

Online Safety Bill - Public Bill Committee Evidence on Pornography Regulation 17 June 2022

[Professor Clare McGlynn](#), Durham Law School, Durham University, and [Professor Lorna Woods](#), School of Law, University of Essex

Executive Summary

Importance of focussing on content of mainstream pornography: While age assurance regulations dominate public discussion regarding pornography and the Bill, the reality is that, were it not for the problematic nature of much mainstream pornography, and the impact of business and service design on user-generated content, there would be far less concern regarding children's access. Therefore, where a key aim is to reduce the adverse impacts of pornography on children, a dual approach is required, tackling content *and* access. The intention here is not to propose a regulatory regime for porn but to ensure that platforms' systems respect existing laws.

Extreme pornography including rape porn easily and freely accessible across Twitter, via Google and on mainstream commercial pornography sites: one-click search on Google displays extensive material on rape porn, Twitter hosts a wide range of unlawful and sexually violent porn and 1 in 8 titles on mainstream commercial porn sites describe sexually violent porn.

Differences in pornography laws across UK raises regulatory challenges: the criminal law on extreme pornography and intimate image abuse varies across the UK. Service providers will be required to understand the laws in each jurisdiction to determine regulatory scope for the United Kingdom as a whole.

Challenges of regulation based on defining illegal content as per on specific criminal offences: requiring a service provider to determine if content 'amounts to' a criminal offence is a challenging standard that likely will result in reduced protection from harms and provide opportunities to obfuscate regulation and with its implicit focus on individual items of content does not fit well with a systems based approach.

Approach to intimate image abuse divided across three categories: intimate image abuse falls into three categories: non-consensual distribution offence as priority illegal content; other image based sexual abuse that is unlawful but not priority; and image based sexual abuse that is not contrary to the criminal law. The boundaries between these categories are somewhat arbitrary and do not necessarily reflect the harm suffered by the victim.

Only some forms of intimate image abuse included as priority offence: Sexual images distributed without consent are commonplace on mainstream porn services, but only those images which have been distributed with intent to cause distress (or in Scotland being reckless as to causing distress) are listed as priority offences. This limits the application of the priority rules to distribution for financial gain (hacking), sexual gratification, as part of 'collector culture', humour/kudos, deprioritising the rest.

Image based sexual abuse not 'amounting to' a criminal offence will be treated as harmful content: where the sharing of intimate images falls outside the criminal offence (sometimes for technical reasons rather than the nature of the content itself), the content could be considered to be harmful to adults, or harmful to children. The

protections provided in relation to content harmful to adults are very weak and apply only to Cat 1 services.

Obscene publications not included as priority offence: despite the Obscene Publications Act, and equivalent provisions in the laws of Northern Ireland and Scotland, specifically targeting the distribution of obscene materials, it is not listed as a priority offence. Material that may be obscene but not extreme porn may include: bestiality involving masturbation, some incest porn, serious bodily injury, choking and suffocation porn.

Few restrictions on user uploading of non-consensual porn: The ease of uploading material to porn services makes non-consensual distribution of sexual images straightforward, with images/videos going viral extremely quickly. Adding friction to this process may reduce virality of some forms of non-consensual sexual material.

Proactive regulation of porn services will be required: Unless Ofcom proactively engages with user-to-user dedicated pornography services they are unlikely to change their current practices. For example, the terms and conditions of the largest porn services bear no relation to the content available online and victims report serious difficulties getting non-consensual material removed.

Detailed briefing on pornography regulation: a detailed briefing on the Bill's provisions regarding pornography is available [here](#).

Recommendations

Overarching recommendations

Revise definition of what constitutes 'illegal' content: amend cl 52(2) which defines illegal content as that which 'amounts to' a criminal offence to either where service providers have 'reasonable grounds to believe' an offence has been committed, as in an earlier draft of the bill, or where 'content is of a type likely to constitute' an offence.

Amend OFCOM's risk assessment duties: OFCOM should be required to take account of the gendered nature of risk and harm. OFCOM should also take non-designated content that is harmful to adults into account when determining risk profile for Cat 1 services.

Mandatory Code of Practice regarding online violence against women and girls: amend the Bill to obligate Ofcom to adopt a code of practice regarding online violence against women and girls to ensure, better understanding of nature and harms of abuse, including intimate image abuse, and to identify best practice in relation to complaints, swift removal of material and transparency reporting.

Revise harm definition to include intersecting characteristics: the definition of harm needs to be revised to ensure account can be taken of intersecting characteristics such as those specified in the Equality Act 2010.

Pornography specific recommendations

Verification of age/consent of uploaders: require user-to-user dedicated porn companies to verify the age/consent of all those in pornographic videos/images uploaded to their services; as part of this process, service providers should consider the need for some form of identification of users uploading/disseminating such images.

Obscene Publications Act: add to list of priority offences in Schedule 7 (and equivalent offences in Scotland and Northern Ireland).

Harmonise age assurance/verification requirements: make the requirements and obligations in cl 68(2) regarding provider porn and cl 31(2) the same to ease enforcement.

Criminal law amendments to provide greater regulation of porn services:

Deepfake porn/altered images - amend English criminal law to include distribution of deepfakes: amend section 33 to include altered images, as is already the law in Scotland.

Criminalise false representations of consent when uploading: introduce new offence criminalising the individual user who makes false representations of consent when uploading to porn websites.

Amend law on intimate image abuse: Government to commit to reviewing the law on intimate image abuse following publication of Law Commission report and to swift new legislation providing a comprehensive, straightforward law, with Schedule 7 being urgently amended to include new offences.

Easy and free accessibility of rape porn, incest porn and sexually violent porn across mainstream porn sites, Twitter and via Google

Importance of focussing on content of mainstream pornography:

1. While age assurance regulations dominate public discussion regarding pornography and the Bill, the reality is that, were it not for the problematic nature of much mainstream pornography, and the impact of business and service design on user-generated content, there would be far less concern regarding children's access. Therefore, where a key aim is to reduce the adverse impacts of pornography on children, a dual approach is required, tackling content *and* access. The intention here is not to propose a regulatory regime for porn but to ensure that platforms' systems respect existing laws. In the offline world there are restrictions on pornographic content that falls short of the criminal threshold (see BBFC age ratings and specifically the content categorised as 18, R18 and content that should not be classified and commercially distributed). Many services do not have systems in place to reflect these existing rules, and do not enforce their terms of service (eg in relation to criminal content) effectively.

Rape porn easily and freely available via search services like Google:

2. A one-click search on Google brings up pages and pages of rape porn content featuring incest, weapons, teenagers and racialised titles, with links to dedicated rape and forced sex pornography websites. The easy availability of rape porn contributes to a climate where sexual violence is normalised and minimised.

Sexually violent and incest porn easily and freely available on Twitter:

3. Simple searches on Twitter display sexually violent porn, incest porn, as well as cartoon child sexual abuse material under the legal threshold. There is also extensive material featuring strangulation.

Sexually violent porn easily accessible on largest commercial pornography websites:

4. Durham University [recent research](#) with Vera-Gray, McGlynn et al found 1 in 8 video titles advertised to first-time user - ie young and teenage boys - on UK's most popular porn websites describe acts of sexual violence. Material depicting criminal acts such as rape, incest and upskirting is being actively pushed to the front page by the porn companies, in direct contravention of their own terms and conditions.

Defining Scope of Illegal Content

5. Regulated services have safety duties in relation to "illegal content", with more specific duties in relation to "priority illegal content". The terms "illegal content" and "priority illegal content" refer to content the use, possession, viewing, accessing or publication or dissemination of which "amounts to" a "relevant offence" (cl 52(2) and (3)). Relevant offences are terrorism offences listed in Schedule 5, child sexual exploitation and abuse offences listed in Schedule 6, priority offences listed in Schedule 7 and a fall-back category of offences comprising offences "where the intended victim is an individual" (cl 52(4)(d)).

Problems with definition of 'amounts to' a criminal offence

6. Defining illegal content as that which "amounts to" a criminal offence seems to require the service provider to make an assessment, and to get it right, of whether an offence has

been committed in an individual case. This brings into play questions not just about the *nature* of the content, but also other aspects of the offence, notably defences and the mental state of the defendant. This appears to mean that the same content may or may not fall within the regime depending on external factors such as the defendant's state of mind or having a defence.¹ In essence, it can be challenging to determine from the content of material whether a criminal offence has been committed.

7. This is a particular issue in relation to pornography as the principal way in which it is regulated in the Bill is via enumeration of various criminal offences. The concerns, therefore, over the use of lists of offences and requiring service providers to determine whether content 'amounts to' a criminal offence have great significance.

8. Overall, the fundamental problem is that this approach, requiring an assessment as to the application of the criminal law, leads to possibly very specific assessments of individual items of content. This is not compatible with a systems-based approach requiring service providers to have systems in place to deal with types of content, *equivalent* to that which would form part of a criminal offence, were all the other elements of the offence present.²

9. In contrast, an earlier draft Bill referred to a service provider having "reasonable grounds to believe" an offence had been committed which granted more latitude in determining the scope of obligations, a standard more consonant with the challenges of identifying whether offences have been committed. While "amounts to" may have been added in the hope of increasing certainty, in practice it may impose greater requirements on service providers to make assessments as to whether illegality duties apply. It is possibly easier for the regulator to assess whether a service provider has taken a reasonable and proportionate approach to establishing a system, than it is to assess whether the service provider has got it right in each case.

10. The detail in the analysis below of the relevant pornography offences belies any notion that specifying criminal offences provides clarity. It is arguable that the opposite is true. Provisions of a more general nature would likely provide more useful guidance and obviate detailed discussion, complaints and legal action, such as 'content of a type likely to constitute extreme pornographic imagery' or content where 'there are reasonable grounds to believe might constitute an extreme pornographic image'.

Recommendation:

11. Amend cl 52(2) which defines illegal content as that which "amounts to" a criminal offence to where service providers have "reasonable grounds to believe" an offence has been committed, as in an earlier draft of the bill.

Defining 'harm' relating to content harmful to adults and children

12. Providers of services likely to be accessed by children have safety duties in relation to content harmful to children; Cat 1 providers have safety duties in relation to the category of content harmful to adults. These are two separate categories on content, though presumably content harmful to adults would also be harmful to children.

13. Content that is harmful to children or harmful to adults is either content listed as priority content in relation to children and/or adults or is defined as "content of a kind which presents a material risk of significant harm to an appreciable number" of children or adults, as the case may be, in the UK (cl 53(4)(c) and cl 54(3)(b) respectively). "Harm" itself is defined as "physical or psychological harm" (cl 187(2)). Societal harms are excluded.

14. In defining harm, cl 187(4) recognises that harm may arise to a person where individuals do or say something about another person with the same ‘individual characteristics or membership of a group’. However, the language used implicitly assumes that there will be a single characteristic defining the group, or a series of characteristics/memberships – each seen separately. It thus does not deal with intersecting characteristics, for example racism and sexism in combination. This is a significant gap as, for example, black and minoritised women experience online abuse, and at disproportionate levels, based on being black/minoritised *and* a woman.

15. Moreover, the definition of the two types of harmful content (cl 53 and 54), by referring to the population of the UK as a whole, does not acknowledge that some groups are both more likely to be harmed by certain types of material and more likely to encounter it. For example, black women are disproportionately affected by online abuse and targeted for that abuse due to being both black and a woman (sometimes referred to as misogynoir). However, whether the harms to black women are ‘significant’ to an “appreciable number” of adults in the UK is not clear and the risk is that they are not. Given that the definition in clauses 53(4)(c) and 54(3)(b) are gatekeeper clauses for the applicability of the safety duties, recognition of differential risks of harm in the subsequent duties of care cannot compensate for this weakness.

16. Note OFCOM’s risk assessment obligations do not contain a requirement to take into account the gendered nature of risk and harm; clause 83 should be amended to remedy this omission. Moreover, clause 83 specifically excludes from the matters that OFCOM should take into consideration “anything relating to non-designated content that is harmful to adults”³. This is significant because until the Secretary of State makes regulations to designate priority content that is harmful to adults, then OFCOM must ignore the risks posed by content which is harmful. Given the difficulties we have noted with the threshold for illegal content, there is a high likelihood that some pornographic content (including that it would not be legal to sell offline) would not be taken into account to determine the riskiness of the Cat 1 service in issue. Even assuming that some content in the future is designated as priority content harmful to adults, there is no guarantee that this form of content will be included.

Recommendation:

17. Amend definition of harm to ensure account can be taken of intersecting characteristics such as those specified in the Equality Act 2010.

18. Amend cl 83 to require OFCOM to take account of the gendered nature of risk and harm and, in relation to Cat 1 services, to take into account non-designated content harmful to adults when determining risk profiles.

Extreme pornography (illegal content, priority offences listed in Schedule 7)

Ubiquity and accessibility of extreme pornography including rape porn:

19. A one-click search on Google brings up pages and pages of rape porn content featuring incest, weapons, teenagers and racialised titles, with links to dedicated rape and forced sex pornography websites. The easy availability of rape porn contributes to a climate where sexual violence is normalised and minimised.

20. Durham University [recent research](#) with Vera-Gray, McGlynn et al found 1 in 8 video titles advertised to first-time user – ie young and teenage boys - on UK's most popular porn websites describe acts of sexual violence. Material depicting criminal acts such as

rape, incest and upskirting is being actively pushed to the front page by the porn companies, in direct contravention of their own terms and conditions.

Extreme pornography criminal offence of possession

21. The offence in section 63 of the Criminal Justice and Immigration Act 2008 makes it an offence to possess an extreme pornographic image which is defined as 'realistic and explicit' material depicting necrophilia, some forms of bestiality, rape and sexual penetration, life-threatening injury, or serious injuries to the anus, breasts or genitals, and that such material is also 'grossly offensive, disgusting or otherwise of an obscene character'.⁴

22. The offence in Scotland differs in some significant respects, in particular including all bestiality images and material depicting serious injuries, not limited to specific body parts, and only that the image is 'obscene'.⁵

Challenges arising from extreme pornography listed as a priority offence (Schedule 7)

23. The criminal offence of possessing extreme pornography is listed in the Bill as a priority offence (in Schedule 7) meaning that service providers *should* proactively seek to reduce the prevalence of this material on their platforms (by having systems to reduce the risk of users coming across the content and minimising the time this sort of material is present on the service) and, on becoming aware of a specific item of content, swiftly remove it. This *should* mean that material that has been found on mainstream porn sites which depicts rape and other non-consensual sexual activity is less readily available and, when identified, is removed. Note that the Bill did not include Scottish, Northern Irish laws criminal offences though this is being rectified through Government amendments.

Regulatory challenges of different criminal laws across the UK:

24. Basing regulation on the specific extreme pornography criminal offence will provide regulatory challenges for service providers who will be required to understand the different laws across the UK in order to determine their obligations. Note that para 299 of the Explanatory Notes in relation to the definition of 'illegal content' in cl 52 state: "content amounting to any offence under the law of England and Wales, Scotland or Northern Ireland which meets the definition under subsection (4) is illegal content (or, as appropriate, priority illegal content, CSEA content etc) in all parts of the United Kingdom for the purposes of regulation under the Bill". This is a form of levelling up approach whereby the widest definition of offence among the home nations effectively forms the basis of protection across the UK. Scots law has a wider application and therefore should provide the standard for interpretation of duties of care relating to illegal content.

Lack of clarity on definition of 'extreme pornographic image':

25. Assumptions that the criminal laws on extreme pornography provide clarity in terms of specific content to be removed are misplaced. For example, an image must be deemed 'obscene', a term that is exceptionally vague and the English Crown Prosecution Service guidance provides little elaboration beyond stating that 'obscene' has an 'ordinary meaning ("repulsive", "filthy", "loathsome" or "lewd")'.⁶ It is not obvious that these words further any real understanding of what might constitute an 'obscene' image.⁷ Note also that the test of what constitutes an 'obscene' image for the extreme pornography offence is different from the definition of 'obscene' in the Obscene Publications Act.

What constitutes 'life-threatening acts':

26. It is not clear what images constitute 'life-threatening acts'. The Explanatory Notes to the English legislation refer to this category as being intended to include 'hanging,

suffocation, or sexual assault involving a threat with a weapon'.⁸ It is possible that strangulation material is included here. It is likely that images of other forms of common activity, such as choking, are not covered by this definition; such material is freely and easily accessible on Twitter and mainstream commercial pornography websites. As noted above, some of the material available via one-click on Google and on Twitter brings up pornographic images of rape and sexual assault with weapons including knives and guns.

Uncertain scope of acts resulting in 'serious injury':

27. The main area of contention around the definition of what constitutes an extreme pornographic image is the scope of an 'act which results, or is likely to result, in serious injury', with English law requiring serious injury to a 'person's anus, breasts or genitals'. As well as debates about whether this element of the definition includes BDSM material, it is also not clear exactly what constitutes 'serious injury', with the English Crown Prosecution Service simply stating that the words 'ordinary meaning' should be applied.⁹ Porn involving weapons is likely to be included (and may constitute 'life-threatening images'). Images of choking may be covered. It should be noted here that Scots law is broader than English law here as it includes acts resulting in, or likely to result in 'serious injury', without the limitation to specific body parts.¹⁰ This definition is therefore far more likely to include strangulation and would therefore be illegal content for the whole of the UK.

Recommendation:

28. A more general review of the scope of extreme porn laws, though outside the scope of the Bill, would be desirable. Such a review could help the functioning of the regime here. See also recommendations on obscene publications (below).

Some forms of intimate image abuse material (non-consensual pornography) (illegal content, priority offence, listed in Schedule 7)

29. Obliging porn platforms to act in relation to intimate image abuse material, often called non-consensual pornography, is vital due to the prevalence and harms of this material.¹¹ Yet the Bill in practice divides intimate image abuse material into three categories, which require different responses from service providers. The categories are: non-consensual distribution offence as priority illegal content; other image based sexual abuse that is unlawful but not priority; and image based sexual abuse that is not contrary to the criminal law. The boundaries between these categories are somewhat arbitrary and do not necessarily reflect the harm suffered by the victim.

30. The criminal offence of non-consensual distribution of private sexual images with intent to cause distress (section 33 of the Criminal Justice and Courts Act 2015) is listed as a priority offence in Schedule 7. This means that porn services will be obligated to ensure this material is not easily encountered on their services and swiftly remove any such content when on notice.

Prevalence of image-based sexual abuse on porn sites:

31. The Revenge Porn Helpline reports that the main destination for distribution of non-consensual material is pornography websites, making up 52% of reports to their service.¹² Notably this is an *increase* in material being distributed on porn sites from previous years. Other research with victims found that 1 in 5 had their images distributed onto pornography websites.¹³ Analysis of the content of mainstream pornography websites found many titles suggesting non-consensual porn on the landing pages of the websites.¹⁴ Many victims have spoken out about their experiences of having sexual images of them shared on porn websites and their difficulties of getting the material removed.¹⁵

Investigations by the *New York Times* also revealed the easy availability of unlawful material that had been circulating on mainstream porn sites for many years, despite attempts to get it removed.¹⁶ For example, the recent study of the content of mainstream porn sites found titles such as ‘Cheated GF fucked on webcam in revenge porn’.¹⁷ However, it should be noted that the terms and conditions of such porn providers have long stated that they do not to allow non-consensual material on their sites, yet the material is still available online, despite being so easily identified by simple word searches.¹⁸ The safety duties require services to enforce their terms of service consistently; it is unclear whether this allows equally poor non-enforcement.

Challenges with specifying non-consensual distribution offence:

32. The current proposal will only apply to a sub-set of intimate image abuse materials due to the requirements being based on a very specific legal provision. Significantly, the law in Scotland differs in many important respects from the law in England, Wales and Northern Ireland.¹⁹ Specifically, the law in Scotland: (a) has a broader definition of what constitutes an intimate image; (b) includes altered images, such as deepfakes; and (c) covers a broader range of abusive motivations.²⁰ Service providers will need to understand the scope of each offence. Nonetheless, only those images which have been distributed with intent to cause distress (or in Scotland being reckless as to causing distress) are listed as priority offences. This limits the application of the priority rules to distribution for financial gain (hacking), sexual gratification, as part of ‘[collector culture](#)’, humour/kudos, deprioritising the rest. While Scottish law covers a broader field than English law (being based on reckless as to distress) and would, under the terms of cl 52²¹, in practice constitute the relevant standard for the regime, it is still limited in scope.

33. The law in England and Wales does not cover the non-consensual distribution of altered, fake images, often referred to as fakeporn or deepfakes. This is quintessentially an issue of online violence against women and girls, growing ever more common and extremely harmful. Note, Scots law does cover altered images and therefore, under cl 52, service providers will be required to act in relation to the non-consensual distribution of altered intimate images.

34. The current English law only covers images which are specifically defined as private and sexual in the legislation. For example, it excludes material that has previously been shared ‘for reward’ (section 33(5)), meaning that sexual material originally shared to a closed group of paid subscribers, such as via OnlyFans, is not included. Such material is often stolen and uploaded to porn websites. The definition also excludes images which may be considered intimate but not sexual, such as people in underwear.²² As noted, the Scottish offence is broader.

Possible reform of English & Welsh law on non-consensual distribution offence:

35. A review of this area of law has been on-going for three years and a final report from the Law Commission is expected soon.²³ Even if this law review recommends a simplification of the law and comprehensive coverage of all forms of intimate image abuse, it is not clear when any legislation would be enacted and come into force. The extent of changes necessary is likely to require new legislation (as opposed to an amendment to the existing section 33 offence) and therefore Schedule 7 would need to be substantively revised. While the Secretary of State has power to amend the schedule, this is likely a time-consuming process with uncertain results.

Scots law on non-consensual distribution of intimate images:

36. While Schedule 7 did not initially list the corresponding offences for Northern Ireland and Scotland, there are Government amendments on this point.

Recommendations:

37. Amend section 33 of the Criminal Justice and Immigration Act to include the non-consensual distribution of deepfake/altered images to bring in line with Scots law and to ensure they are included as priority offences.²⁴

38. Government to commit to reviewing the law on intimate image abuse following publication of Law Commission and to swift new legislation providing a comprehensive, straightforward law, with Schedule 7 being urgently amended to include new offences.

Obscene publications regarding adults (which are not extreme pornography) (illegal non-designated content)

39. Offences under the Obscene Publications Act 1959, as well as the Scottish equivalent²⁵, are *not* listed as priority offences meaning that there are reduced obligations on service providers compared with extreme pornographic images. The 1959 Act criminalises the publication (whether or not for gain) of an 'obscene' article and therefore specifically addresses the distribution of a pornographic materials deemed unlawful. It might have been thought, therefore, that this is the provision most appropriately included in a priority list.²⁶

40. That these are not listed as a priority offence must be assumed to be an attempt to limit the scope of the priority offences, likely due to their exceptional opacity of meaning. For example, an obscene publication is one which if taken as a whole, tends to "deprave and corrupt" persons who are likely to see it.²⁷ Subsequent case law has done little to clarify these terms and, with so few prosecutions, there is little guidance as to exactly what this law covers. Nonetheless, as noted above, the extreme pornography laws are themselves unclear, with the definition requiring proof that an image is 'obscene'.²⁸

41. There is overlap between the offences, with prosecutorial guidance stating that all material that is extreme pornography is likely to be deemed obscene. This raises the question as to what materials might be obscene, but not extreme. The CPS guidelines suggest that the following may all constitute obscene material: content relating to criminal conduct, content involving participants who cannot consent (children, animals, dead people) and content that shows the commission of a criminal offence.

42. Material that may be obscene, but not extreme porn, could include depictions of:

- *bestiality*: masturbation of or by an animal as there is no consent (under English law)²⁹
- *Incest porn*: depictions of acts which constitute criminal offences, such as penetrative sexual activity between proscribed family members including parents, children, aunts and uncles.³⁰ There is an extensive amount of such material freely and easily accessible online.³¹ Complications may arise in relation to material seeking to evade regulation where titles include terms such as 'not Sister and Brother'.³²
- *serious bodily injury*: pornographic material depicting serious injury to the body other than the anus, breasts or genitals as such acts may constitute criminal conduct, as it is not possible to consent to injury constituting actual bodily harm or worse³³
- *choking*: depictions of choking might be considered 'life-threatening' and if so, may constitute an extreme pornographic image. If not, choking might be considered actual bodily harm and therefore criminal conduct and potentially obscene.

- *Suffocation and strangulation*: depictions may be deemed 'life-threatening' and therefore an extreme pornographic image. If not, but of the level of actual bodily harm, it is likely criminal conduct and therefore potentially obscene.

Recommendation:

43. Add Obscene Publications Act (and equivalent Northern Irish and Scots law) to list of priority offences in Schedule 7 particularly to capture incest porn and strangulation.

Age Assurance/Verification and Pornography Services

Children's access to porn:

44. A 2019 BBFC study found that 51% of 11- to 13-year-olds, 66% of 14- and 15-year-olds, and 79% of 16- and 17-year-olds had seen pornography at some point.³⁴ Overall, recent evidence suggests pornography exposure could be 'daily' for 'most' 16-to 18-year-old boys and young men.³⁵

45. 2019 survey of 1,000 16-17-year-olds in the UK found a higher proportion viewing material on social media (63%) and search engines (51%), compared to dedicated pornographic websites (47%).³⁶ However, more time is spent viewing pornographic material on dedicated pornographic websites than on social media, search engines, or YouTube. This is similar to the BBFC study which found that among 16- to 17-year-olds, 62% had intentionally sought out pornography via an image or video search engine, 46% via social media sites, and 44% via dedicated pornography websites.³⁷

Possible ease of evading age assurance:

46. Most significantly in terms of age assurance discussions, survey evidence suggests that 46% of 16-17-year-olds had used a VPN or Tor browser, and another 23% knew what they were.³⁸ This means that older children may be able to evade age restrictions with relative ease, depending on what requirements are in place for age verification/assurance, as well as the approach taken to the interpretation of the safety duties.

Gendered use and exposure to pornography:

47. A gendered analysis and understanding of these issues is key, with the surveys above noting that girls were significantly less likely to view pornography on dedicated pornography websites, viewed pornography less frequently and viewing for less time. When considering girls' use of pornography, the context of inequality and levels of sexual abuse must also be noted, which can influence why girls are viewing pornography, and the context (ie possible coercion).³⁹ Girls will also be accessing pornography for similar reasons to boys, in the absence of appropriate and helpful sex education.

Robust enforcement required if age assurance obligations to be effective:

48. Even if age assurance provisions are enacted, implementation is not guaranteed. Experience from France and Germany shows that despite legal requirements to introduce age restrictions and pressure from regulators, pornography platforms are strongly resisting, including Pornhub - despite it stating its support for age verification.⁴⁰ While there are enforcement mechanisms in the Bill, including business disruption measures and fines for executives, there will still be challenges due to the lack of transparency regarding the ownership and control of the largest pornography platforms.⁴¹

Differences in age assurance obligations between Part 3 safety duties and Part 5 access obligations:

49. Part 5 only applies to those services *not* showing or displaying user content. Section 68(2) (Part 5) specifically provides a 'duty to ensure that children are not normally able to

encounter content that is regulated provider pornographic content in relation to the service (for example, by using age verification)'. If the service *only* publishes or displays user porn, it does *not* have to comply with the access requirements in Part 5. But, such services, such as OnlyFans or Twitter, will be subject to the general children's safety duties which require services to mitigate harm to children or to introduce limits on access.⁴² As with the other categories of content, there are more detailed obligations with regard to priority content harmful to children; unfortunately, the Bill does not specify any priority content categories. Note that the language in the safety duties on user and search services in cl 31(2) - 'that it is not possible for children to access' - arguably imposes a more stringent obligation than that for provider porn services in Part 5, 68(2) ('not normally able to encounter').

OFCOM Code of Practice on age assurance and VPNs:

50. Currently, high proportions of young people either use VPNs or know of their use in evading restrictions on access to various services. If age assurance/verification obligations are to be effective, they will need to include provisions on the use or not of VPNs and for this to be rigorously enforced.

Recommendations

51. Harmonise age assurance/verification requirements across parts 3 and 5 of the Bill rather than current 'not normally able to encounter' and 'not possible for children to access'.

52. Consider specifying in more detail minimum standards for age verification/assurance such as blocking of VPNs.

Pornography that is lawful but harmful to adults

53. Content that is harmful to adults but not contrary to the criminal law has the lowest level of protection and is sub-divided into two categories:

- priority harmful content: service providers only have to specify in their terms of service how they are to deal with this content.
- other (non-designated) harmful content: all that is required is a statement as to levels of risk and harm from such content.

54. These duties only apply to Cat 1 services (the largest/riskiest but as yet not defined). There are additional user empowerment duties which are unique to this category of priority content. These are tools to enable the user to reduce the likelihood of the user encountering priority harmful content or to alert the user as to the harmful nature of that content. The Bill also requires that service providers have a duty to provide tools to filter out non-verified users if a user so wishes.

55. While there are equivalent provisions in relation to illegal content and content harmful to adults applying to search engines, there is no such equivalent for content harmful to adults.

What types of pornography might be lawful but harmful to adults?

56. We do not yet know what pornography, if any, will be considered 'lawful but harmful to adults' (of either category). At the moment, this is to be determined by the Secretary of State at a later date. We would suggest that the following should be listed as priority harmful content:

Porn representing potentially unlawful acts, including incest porn, suffocation, strangulation (if not classed as obscene): There is a range of pornographic

material that many would argue is harmful as it eroticises abuse and sexual violence, including many representations of incest (see above).⁴³ Some of this material may be obscene, but it may not be, in which case it might be considered harmful.

Non-consensual pornography not currently criminalised: This would include intimate images uploaded to porn sites where there was no evidence to prove intention to cause distress, including voyeurism and upskirting images.⁴⁴

Deepfake porn, fakeporn and adverts for deepfake porn services: the distribution of deepfake or fakeporn is not currently criminalised in England, Wales and Northern Ireland and therefore not included in the current list of priority offences in Schedule 7. Lawful but harmful material should also include adverts for deepfake porn services (where deepfake porn can be created for a fee) as these often advertise showing deepfake porn.⁴⁵

Nudifying apps and images: There are now apps available which ‘nudify’ a non-sexual image of a woman or girl which have received millions of hits.⁴⁶ These images are often then shared on other forums, distributed through social media and uploaded to porn sites. Parliament’s DCMS select committee report on the Online Safety Bill recommended that nudification images should either be subject to the criminal law, or pending such reforms, be included as legal but harmful content.⁴⁷

57. We also note that the distribution of content that it is not contrary to the criminal law may still be restricted in the offline environment. For example content classified as 18R by the BBFC should be distributed only via a licensed establishment. It is unclear to us why similar content distributed online (but which as a matter of drafting) is available without restrictions, prima facie running contrary to the principle that the same approach should be taken online as offline. The online safety regime would not preclude such content from being available; for harmful but lawful content the obligation is for service providers only have to specify in their terms of service how they deal with this content.

Recommendation:

58. List content harmful but lawful to include distribution of deepfake porn, all forms of non-consensual porn not criminalized, and incest porn not falling within obscenity laws. Bring online position closer to offline position by listing material that would not obtain an R18 or any other classification from the BBFC (as described in Communications Act 2003 S368E(3)(a) and (b)) but which is not illegal content.

Additional Legislative Options for Regulating Online Pornography

59. Consideration should be given to the following measures which would aim to reduce the extent of unlawful material on pornography services:

Require porn companies to verify the age/consent of all those in pornographic videos/images

60. The Online Safety Bill could include new provisions requiring pornography providers to ensure the age and/or consent of all those featured in provider porn and user porn that is published or displayed on their sites.

61. Such a provision was by the Canadian Parliament’s Standing Committee on Access to Information, Privacy and Ethics in June 2021: ‘That the Government of Canada mandate that content-hosting platforms operating in Canada require affirmation from all persons depicted in pornographic content, before it can be uploaded, that they are 18 years old or older and that they consent to its distribution, and that it consult with the Privacy

Commissioner of Canada with respect to the implementation of such obligation.’⁴⁸ These provisions are now included in a Private Member’s Bill currently before the Canadian Parliament.⁴⁹

62. Service providers should consider the extent to which users who upload/disseminate user-generated porn should be identifiable, so as to facilitate effective enforcement of prohibitions of non-consensual sharing of intimate images, as well as CSAEM. The European Parliament’s negotiating position for the DSA contained such a provision. Note this is not a requirement to end anonymity generally, rather the suggestion to look at the risk relating a specific group of users and content.⁵⁰

New offence criminalising the individual user who makes false representations of consent when uploading to porn websites

63. The Online Safety Bill could introduce a new criminal offence where an individual user makes a false representation that they have the consent of all those featured in any user porn to be uploaded to a service provider.

64. This has been [recommended](#) by a coalition of violence against women organisations in their evidence regarding the Online Safety Bill. Such a provision would mirror current laws where making false representations can constitute the criminal offence of fraud.⁵¹ A similar provision was [recommended](#) by the Canadian Parliament’s Standing Committee on Access to Information, Privacy and Ethics in June 2021: ‘That the Government of Canada set requirements for uploaders of content to provide proof of valid consent of all persons depicted and that the new regulations include penalties severe enough to act as an effective deterrent.’

Expertise

[Professor Clare McGlynn QC \(Hon\)](#) is an expert on laws relating to pornography, sexual violence and online abuse, including image-based sexual abuse and cyberflashing. She’s co-author of the recent [study](#) revealing 1 in 8 title on mainstream porn sites describe sexually violent porn, widely reported including in [Sunday Times](#) and [New York Times](#). She has given oral evidence before select committees of the [Scottish, UK Parliament](#) and [New Zealand Parliament](#) on reforms to online abuse laws, as well as recently giving [oral evidence](#) to the UK Parliament Joint Committee reviewing the Online Safety Bill. She has addressed policy audiences across Europe, Australia, Korea and the US, as well as working with social media companies including Facebook, Google and TikTok to develop their policies. She played a key role in the [campaign](#) to include rape pornography within the extreme pornography laws, working together with the End Violence Against Women Coalition and Rape Crisis South London. She is a co-author of the recently published books [Cyberflashing: recognising harms, reforming laws](#) (2021) and [Image-Based Sexual Abuse: a study on the causes and consequences of non-consensual imagery](#) (2021). [www.ClareMcGlynn.com](#) @McGlynnClare

[Professor Lorna Woods](#), OBE is Professor of Internet Law at the University of Essex and a member of the Human Rights Centre. She started her career in private practice, advising in the technology, media and telecommunications sectors and, since moving to academia, she has taught and researched in these areas. Professor Woods has received an OBE for her services to internet safety policy. Her most recent project, with Carnegie UK Trust, is on [the regulation of social media](#), introducing and arguing for a systemic approach. This work underpinned the UK government’s approach to legislation; she has been invited to give evidence to numerous Parliamentary select committees both in the UK and abroad, and regularly presents on law and tech at policy conferences. Recent publications include "[Obliging Platforms to Accept a Duty of Care](#)" in Moore and Tambini (eds) *Regulating Big Tech: Policy Responses to Digital Dominance* (OUP, 2021) and a co-edited collection, [Perspectives on Platform Regulation Concepts and Models of Social Media Governance Across the Globe](#) (Nomos, 2021). Professor Woods also researches digital human rights, including a chapter on freedom of expression in Peers et al (eds) [The Charter of Fundamental Rights: A Commentary \(2nd ed\)](#) (Hart, 2021). She is a senior associate research fellow at the Information law and Policy Centre, Institute of Advanced Legal Studies, University of London, a member of the Centre for Science and Policy network at the University of Cambridge and a fellow of the Royal Society for Arts.

¹ For concerns regarding the focus in the Bill on specific criminal offences, see the comments of the Independent Reviewer of Terrorism Legislation: [Microsoft Word - Re OSB and Terrorism Legislation.-docx \(independent.gov.uk\)](#)

² Some reflection of this type of approach can be seen in the definitions of content harmful to adults and harmful to children, which both refer to content 'of a kind'.

³ Clause 83(6)

⁴ For an analysis of the extreme pornography offence, data on prosecutions and recommendations for reform, see Clare McGlynn and Hannah Bows, '[Possessing Extreme Pornography: Policing, Prosecutions and the Need for Reform](#)' (2020) 83(6) *Journal of Criminal Law* 473-488 and Clare McGlynn and Erika Rackley, '[Criminalising Extreme Pornography: A Lost Opportunity](#)' (2009) *Criminal Law Review* 245-260.

⁵ Section 51A Civic Government (Scotland) Act 1982.

⁶ [Extreme Pornography | The Crown Prosecution Service \(cps.gov.uk\)](#)

⁷ To further confuse, there is no symmetry between the meaning of 'obscene' in the extreme pornography offence (a lower threshold based on the 'ordinary' meaning of the word) and obscenity under the Obscene Publications Act (meaning the actions must also 'deprave and corrupt'). For an explanation and discussion, see Clare McGlynn and Hannah Bows, '[Possessing Extreme Pornography: Policing, Prosecutions and the Need for Reform](#)' (2020) 83(6) *Journal of Criminal Law* 473-488.

⁸ [400672_CH4-EN_TEXT \(legislation.gov.uk\)](#)

⁹ [Extreme Pornography | The Crown Prosecution Service \(cps.gov.uk\)](#)

¹⁰ Section 51A Civic Government (Scotland) Act 1982.

¹¹ For more information on the prevalence and harms of intimate image abuse, see the summary given in Clare McGlynn and Lorna Woods, *Image-Based Sexual Abuse, Pornography Platforms and the Digital Services Act*, available at: [ImageBasedAbuse-and-DSA-Expert-Opinion-McGlynn-and-Woods-17-Jan-2022.pdf \(hateaid.org\)](#)

¹² 'Revenge Porn Helpline, *Intimate Image Abuse - an evolving landscape* (2021): [RP_report_full_final_AW \(revengepornhelpline.org.uk\)](#)

¹³ Survey of 6,109 participants across Australia, New Zealand and the United Kingdom: Henry, McGlynn et al, *Image-Based Sexual Abuse: a study on the causes and consequences of non-consensual sexual imagery* (Routledge, 2021), p 29.

¹⁴ Fiona Vera-Gray, Clare McGlynn et al (2021) 61(5) [Sexual violence as a sexual script in mainstream online pornography](#) *British Journal of Criminology* 1243-1260.

¹⁵ [#NotYourPorn Is The Campaign Fighting To Get Non-Consensual Content Removed From UK Porn Sites \(bustle.com\)](#) and [Pornhub: The ongoing revenge porn investigation \(openaccessgovernment.org\)](#).

¹⁶ [Opinion | The Children of Pornhub - The New York Times \(nytimes.com\)](#) and [Opinion | Why Do We Let Corporations Profit From Rape Videos? - The New York Times \(nytimes.com\)](#).

¹⁷ Fiona Vera-Gray, Clare McGlynn et al (2021) 61(5) [Sexual violence as a sexual script in mainstream online pornography](#) *British Journal of Criminology* 1243-1260

¹⁸ Clare McGlynn and Fiona Vera-Gray, [Porn Website T&Cs Are A Works Of Fiction. We Need Radical Measures To Take Them On. | HuffPost UK Life \(huffingtonpost.co.uk\)](#)

¹⁹ The law in Northern Ireland replicates English law, see Northern Ireland (Justice Act (Northern Ireland) 2016, ss.51- 53.

²⁰ Section 2, Abusive Behaviour and Sexual Harm Act (Scotland) Act 2016.

²¹ Clause 52 and Explanatory Notes para 299

²² See discussion in the Law Commission [Consultation on Intimate Image Abuse](#), para 6.51.

²³ For more information, see the Law Commission website for this project: [Taking, making and sharing intimate images without consent | Law Commission](#)

²⁴ This is straightforward. Scots law provides a definition of intimate image or video as including material 'whether or not the image has been altered in any way' (section 3(2) Abusive Behaviour and Sexual Harm Act 2016.

²⁵ S 51 Civic Government (Scotland) Act 1982

²⁶ The equivalent offence in Scotland is to be found in section 51 of the Civic Government (Scotland) Act 1982. The law also differs in Northern Ireland.

²⁷ Case law does little to enlighten us as to the meaning of these terms: "To deprave means to make morally bad, to pervert, to debase or to corrupt morally. To corrupt means to render morally unsound or rotten, to destroy the moral purity or chastity, to pervert or ruin good quality, to debase, to defile": *Penguin Books Ltd* [1961] Crim LR 176.

²⁸ Section 63(5A).

²⁹ The extreme porn offence only covers intercourse and oral sex with an animal, section 63(7) Criminal Justice and Immigration Act 2008.

³⁰ Offences under sections 64 and 65 of the Sexual Offences Act 2003.

³¹ The titles used are all taken from the following study which found that sexual activity between family members was the most common form of sexually violence porn found in the study from Vera-Gray, McGlynn et al (2021). This prevalence is similar to other studies such as New Zealand research which found that nearly half of the pornographic videos examined featured step or other family sexual activity Office of Film and Literature Classification (2019), [Breaking Down Porn—A Classification Office Analysis of Commonly Viewed Pornography in New Zealand](#). Office of Film and Literature Classification (Office of Film and Literature Classification 2019).

³² Titles from study Vera-gray, Clare McGlynn et al (2021).

³³ The current law states that it is not possible to consent to ‘serious harm’ defined as actual bodily harm or more severe: section 71 of the Domestic Abuse Act 2021 which codified existing case law. Crown Prosecution Service guidance explains: ‘Where a person consents to an activity, as a matter of law such consent will not amount to a defence to assault occasioning actual bodily harm or worse: *R v Brown and others* [1994] 1 AC 212. Accordingly, publications which show or depict the infliction of serious harm may be considered to be obscene publications because they show criminal assault notwithstanding the consent of the victim. This includes dismemberment and graphic mutilation. It includes asphyxiation causing unconsciousness, which is more than transient and trifling, and given its danger is serious.’ [Obscene Publications | The Crown Prosecution Service \(cps.gov.uk\)](#) CPS guidance further states that bodily harm ‘has its ordinary meaning and includes any hurt calculated to interfere with the health or comfort of the victim: such hurt need not be permanent, but must be more than transient and trifling: (*R v Donovan* [1934] 2 KB 498)’: [Offences against the Person, incorporating the Charging Standard | The Crown Prosecution Service \(cps.gov.uk\)](#)

³⁴ A representative sample of 1,142 UK children: BBFC (2020), [Young people, pornography & age-verification](#) p 15.

³⁵ As evidenced in BBFC 2020 study and Thurman, N., & Obster, F. (2021). [The regulation of internet pornography: What a survey of under-18s tells us about the necessity for and potential efficacy of emerging legislative approaches](#). *Policy Internet*, 13, 415–432.

³⁶ Thurman, N., & Obster, F. (2021). [The regulation of internet pornography: What a survey of under-18s tells us about the necessity for and potential efficacy of emerging legislative approaches](#). *Policy Internet*, 13, 415–432. <https://doi.org/10.1002/poi3.250>

³⁷ BBFC (2020) [Young people, pornography & age-verification](#) p 26.

³⁸ Thurman, N., & Obster, F. (2021). [The regulation of internet pornography: What a survey of under-18s tells us about the necessity for and potential efficacy of emerging legislative approaches](#). *Policy Internet*, 13, 415–432, p 418. This is higher than a similar survey with French 15-17 year-olds which found 9% had used a VPN and 33% knew of them: Thurman et al (2022) ‘[Lessons from France on the regulation of internet pornography: how displacement, circumvention and legislative scope may limit the efficacy of Article 23](#)’ *Policy and Internet* 1-22.

³⁹ Children’s Commissioner (2013) [Basically_porn_is_everywhere.pdf \(childrenscommissioner.gov.uk\)](#).

⁴⁰ Thurman et al (2022) (above) and [Twitter Has Started Blocking Porn in Germany | WIRED](#); in re France see Blocman, A., ‘ARCOM orders two more pornographic websites to block access to minors’ (2022) 6:1 IRIS 9, <https://merlin.obs.coe.int/article/9509>

⁴¹ [Mysterious owner of Pornhub found living in London - The Globe and Mail](#)

⁴² NSPCC, *Time to act - an assessment of the Online Safety Bill* (April 2022) p 17: [time-to-act.pdf \(nspcc.org.uk\)](#). The NSPCC does note that ‘OnlyFans will be required to introduce age verification measures to comply with the Video Sharing Platforms (VSP) regime, although it is anticipated that the online safety regime will supersede these arrangements. As a result, there is a potentially perverse outcome whereby OnlyFans is subject to a less onerous regulatory regime when the Online Safety Act takes effect.’

⁴³ Titles from study Vera-Gray, Clare McGlynn et al (2021).

⁴⁴ For the extent of such material on mainstream porn sites, see Vera-Gray et al and ([No Woman In A Public Place Is Free From The Risk Of Upskirting - We Must Do More To Tackle Image-based Sexual Abuse | HuffPost UK Life \(huffingtonpost.co.uk\)](#))

⁴⁵ The [report](#) of Parliament’s Joint Committee on the Online Safety Bill noted that: Platforms which host pornography could reasonably be expected to identify deepfake pornography as a risk that could arise on their services and would therefore need systems and processes in place to mitigate that risk’ (p 166).

⁴⁶ [Nudification Internet Trend: AI Tools Which 'Undress' Womens Photos | Glamour UK \(glamour-magazine.co.uk\)](#)

⁴⁷ DCMS Committee, Online Safety Bill Report: [Online safety and online harms \(parliament.uk\)](#) p 3.

⁴⁸ Standing Committee on Access to Information, Privacy and Ethics, *Ensuring the Protection of Privacy and Reputation on Platforms Such as Pornhub* (July 2021): ‘Recommendation of the Canadian parliament concerning the duty to verify age and consent: That the Government of Canada mandate that content-hosting platforms operating in Canada require affirmation from all persons depicted in pornographic content, before it can be uploaded, that they are 18 years old or older and that they consent to its distribution, and that it consult with the Privacy Commissioner of Canada with respect to

the implementation of such obligation.'

⁴⁹ [Bill C-302 432 An Act to amend the Criminal Code \(pornographic material\) | Projet de loi C-302 432 Loi modifiant le Code criminel \(matériel pornographique\) \(parl.ca\)](#)

⁵⁰ Clare McGlynn and Lorna Woods, 'Image-based Sexual Abuse, Pornography Platforms and the Digital Services Act' (2022), <https://hateaid.org/wp-content/uploads/2022/04/ImageBasedAbuse-and-DSA-Expert-Opinion-McGlynn-and-Woods-17-Jan-2022.pdf>

⁵¹ Fraud Act 2006 [Fraud by false representation](#) is when someone dishonestly makes an untrue or misleading representation with the intention of making a gain for himself or causing loss to another. There are many other false representations provisions, such as in electoral laws. They usually are targeted at individuals seeking obtain financial or similar gains.