

Criminal Justice Committee

**19th Meeting, 2022 (Session 6), Wednesday
8 June 2022**

Legislative consent memorandum

Note by the clerk

Purpose of the paper

1. This paper invites the Committee to consider a Legislative Consent Memorandum (LCM) in relation to the following UK Government Bill:
 - [Online Safety Bill](#)
2. The Online Safety Bill was introduced in the House of Commons on 17 March 2022. It is currently at the committee stage in the House of Commons.

Legislative consent process

3. The process for considering consent to the relevant provisions in a UK Bill essentially commences with the publication, normally by the Scottish Government, of an LCM. This LCM relates to a Bill under consideration in the UK Parliament which contains what are known as “relevant provisions”. These provisions could:
 - change the law on a “devolved matter” (an area of policy which the UK Parliament devolved to the Scottish Parliament in the Scotland Act 1998);
or
 - alter the “legislative competence” of the Scottish Parliament (its powers to make laws) or the “executive competence” of Scottish Ministers (their powers to govern).
4. Under an agreement formerly known as the “Sewel Convention”, the UK Parliament will not normally pass bills that contain relevant provisions without first obtaining the consent of the Scottish Parliament. The consent itself is given through a motion (a Legislative Consent Motion) which is taken in the Chamber – but the detailed scrutiny is undertaken by a Scottish Parliament committee on the basis of a memorandum. The motion must normally be decided on before the Bill reaches its final amending stage at the UK Parliament in the House in which it

was first introduced (although this can be as late as the last amending stage in the second house). On occasion, a memorandum is lodged which invites the Parliament to note that the Scottish Government does not intend to lodge a legislative consent motion on a particular bill.

5. The detailed procedure for scrutiny of Legislative Consent Memorandums and Motions is set out in [Chapter 9B](#) of the Parliament's Standing Orders.

Online Safety Bill

6. The Bill aims to establish 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");
 - Providers of internet services on which provider pornographic content (pornographic content that is published by a provider and is not user generated) is published or displayed.
7. The Bill also confers new powers on the Office of Communications (OFCOM) enabling them to act as the online safety regulator. This role will include overseeing and enforcing the new regulatory regime.
8. The Bill provides for a legislative framework for the regulation of providers of user-to-user internet services (e.g. Facebook, Twitter, Youtube and Instagram which enable the publication and sharing of user-generated content) and search services which enable users to search multiple websites and databases, empowering Ofcom to act as a regulator in relation to these services. This will have effect across the whole of the UK.
9. Two areas of the Bill alter the executive competence of the Scottish Ministers:
 - Clause 175(3) – Scottish Ministers power to amend list of descriptions of education and childcare for purpose of exemption from requirements of the Bill
 - Clause 176(2) – Scottish Ministers' power to amend list of child sexual exploitation and abuse offences relevant to operation of 'priority illegal content' scheme
10. Further details of these provisions can be found in paragraph 14 of the LCM.
11. The provisions for which legislative consent is sought provide the Scottish Ministers with certain powers to make adjustments to the operation of reserved regulation in relation to devolved areas. The Scottish Government considers it

preferable that the Scottish Ministers and Scottish Parliament have the ability to amend these provisions to reflect changes to devolved legislation concerning child sexual exploitation and abuse, and to amend the list of descriptions of education and childcare in Scotland which are exempt from the provisions of this Bill, rather than having to rely on the UK Government to promote secondary legislation in the Westminster Parliament.

Scottish Government Legislative Consent Memorandum

12. A Legislative Consent Memorandum was lodged by Keith Brown MSP, Cabinet Secretary for Justice and Veterans, on 31 March 2022. The LCM can be found in the **Annex**.

13. The Cabinet Secretary for Justice and Veterans is due to attend the Committee meeting on 8 June to answer any questions members may have on the LCM.

14. In considering whether to support the Bill the Scottish Government reached the following conclusion:

“It is the view of the Scottish Government that it is preferable in terms of good governance that the Scottish Ministers are empowered to amend by secondary legislation the child sexual exploitation and abuse offences to which this Bill applies to reflect any future reform of Scottish legislation in this area, and to amend the list of descriptions of education and childcare in Part 2 of Schedule 1 which relate to Scotland and are exempt from the requirements of this Bill, rather than relying on UK Ministers using their powers to amend the provisions via a secondary order made in the UK Parliament.”

15. The LCM sets out the Scottish Government’s draft motion (Annex, paragraph 19).

Action

16. Members are invited to consider whether to agree with the recommendation of the Scottish Government that the relevant provisions of the Online Safety Bill, introduced in the House of Commons on 17 March 2022, relating to the powers for Scottish Ministers to change by secondary legislation relevant child sexual exploitation and abuse offences for the regulation of priority illegal content scheme, and to change by secondary legislation the list of descriptions of education and childcare which relate to Scotland and are exempt from requirements of the Bill, so far as these matters alter the executive competence of the Scottish Ministers, should be considered by the UK Parliament.

17. Members are also asked to agree that the Convener should arrange for the publication of a short, factual report on the outcome of the Committee’s deliberations.

CJ/S6/22/19/1

**Clerks to the Criminal Justice Committee
May 2022**

Annex

Legislative Consent Memorandum

Online Safety Bill

Background

1. This memorandum has been lodged by Keith Brown MSP, Cabinet Secretary for Justice and Veterans, under Rule 9.B.3.1(a) of the Parliament's standing orders. The Online Safety Bill was introduced in the House of Commons on 17 March 2022.

The Bill can be found at:

<https://bills.parliament.uk/bills/3137>

Content of the Online Safety Bill

2. The overarching aim of the Bill is to establish a new regulatory regime to address illegal and harmful content online.

3. The Bill makes provision to impose legal requirements on:

- Providers of internet services which allow users to encounter content generated, uploaded or shared by other users, i.e. user-generated content ("user-to-user services");
- Providers of search engines which enable users to search multiple websites and databases ("search services");
- Providers of internet services on which provider pornographic content is published or displayed.

4. The Bill will require providers of user-to-user and search services to:

- Assess their user base and the risks of harm to those users present on the service;
- Take steps to mitigate and manage the risks of harm to individuals arising from illegal content and activity, and (for services likely to be accessed by children) content and activity that is harmful to children;
- Put in place systems and processes which allow users and affected persons to easily report specified types of content and activity to the service provider;
- Establish a transparent and easy to use complaints procedure which allows for complaints of specified types to be made;
- Have regard to the importance of protecting users' legal rights to freedom of expression and protecting users from a breach of a legal right to privacy when implementing safety policies and procedures; and

- Put in place systems and processes designed to ensure that detected but unreported Child Sexual Exploitation and Abuse (CSEA) content is reported to the National Crime Agency.

5. Those user-to-user services which meet what are called Category 1 threshold conditions, specified by the Secretary of State, will be subject to additional legal requirements, including to:

- Set clear and accessible provisions in terms of service explaining how content that is legal but harmful to adults will be treated, and apply those provisions consistently;
- Carry out an assessment of the impact that safety policies and procedures will have on users' legal rights to freedom of expression and users' privacy;
- Specify in a public statement the steps taken to protect users' legal rights to freedom of expression and users' privacy;
- Put in place systems and processes designed to ensure that the importance of the free expression of content of democratic importance is taken into account when making decisions about how to treat such content;
- Put in place systems and processes designed to ensure that the importance of the free expression of journalistic content is taken into account when making decisions about how to treat such content;
- Put in place a dedicated and expedited complaints procedure that ensures that the decisions of the service provider to take action against a user because of a particular piece of journalistic content can be challenged;
- Offer optional user verification and user empowerment tools on their sites; and
- Put in place proportionate systems and processes to prevent the risk of users encountering fraudulent adverts.

6. Those search services which meet what are called Category 2A threshold conditions will be under a duty to produce annual transparency reports and to put in place proportionate systems and processes to prevent the risk of users encountering fraudulent adverts

7. The Bill confers new powers on OFCOM enabling it to act as the online safety regulator. OFCOM will be responsible for enforcing the legal requirements imposed on service providers.

8. The Bill gives OFCOM the power to compel providers falling within the scope of the scheme to provide information and to require an individual from an in scope provider to attend an interview; powers of entry and inspection; and the power to require a service provider to undertake, and pay for, a report from a skilled person.

9. The new powers conferred on OFCOM also include the power to give enforcement notifications (which may set out the steps required to remedy a contravention) and the power to impose financial penalties of up to £18 million or 10% of qualifying worldwide revenue, whichever is greater. Where a service provider has failed or is still failing to comply with a notified requirement (set out in the provisional notice of enforcement) and the period allowed for representations has expired, OFCOM can issue a confirmation decision which can include a notice

imposing requirements for the provider to take steps to comply with a notified requirement and/or to pay a penalty.

10. If a service provider fails to comply with a confirmation decision, OFCOM can, in certain circumstances, apply to the Courts for an order imposing business disruption measures on that provider.

11. The Bill requires OFCOM to produce codes of practice for service providers, setting out the recommended steps that providers can take in order to comply with certain legal requirements.

12. The Bill also requires providers of internet services which make pornographic material available by way of the service (as opposed to enabling users to generate or share such content) to ensure that children are not normally able to encounter that pornographic content.

13. The Bill also replaces existing communications offences with three new communications offences: a harmful communications offence, a false communications offence and a threatening communications offence, as well as the creation of a new “cyberflashing” offence.

Provisions which relate to Scotland

14. The Bill provides for a legislative framework for the regulation of providers of user-to-user internet services (i.e. services like Facebook, Twitter, Youtube and Instagram which enable the publication and sharing of user-generated content) and search services which enable users to search multiple websites and databases, empowering Ofcom to act as a regulator in relation to these services. This will have effect across the whole of the UK. The content of the Bill as introduced relating to Scotland that requires an LCM do so, because it alters the executive competence of the Scottish Ministers is in two areas as follows:

Power for Scottish Ministers to amend the list of descriptions of education and childcare which relate to Scotland

- Clause 175(3) – Scottish Ministers power to amend list of descriptions of education and childcare for purpose of exemption from requirements of the Bill
 - o The Bill provides the Scottish Ministers with a power to amend the list of descriptions of education and childcare which relate to Scotland, contained in Part 2 of Schedule 1 to the Bill, which are exempt from the requirements that the Bill places on providers of internet services, by making regulations subject to affirmative procedure. This will enable the Scottish Ministers to amend, remove or add further descriptions of exempt education or childcare. This clause alters the executive competence of Scottish Ministers.

Power for Scottish Ministers to amend list of ‘Child Sexual Exploitation and Abuse offences’

- Clause 176(2) – Scottish Ministers’ power to amend list of child sexual exploitation and abuse offences relevant to operation of ‘priority illegal content’ scheme
 - o The Bill places a duty on providers of internet services to proactively remove content posted by users of their sites that amounts to certain ‘priority illegal content’ offences. These include the child sexual exploitation and abuse offences listed at Part 2 of Schedule 6 to the Bill. Clause 176(2) of the Bill provides that the Scottish Ministers may amend this list by regulations subject to affirmative procedure. This means that in the event that Scottish criminal law concerning sexual offences against children is reformed, the Scottish Ministers would be able to update the list of Scottish child sexual exploitation and abuse offences to reflect those changes. This clause alters the executive competence of Scottish Ministers.

Reasons for seeking a legislative consent motion

15. The provisions in this Bill for which legislative consent is sought provide the Scottish Ministers with certain powers to make adjustments to the operation of reserved regulation in relation to devolved areas. The Scottish Government considers it preferable that the Scottish Ministers and Scottish Parliament have the ability to amend these provisions to reflect changes to devolved legislation concerning child sexual exploitation and abuse, and to amend the list of descriptions of education and childcare in Scotland which are exempt from the provisions of this Bill, rather than having to rely on the UK Government to promote secondary legislation in the Westminster Parliament.

Consultation

16. Given the nature of the effect of the two LCM clauses altering the executive competence of Scottish Ministers, no consultation has been considered necessary. In the event that the Scottish Ministers were in future to make use of the powers to amend the list of descriptions of education and childcare, or to amend the list of child sexual exploitation and abuse offences in Scotland which are ‘priority illegal content offences’, it is expected that appropriate consultation would be carried out prior to the making of an order to use these powers.

Financial implications

17. The provisions of the Bill which extend to Scotland have no significant financial implications.

Conclusion

18. It is the view of the Scottish Government that it is preferable in terms of good governance that the Scottish Ministers are empowered to amend by secondary legislation the child sexual exploitation and abuse offences to which this Bill applies to reflect any future reform of Scottish legislation in this area, and to amend the list of descriptions of education and childcare in Part 2 of Schedule 1 which relate to Scotland and are exempt from the requirements of this Bill, rather than relying on UK Ministers using their powers to amend the provisions via a secondary order made in the UK Parliament.

Draft Legislative Consent Motion

19. The draft motion, which will be lodged by the Cabinet Secretary for Justice and Veterans, is: “That the Parliament agrees that the relevant provisions of the Online Safety Bill, introduced in the House of Commons on 17 March 2022, relating to the powers for Scottish Ministers to change by secondary legislation relevant child sexual exploitation and abuse offences for the regulation of priority illegal content scheme, and to change by secondary legislation the list of descriptions of education and childcare which relate to Scotland and are exempt from requirements of the Bill, so far as these matters alter the executive competence of the Scottish Ministers, should be considered by the UK Parliament.”

Scottish Government
March 2022