

## Pornography and the Online Safety Bill

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

10 May 2022

### Key points

**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. This also raises the question of the appropriate regime for regulating pornographic content, as other regulatory regimes designed to tackle content standards may be more appropriate in some cases.

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

**Only user-to-user and search services have duty of care and safety obligations:** Important to note that while the Bill extended age assurance requirements to all porn providers, only those with user-to-user services are required to comply with the safety duties.

**Problems defining illegal content based 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.

**Definition of harm does not recognise intersecting characteristics:** The definition of harm in cl 187 does not appear to recognise intersecting characteristics, such as being a black woman, leading to a lack of understanding of the nature and prevalence of online harms.

**Welcome inclusion of extreme pornography as priority offence particularly in light of easy availability of rape porn:** Listed as a priority offence, service providers – including search services - will be required to reduce the prevalence of such material online.

**Extreme pornography offence lacks clarity with risk of reduced removal of content:** However, some elements of the extreme pornography offence lack clarity, with the risk of reduced enforcement of obligations.

**Not all bestiality porn included and differences between English and Scots law:** Bestiality videos/images of masturbation are not included in the extreme porn offence in England (but they are in

Scotland). Differences in law between UK jurisdictions could give rise to regulatory challenges and lack of enforcement of safety duties.

**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 are listed as priority offences. This excludes distribution for financial gain (hacking), sexual gratification, as part of 'collector culture', humour/kudos. The limited nature of the English law offence may mean less swift or effective removal of non-consensual material. The law in Scotland is broader than in England, Wales and Northern Ireland potentially leading to regulatory failures.

**Obscene publications not included as priority offence:** despite the Obscene Publications Act 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 including: bestiality involving masturbation, some incest porn, serious bodily injury, choking and suffocation porn.

**Deepfake porn not a priority offence:** The non-consensual distribution of deepfake porn which is increasingly prevalent and potentially devastating is not currently an offence in England, Wales and Northern Ireland and therefore not a priority offence. It might be considered harmful but legal, but little is known about this category, and it would only apply to the largest/riskiest Cat 1 companies.

**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. There are no requirements on user-to-user dedicated pornography services to authenticate the age or consent of those in videos/image uploaded by users. 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.

## Recommendations

### Overarching recommendations

**Priority content not tied to specific criminal offence:** Ultimately, broader definitions of priority illegal content, not tied to very specific criminal offences, would provide far greater protection against online harms.

**Expand definition of 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.

**Include Scotland and Northern Ireland offences as priority offences:** amend priority offences in Schedule 7 to include equivalent offences under Scots and Northern Irish law.

**Include in Bill schedule of harmful but lawful content:** Amend Bill to include Schedule of content harmful but lawful to adults and include deepfake/altered porn as a priority content harmful to adults and to children.

**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

**Amend definition of illegal content:** amend cl 52 so that rather than requiring content to 'amount to' the relevant criminal offences, the definition should refer to 'content of a type likely to constitute ' such an offence or content where 'there are reasonable grounds to believe ' it might constitute such an offence.

**Deepfake porn included as priority harmful content:** include non-consensual distribution of deepfakes/altered sexual images as a priority harm in a schedule listing content harmful to adults and schedule of primary priority content harmful to children.

**Obscene Publications Act:** add to list of priority offences in Schedule 7.

**Content harmful to adults list:** produce list of content harmful to adults, to include distribution of deepfake porn, all forms of non-consensual porn not criminalized and incest porn not falling within obscenity laws.

**Harmonise age assurance/verification requirements:** make the requirements and obligations regarding children's access 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 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.

## Case studies: Pornography content and access in the Online Safety Bill

We provide below some initial suggestions as to how the Online Safety Bill might affect access to, and the content of, pornography on current services. This analysis is *preliminary* as there are many areas of the Bill that are not clear, not yet substantiated in terms of detail or there is a lack of specificity as to how provisions will operate in practice.

### Google: search service with porn easily accessible

Google is an example of a search service covered by the Bill (cl 2) and which could be affected to a considerable extent by the obligations in the Bill.

**Availability of pornography:** Pornography, including extreme pornography, is easily accessible via the most basic, one-click search on Google. This includes the easy search for and return of extreme pornography, other illegal porn and incest porn. The easy availability of rape pornography via one-click on Google provides a clear example of how easy it is to access material that is unlawful to possess or distribute, and which plays a significant role in normalizing and minimizing sexual violence.

**Children's access:** As the service is a search service and not a provider of porn, it is not affected by the Part 5 children's access obligations.

**Children's duties of care:** Google is a service likely to be classed as 'likely to be accessed by children' and therefore child safety duties apply. These require a search service to minimise the risk of children in age groups judged to be at risk of harm from encountering search content that is harmful (including pornography which is priority content). However, the obligation is to 'minimise' risks and harms and may be satisfied by means such as parental controls.

#### **Other duties of care:**

**(a) risk assessment:** Google will be required to undertake a risk assessment including identifying the level of risk of encountering priority illegal content, such as extreme porn, as well as identifying the nature and severity of harm that might be suffered. There is a very high level of risk of encountering extreme porn (and other illegal porn) through search on Google, and the harm is considerable (hence why the possession of this material is a criminal offence).

**(b) safety duties:** The safety duties require search services to minimise the risk of individuals encountering priority illegal content and other illegal content of which it has been made aware. It must also make publicly available statements how individuals are to be protected from illegal content. In terms of priority offences, this will principally mean ensuring no extreme porn on the service, as well as any private, sexual material distributed without consent and with intent to cause distress. There are no obligations with regard content that is harmful to adults.

**Change following the Bill:** The duty of care applying to priority offences, such as extreme pornography including rape porn, should make a considerable difference to searches on Google. Google will be obliged to *minimize* the risk of encountering this material which at present is astonishingly easy to access. This will require considerable steps to alter search services compared to current practice.

## **Pornhub and similar large, mainstream, commercial porn services**

These are services dedicated to distributing pornography and include user-generated content as well as service provider content. The services are free and easily accessible.

**Availability of pornography:** Evidence suggests there is a considerable amount of sexually violent and unlawful material (intimate image abuse videos/images) on these sites, as well as deepfake/altered videos, despite terms and conditions, and public statements, suggesting otherwise.

**Children's access:** In relation to provider porn (as opposed to porn uploaded by users), they will be subject to the duty to restrict access to children (through child safety duties in cl 68(2)), though note the ease of evading restrictions through VPNs and similar. As regards user-generated content, service providers would either have to ensure that children cannot access the service (cl 31(2)) or comply with the children's safety duty.

**Other duties of care:** These will apply to user porn, but not porn provided by the porn service. There are separate duties depending on the type of content. The illegal content safety duty includes obligations to proactively ensure users do not encounter content amounting to priority offences, including extreme pornography and some forms of intimate image abuse material. In relation to other illegal material, for example obscene publications, there are reduced obligations, including having a system remove such content swiftly when notified. Services could be more proactive in removing such content: the Bill envisages the possibility of "proactive technologies" (including content moderation technology, user-profiling technology and behaviour identification technology) in relation to illegal content. It is unclear, however, what level of action will be expected in relation to the different types of illegal content. For content harmful to adults, the obligations on service providers only apply to priority content and that is limited to telling users how such content would be treated by the provider and giving users tools to curate their own experience. This set of obligations only apply to a limited number of service providers: those large and risky (Cat 1).

### **Change following the Bill:**

**(a) content:** While new illegal content duties could impact on the content available, there are unlikely to be any significant changes regarding content unless there is proactive investigation and challenge from Ofcom, due to these services currently failing to comply with their own terms of service and obfuscating attempts to remove unlawful content. The obligations regarding content that is deemed harmful to adults is very weak; it is unclear as yet which companies would have obligations as regards this category of content in any event.

**(b) access:** While age assurance will need to be formally introduced, it is unclear whether the obligations in clauses 68(2) affecting provider porn, and 31(2) on user porn, will require the same standards of age assurance as each other, and whether these will amount to more stringent requirements than current industry practice. There is no automatic linking of the two provisions, leaving the possibility that a service which complies with cl 68(2) does not satisfy cl 31(2) and therefore would still have to engage with the children's safety duties (or vice versa). If there is no tightening of standards, the ease of circumventing such restrictions, especially by older children, will mean young people continue to access pornography from the mainstream commercial sites.

## Twitter: user to user service with porn content, likely accessed by children

Twitter is an example of a user-to-user service where user-generated pornography can be easily accessed and is likely to be a Category 1 service.

**Availability of pornography:** Pornography is easily accessible on Twitter.

**Children's access:** As Twitter only displays user-generated porn, the access restrictions in Part 5 of the Bill do not apply. Platforms providing user porn only, such as Twitter, will be subject to the general children's safety duties as they are likely to be accessed by children (unless they put in place measures to ensure that children do not access the service (cl 31(2))).

**Children's duties of care:** As the Government has indicated that all pornography will be classed as 'priority content' regarding children, this would require Twitter to protect children in age groups judged to be at risk of harm from encountering this content, for example by using age assurance mechanisms.

**Other duties of care:** This will principally mean ensuring no extreme porn on the service. More challenging will be obligations to ensure that some forms of non-consensual sexual material listed as priority offences are not encountered through the service, and to take down that content swiftly on becoming aware of it. In relation to other illegal pornography, such as obscene materials, there are reduced obligations, such as having a system to remove such content when notified, as described above regarding Pornhub. The obligations in relation to content that is harmful to adults are weak, though the service providers should apply their terms of service consistently and provide user empowerment tools.

**Change following the Bill:** As pornography is likely to be classed as 'priority content' regarding children, this would require Twitter to protect children in age groups judged to be at risk of harm from encountering this content, for example by using age assurance mechanisms. It is unclear exactly what will be required to meet this obligation. As some forms of intimate image abuse material are classed as priority offences, measures ensuring such content is not encountered will be required, with swift take-down.

## OnlyFans: user-to-user service with porn content

OnlyFans is an example of a user-to-user service displaying pornography. The extent of its obligations will depend on whether it is classed as a service 'likely to be accessed by children'. While the service is aimed at over 18s, recent investigations have shown how easy it has been for children to establish accounts.<sup>1</sup>

**Availability of pornography:** Pornography is easily accessible on OnlyFans.

**Children's access and children's duties of care:** There is a two-fold test for 'likely to be accessed by children': (a) could the service be accessed by a child (satisfied if, for example, age assurance measures are weak and ineffective); and (b) there 'a significant number' of children so accessing. It is not clear what the threshold is for 'significant' numbers accessing. It seems likely, therefore, that OnlyFans will need to ensure robust age assurance measures to ensure children are not accessing the service.

**Other duties of care:** The approach to extreme porn is the same as for Twitter. There may be challenges where there is pornographic material on the boundaries of extreme pornography, obscene

material and lawful pornography, particularly with BDSM material and other pornography which may represent a criminal offence (harm above the threshold to which consent is not possible). OnlyFans will be obligated to 'mitigate and manage' risks regarding illegal content, but it is not clear how robust this requirement will be though it is likely to require illegal material (and priority offence if extreme pornography) to be removed when notified.

**Change following the Bill:** As OnlyFans is based on user-generated material over which the content creators have control, there is far less scope for unlawful and harmful material on the service. As the Bill largely focuses on criminal content (regarding adults), the Bill will likely have little impact on the content available on the site. Far more of an issue is the use of content creators' pornographic material without their consent, such as pornography unlawfully downloaded from OnlyFans and distributed on other porn services and forums.

### Summary of duties of care and access

Type of pornography service	Duties of care	Restricting children's access
Porn services providing platform porn and user porn (if the user element is of sufficient size/risk to be in scope)	Yes (regarding user porn)	Yes (regarding user porn) through child safety duty
Porn services in scope providing platform porn only (not user porn)	No	Yes (through Part 5)
User-to-user service in scope that shows or displays user-porn and likely to be accessed by children (eg Twitter)	Yes	Yes through child safety duty (but forms of age assurance likely satisfy duty)
User-to-user service in scope that shows or displays user-porn (but not likely to be accessed by children eg OnlyFans)	Yes	No (unless likely to be accessed by children)
Porn service not in scope	No	No
Search service in scope	yes	Yes through child safety duty (but forms of age assurance likely satisfy duty)

### Expertise

**Professor Clare McGlynn QC (Hon)** is an expert on laws relating to pornography, sexual violence and online abuse and is co-author of the recent [study](#) revealing 1 in 8 title on mainstream porn sites describe sexually violent porn and 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](http://www.ClareMcGlynn.com)

**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. She received an OBE for her services to internet safety policy. Her work with Carnegie UK Trust on [the regulation of social media](#) underpinned the UK government's approach to legislation.