance, such as that under clause 157. Our view is that guidance of this kind is non-legislative in nature. Whilst Ofcom is required to have regard to the guidance, the guidance document itself does not create any statutory requirements. On this basis, we do not agree that that it would be appropriate to be subject to parliamentary approval as a piece of secondary legislation.

We do not agree that the three-year limit on when guidance may be issued indicates that this has an impact on Ofcom’s independence. It provides an open and transparent way for the Government formally to provide guidance to Ofcom if required in the future, whilst providing certainty and stability that there is both consultation with Ofcom and a limit to how often it can be issued.

As such, I am afraid that the Government is not able to accept this recommendation.

Recommendation 5: “Accordingly, we consider that the powers conferred by paragraph 1 of Schedule 11 should be subject to the affirmative resolution procedure.”

We recognise the Committee’s concerns that the regulations specifying the threshold conditions for categorisation be subject to adequate parliamentary scrutiny. This recommendation would require the first regulations specifying the Category 1 threshold conditions (paragraph 1 of Schedule 11) and any future amendments to the regulations specifying threshold conditions to be subject to the affirmative rather than negative resolution procedure. We are keen to ensure that we address the Committee’s concerns here, and will be bringing forward amendments to change the procedure for making the first regulations specifying threshold conditions to the affirmative resolution procedure.

To ensure that the regime remains agile enough to respond to the rapid pace of change in the technology sector, it is necessary that future amendments to the threshold conditions use the negative resolution procedure. This will allow any required changes to the thresholds to be made swiftly if new functionalities, or other characteristics and factors, of a service emerge in future which pose new risks and need to be assessed for category designation. This will ensure the regime can adapt quickly to new threats and is not dependent on securing parliamentary time.

The Government will table these amendments in tranches for Report stage in the House of Lords and I hope that our response has been able to alleviate the Committee’s concerns.

Many thanks to you and the Committee for your considerations of this vital piece of legislation. I look forward to continuing to work on it with you.

29 June 2023

APPENDIX 2: 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.