

INDEPENDENT REVIEWER OF TERRORISM LEGISLATION

ROUND 2: NOTE ON FUTURE ONLINE SAFETY REGULATION

1. Yesterday, 2 March 2023, the government unveiled what looks like a revised approach to online safety legislation in the form of new clauses and a consultation.
2. In short, the government is signalling (a) that Acts of Parliament are too slow given the pace of tech change and (b) that age is becoming the key determinant for online regulation.
3. The purpose of this Note is to consider some of the unstated context behind this revised approach.

SPEEDIER REGULATION

4. The government proposes to amend the Online Safety Act 2023, by way of a new clause in the Crime and Policing Bill laid yesterday, by granting itself extremely wide powers.
5. If passed, the new section 216A will allow the government to amend “any” provision of the Online Safety Act 2023 by regulation, meaning that future amendments to the Act will no longer require the full legislative procedure involved in passing primary legislation¹.
6. The only limit is that the amendments are for or in connection with the purpose of minimising or mitigating the risks of harm to individuals in the United Kingdom presented by illegal AI-generated content or the use of AI services for the commission or facilitation of priority offences².
7. In process terms, this means that the government will be able to direct changes by statutory instrument, subject to approval of a single vote in each House of Parliament³. Statutory instruments involve much less detailed scrutiny by

¹ This is sometimes referred to as conferring a Henry VIII power.

² Section 216A(1).

³ Section 225(fa).

Parliament, and are unamendable, meaning that MPs are faced with a take-it-or-leave-it choice.

8. This approach to legislation must be tempting in order to avoid the Online Safety Act 2023 becoming obsolescent as new online technology emerges.
9. However, this approach raises some quite profound questions:
 - Will Parliament have enough time to consider the impact of future regulations – made under the new power - before it is asked to vote on those future regulations?
 - Will Parliament have enough independent information about the effect of those future regulations, or will it be forced to rely on briefings from government and/or lobby groups?
 - What if Parliament agrees with some future regulations but not all, or would agree but with amendments?
10. OFCOM might be well-placed to comment on future regulations made under the new power, but every indication is that OFCOM sees itself as implementing rules rather than advocating for law reform⁴. In these circumstances it is unclear to what extent, if at all, OFCOM would be willing to provide public analysis of the pros and cons of new regulations.
11. This Note does not argue that such powers are necessarily wrong given the pace of technological change – but there are serious drawbacks and insufficient safeguards to ensure that wise laws are passed.
12. For completeness, section 216A does not make it illegal to possess or transmit AI tools designed to create illegal content⁵. Its purpose appears to be to allow the government to put duties on providers of AI services in relation to their chatbots and other AI-content generating tools.
13. However, the width of the power is so wide that it would in principle allow the government to create new offences (and therefore, unless I have missed something, I suggest section 216A should be further amended to exclude this possibility).

⁴ E.g. letter Dame Melanie Dawes, CEO OFCOM, to Baroness Keeley and Dame Chi Onwurah MP (30.6.25).

⁵ This is to be found, in relation to the possession of Child Sex Abuse-image generators only, in Clause 65 of the Crime and Policing Bill. In *Terrorism Acts in 2023 (Annex: Generative AI)* I considered the case for and against prohibiting AI-tools designed to create terrorism content and/or to stir up racial hatred.

CHILDREN: THE NEW FRONTIER

14. Yesterday the government published, “Growing up in the online world: a national consultation”⁶. The focus of the consultation questions suggests a clear direction of travel: greater regulation in relation to children than adults.
15. There is merit in this approach, which is a recognition that the current strictures of the Online Safety Act 2023 are not sufficiently protecting children.
16. But around the corner are difficult questions. If children under 16, say, are restricted from social media or chatbots (and are therefore far less likely to be radicalised through these means to commit terrorist offences), what about children under 18? What about young adults?
17. If the principled reason to divide children (at 16 or 18) from adults is based on the latter’s greater rights to freedom of expression, it is a shame that analysis on how freedom of expression applies to online content is so undeveloped. Is there the same value in online content as offline speech? Is social media “brain-rot”⁷ content as valuable as content produced by recognised news organisations? Debate is sometimes shaped by free speech absolutism that treats all online restriction as objectionable. Creating restrictions for children could be seen as a way of evading this difficult and unexplored area.
18. Without commenting further on the merits, caution is also required about raising false expectations. For example, Question 25 invites consultees to indicate features (such as infinite scrolling) which they think “should be age restricted”.
19. However, in the real world whether features on any particular service will be age restricted for UK children depends on:
- Whether the service applies effective age-gating in response to new legislation or ignores its obligations under future online safety legislation.
 - If the latter, it then depends on whether OFCOM, or some other part of government, has sufficient coverage of the internet to spot non-compliance. That should not be taken for granted.

⁶ Department for Science, Innovation & Technology, CP 1528.

⁷ For “brain-rot” content see, OFCOM, Online Nation Report 2025 (10.12.25), at page 9.

- Even if detected, it depends upon whether OFCOM has the enforcement appetite to open an investigation and use its powers.
- Even if an initially non-compliant service does respond positively to OFCOM, it all takes time.

20. No one should therefore think that new laws can solve the internet's problems by a legislative click of the fingers.

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