EXPLANATORY MEMORANDUM TO

THE PUBLIC INTEREST DISCLOSURE (PRESCRIBED PERSONS) (AMENDMENT) ORDER 2023

2023 No. 1254

1. Introduction

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

2. Purpose of the instrument

2.1 This Order will add the regulation of regulated services under the Online Safety Act 2023 to the list of matters that whistleblowers are able to disclose to Ofcom in its role as a 'prescribed person' under the Public Interest Disclosure (Prescribed Persons) Order 2014.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The extent of this instrument is Great Britain.

4.2 The territorial application of this instrument is Great Britain.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation no statement is required.

6. Legislative Context

6.1 This Order amends the Schedule to the Public Interest Disclosure (Prescribed Persons) Order 2014 (the "2014 Order").

6.2 Part IVA of the Employment Rights Act 1996 (the "1996 Act") provides protection for workers who suffer a detriment or are dismissed as a result of whistleblowing by making a qualifying disclosure within the meaning of section 43B of the 1996 Act in accordance with any of sections 43C to 43H of that Act. A qualifying disclosure under section 43B requires the worker to have reasonably believed the disclosure was made in the public interest and tends to show certain kinds of wrongdoing including, for example, that a person has failed to comply with a legal obligation or that the health or safety of a person is likely to be endangered.

6.3 Section 43F of the 1996 Act provides that a qualifying disclosure is a protected disclosure where, subject to certain requirements, the worker makes the disclosure to a person prescribed by an order made by the Secretary of State for the purpose of receiving disclosures about the matters concerned. The Schedule to the 2014 Order lists the prescribed persons and the matters in respect of which they are prescribed for the purposes of section 43F.

6.4 This Order amends the Schedule to the 2014 Order to prescribe additional matters in respect of which the Office of Communications (Ofcom) is a prescribed person. Following the amendments made by this Order, whistleblowing to Ofcom about matters relating to Ofcom's regulation of regulated services under the Online Safety Act 2023 ("OSA 2023") can be a protected disclosure under section 43F of the 1996 Act, provided that all of the other relevant requirements in Part IVA for protected disclosures are met.

6.5 Regulated services are defined in section 4(4) of OSA 2023. Regulated services includes certain internet services which allow users to generate or share content on the service which can be encountered by other users, internet services which include search engines as part of their service, and internet services which publish pornographic content on their service. Internet services which meet the criteria to be regulated services are subject to various obligations under OSA 2023. Ofcom is the regulator responsible for enforcement of the regime.

7. Policy background

What is being done and why?

7.1 A whistleblower is a worker who reports certain types of wrongdoing. The reporting of the wrongdoing must be made in the public interest, for example the wrongdoing affects the general public, and is limited to certain areas of wrongdoing, such as a criminal offence has been committed. Prescribed persons are people and bodies that whistleblowers can report to rather than their employer.

7.2 The amendments made by this Order will ensure whistleblowers working in organisations relating to Ofcom's regulation of regulated services under the Online Safety Act 2023 are protected when disclosing information to Ofcom. An example of a possible disclosure is information which shows that a social media platform may not be complying with its duty under the OSA 2023 to protect children from harmful content. Extending the protections in the 1996 Act to cover workers whistleblowing about compliance with OSA 2023 will remove a disincentive which deters workers from providing information to Ofcom. Information from whistleblowers will aid Ofcom in carrying out its OSA 2023 functions and therefore contribute towards OSA 2023's objective of protecting the public from harmful content online. Disclosures on other matters related to regulated services under the OSA 2023 should be made to the persons prescribed for those matters. For example, disclosures relating to their compliance with data protection legislation should be made to the Information Commissioner.

Explanations

What did any law do before the changes to be made by this instrument?

7.3 The 2014 Order contains description of matters for which whistleblowers can make disclosures to Ofcom about and be protected under the 1996 Act, but it does not currently extend to cover the regulation of regulated services under OSA 2023.

Why is it being changed?

7.4 To ensure whistleblowers working in organisations relating to Ofcom's regulation of regulated services under OSA 2023 are protected when disclosing information to Ofcom.

What will it now do?

7.5 Following the amendments made by this Order, whistleblowing to Ofcom about matters relating to Ofcom's regulation of regulated services under OSA 2023 can be a protected disclosure, and the makers of such protected disclosures will receive protection under the 1996 Act from suffering detriment as a result of making the disclosures.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 Consolidation is not being done.

10. Consultation outcome

10.1 A consultation has not taken place because it would not be proportionate to the change delivered by this instrument. Consultation is also not a prerequisite for the Secretary of State to exercise the power to make this Order.

11. Guidance

11.1 Guidance is not required.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this instrument because no significant impact on the private, voluntary or public sectors is foreseen.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 This instrument does not impose additional burdens on business and therefore there is no need to minimise the impact of the requirement on small businesses. Employers are already prohibited from causing detriment to qualifying whistleblowers and this instrument is not placing new obligations on them.

14. Monitoring & review

14.1 The instrument does not include a statutory review clause as it only seeks to amend existing legislation by prescribing additional matters in respect of which Ofcom is a prescribed person. Ofcom publishes an annual whistleblowing report on the matters it is responsible for.

14.2 The Government will continue to subject the prescribed persons list to internal review regularly to ensure the prescribed persons on the list remain relevant. At the time of the next review, the efficacy of the changes made by this instrument will be considered and further amendments may be made.

15. Contact

15.1 George Cutts at the Department for Science, Innovation & Technology. Telephone: 07710025629 or email: george.cutts@dsit.gov.uk can be contacted with any queries regarding the instrument.

15.2 Daniel Okubo, Deputy Director for Online Harms - Regulation, at the Department for Science, Innovation & Technology can confirm that this Explanatory Memorandum meets the required standard. Email: daniel.okubo@dsit.gov.uk

15.3 Saqib Bhatti MP, Parliamentary Under Secretary of State (Minister for Tech and the Digital Economy) at the Department for Science, Innovation & Technology can confirm that this Explanatory Memorandum meets the required standard.