EXPLANATORY MEMORANDUM TO

THE ONLINE SAFETY ACT 2023 (PRIORITY OFFENCES) (AMENDMENT) REGULATIONS 2024

2024 No. 1188

1. Introduction

1.1 This explanatory memorandum has been prepared by The Department for Science, Innovation and Technology and is laid before Parliament by command of His Majesty.

2. Declaration

2.1 Baroness Jones of Whitchurch, Parliamentary Under-Secretary of State for the Future Digital Economy and Online Safety at the Department for Science, Innovation and Technology confirms that this Explanatory Memorandum meets the required standard.

2.2 Daniel Okubo, Deputy Director for Security & Online Harms, at the Department for Science, Innovation and Technology confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Max Pumphrey at the Department for Science Innovation and Technology Telephone: 07511 161770 or max.pumphrey@dsit.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This Statutory Instrument (SI) amends the Online Safety Act 2023 (OSA). The OSA gives certain internet services new duties to protect their users from illegal content and activity online.

4.2 This SI inserts new Sexual Offences Act 2003 (SOA) offences into the OSA 'priority offences' Schedule 7. These new offences relate to individuals sharing, or threatening to share, intimate images of others without their consent (Intimate Image Abuse offences or 'IIA' offences). These were recently inserted into the SOA in new section 66B by s.188 of the OSA. The offences came into force on 31 January 2024.

4.3 The SI also removes an offence from OSA 'priority offences' Schedule 7. This is the offence in section 33 of the Criminal Justice and Courts Act 2015 (CJCA) about disclosing, or threatening to disclose, private sexual photographs and films with intent to cause distress.

4.4 This offence was repealed by the OSA when the new SOA IIA offences came into force. However, the repealed offence is still included in the OSA priority offences schedule (paragraph 30 of Schedule 7).

Where does the legislation extend to, and apply?

4.5 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is the United Kingdom.

4.6 The territorial application of this instrument (that is, where the instrument produces a practical effect) is the United Kingdom.

5. Policy Context

What is being done and why?

5.1 Following a Law Commission review into the law governing revenge pornography and sharing intimate images, the previous Government created new criminal offences about sharing intimate images of others without their consent through the OSA. The OSA inserted these offences into the SOA.

5.2 These offences expand upon and replace an offence in the CJCA that related to sharing private sexual images intending to cause distress. The new SOA IIA offences criminalise the non-consensual sharing of intimate images in some additional circumstances. For example, including where the intention relates to obtaining sexual gratification, or where the intention is to humiliate. The new offences also extend the definition of what constitutes a photograph or film.

5.3 Separately, the OSA gives certain internet services new duties for illegal content. Under these duties, providers have additional obligations for 'priority offences'.

5.4 These offences are set out in Schedules 5, 6 and 7 to the Act. The Schedules currently include the (now-repealed) CJCA offence, but not the new SOA offences.

5.5 Through this SI, the government will replace the now-repealed CJCA offence with the new SOA IIA offences. This will ensure internet services will have the 'priority' illegal content duties for the new SOA offences.

What was the previous policy, how is this different?

5.6 The previous policy was that internet services' duties for 'priority' illegal content would apply to content which amounted to the (now-repealed) offence at s.33 of the CJCA.

5.7 The new policy is that internet services' duties for 'priority' illegal content should be for the new SOA IIA offences. As above, this is different because the new SOA offences criminalise a slightly different range of actions relating to IIA.

6. Legislative and Legal Context

How has the law changed?

6.1 Schedules 5, 6 and 7 of the OSA set out the 'priority offences' for internet services' OSA illegal content duties.

6.2 Currently, paragraph 30 of Schedule 7 states section 33 of the CJCA (disclosing, or threatening to disclose, private sexual photographs and films with intent to cause distress) is a priority offence.

6.3 This will be removed. Schedule 7 to the OSA will be updated to show that the new IIA offences (set out in section 66B of the SOA) are priority offences.

Why was this approach taken to change the law?

6.4 This is the only possible approach to make the necessary changes.

7. Consultation

Summary of consultation outcome and methodology

7.1 During the passage of the OSA through Parliament, Parliament approved the inclusion of intimate image abuse-related offence at s.33 CJCA as a 'priority offence' for providers' illegal content duties. Following this scrutiny, this Statutory Instrument makes an administrative change, which reflects wider changes in the law governing IIA offending in the United Kingdom.

8. Applicable Guidance

8.1 The OSA designates Ofcom as the regulator for internet services' new OSA duties.

8.2 Under the OSA, Ofcom is obliged to produce codes of practice for providers. These will set out the steps providers can take to fulfil their duties, including their illegal content duties for IIA offending and the new SOA IIA priority offences (among other offences).

8.3 Ofcom is also obliged to produce guidance for providers, to assist them in fulfilling their illegal content duties. This will include guidance on how providers should make judgements about illegal content such as the SOA IIA offences, and how they should carry out their risk assessments for illegal content such as the SOA IIA offences.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this instrument because the SI relates to maintenance of existing regulatory standards. We have estimated that the net effect of this policy on UK businesses will amount to less than £5 million pounds per year, so a full Impact Assessment is not required. A De minimis Assessment has been conducted.

Impact on businesses, charities and voluntary bodies

9.2 There is no significant impact on UK businesses, charities or voluntary bodies who are in scope of the Online Safety Act because this change does not significantly affect their duties under the Act.

9.3 The legislation does not impact UK small or micro businesses that are in scope of the Online Safety Act for the same reason.

9.4 There is no, or no significant, impact on the public sector because these bodies will not usually have duties under the Online Safety Act, as public sector bodies' sites are not usually of a kind that will be in scope.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The OSA imposes obligations on both Ofcom and the Secretary of State to review the functioning of the Act's illegal content duties. This will encompass the inclusion of the new IIA offence as a priority offence for providers' duties.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 There are no matters to include here.

12. European Convention on Human Rights

12.1 The Parliamentary Under-Secretary of State for the Future Digital Economy and Online Safety has made the following statement regarding Human Rights:

"In my view the provisions of the Online Safety Act 2023 (priority offences) (amendment) Regulations 2024 are compatible with the Convention rights."

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").