

Pornography and the Online Safety Bill

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

Revised 1 July 2022

This is a revised version of a briefing first published in May 2022. It includes the following:

- summary of key points and recommendations
- case studies of how the Online Safety Bill may affect the largest internet service providers, in relation to pornography, including Google, Twitter, OnlyFans and Pornhub; and
- an outline of the ways in which the Online Safety Bill will regulate pornography.

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. 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 content featuring incest, weapons, teenagers and racialised titles, with links to dedicated rape and forced sex pornography websites. 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. Further, 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 excludes from the application of the priority rules material distributed 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 unlawful, obscene materials, it is not listed as a priority offence. Material that may be obscene but not extreme porn may include some incest porn, serious bodily injury, choking and suffocation porn.

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.

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.

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.

Case studies: Online Safety Bill and pornography access and content

We provide below some initial suggestions as to how the Online Safety Bill might affect the availability and content of pornography current available. 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 *should* require considerable steps to alter search services compared to current practice. Key will be the extent to which OFCOM accepts minimal measures such as 'safesearch' as complying with the safety duties.

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 possible 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 including extreme and unlawful pornography is easily accessible on Twitter. A straightforward search reveals material with titles such as ‘daddy’s little girl had a rough day at school, time to cheer her up’; ‘keep on choking and hold those tears in bitch’; ‘r*ped over a bin’; ‘kidnapped and taken to the woods’.

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. While Twitter claim porn content is only accessible to over-18s, there are no effective age checks.

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. While there is extensive sexually violent porn on Twitter, including extreme porn, it remains unclear the extent to which the regulator OFCOM will require more proactive regulation of this content.

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.¹

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)

Pornography and the Online Safety Bill

The following sections examine:

- **Regulation of pornography in Online Safety Bill**
- **General regulatory scheme of duties of care, risk assessment and mitigation**
 - Defining 'illegal' content
 - Obligations regarding illegal content
 - Defining content harmful to adults and to children
 - What are the obligations regarding non-designated (non-priority) illegal content?
 - User to user duties of care
 - Search services and duties of care
- **Age assurance and pornography services**
- **Children's safety duties**
- **What forms of pornography are regulated in the Bill and how?**
 - Child sexual abuse imagery (illegal content, listed Schedule 6)

- Obscene publications encouraging child sexual abuse
- Extreme pornography (illegal content, priority offences listed in Schedule 7)
- Some forms of intimate image abuse material (non-consensual porn) (illegal content, priority offence, listed in Schedule 7)
- Obscene publications regarding adults (which are not extreme porn (illegal non-designated content))
- Pornography that is lawful but harmful to adults
- **Additional legislative options for regulating online pornography**
 - Require porn companies to verify age/consent
 - New offence criminalising individual users making false representations of consent

Regulation of Pornography in the Online Safety Bill

The Online Safety Bill does not directly regulate content: instead, it looks at features of in scope services and the impact of those features on the existence, dissemination/promotion and access to certain types of content, including pornography (Part 3). Additionally, there are requirements to restrict children's access to pornography included in Part 5 of the Bill.

It is important to note that while age assurance regulations dominate public discussion regarding pornography and the Bill, in view of the relative ease by which such measures can be circumvented, particularly by older children², focus should remain on the general duties of care and their impact on the pornography content that is freely and easily available to adults and children. 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 (such as easy uploading of user-generated porn including unlawful material), there would be far less concern regarding children's access.³ Therefore, where a key aim is to reduce the adverse impacts of pornography on children, a dual approach is required, tackling content *and* access. Whether this is achieved just through the Online Safety Bill is another question; there are other regimes which are designed to tackle content standards in a way that the Online Safety regime does not. The Online Safety regime should however be drafted to link into those other regimes where they exist.

In addition, greater focus and analysis is required on the extent to which pornography content is, or is not, impacted by the Bill in light of the extent of sexually violent, unlawful and potentially harmful easily and freely available on mainstream pornography services and through search services.⁴

General regulatory scheme of duties of care, risk assessments and mitigation

The Online Safety Bill applies to three types of service where they have links with the UK: user-to-user services; search services; and other internet services that are providers of pornographic content.

A large proportion of the Bill elaborates 'duties of care' that are imposed on user-to-user services and search services. Where a service provides pornography but not from users (a 'regulated provider pornographic content', see more below), Part 5 imposes duties regarding children's access to ensure they are not normally able to encounter pornography (eg by using age verification).

While the Bill is ostensibly focused on the systems and processes of service providers, the scope and application of the duties differs considerably between different categories of content. Further,

regarding pornography content, the duties of care only relate to user pornography and not provider pornographic content (see further below).

The duties of care comprise a bundle of duties that vary in scope depending on the nature (user-to-user or search) and size/riskiness of the service. The duties include a risk assessment obligation and safety duty to mitigate risks in relation to three types of content, though not all service providers have duties in relation to all three types (cl 6 and cl 21):

Illegal Content

- Priority content, including terrorism (listed in Schedule 5), child sexual abuse and exploitation (listed in Schedule 6) and other criminal offences listed in Schedule 7
- non-designated illegal content as defined in cl 52(4)(d)

Content harmful to children

- Primary priority content harmful to children designated by the Secretary of State as such
- Priority content harmful to children designated by the Secretary of State as such
- Non-designated content that is harmful to children (and which is 'of a kind which presents a material risk of significant harm to an appreciable number of children in the UK' (cl 53(4)(c))

Content harmful to adults

- Priority content harmful to adults designated by the Secretary of State as such.
- non-designated content that is harmful to adults

The risk assessment duty requires services to assess the level of risk in relation to relevant categories of content on the platform; the safety duties require the service to take proportionate steps to mitigate and manage those risks. For priority harms, the nature of the safety duties are set down in more detail. Additionally, there are obligations to provide reporting and complaints mechanisms, as well as record-keeping and review duties. For most services there will be transparency reporting obligations.

All services are subject to the illegal content duties; services that are likely to be accessed by children are subject to the children's risk assessment and safety duties. Only the largest and riskiest user-to-user services have obligations with regard to content that is harmful to adults (Category 1 services), and this brings with it extra duties including the obligation to provide identity assurance functionality.

The overall regime requires services to comply with the obligations in the Bill, enforced by the regulatory Ofcom. In reality, Ofcom will be prioritising its work. Only if there is proactive attention to porn services is there likely to be any change. For example, at the moment, the terms and conditions of service of the largest porn companies bear no relation to the material on their websites.⁵ Further, victims report serious difficulties in getting non-consensual material swiftly removed from porn websites.⁶

Defining 'illegal' content

Illegal content refers to content which "amounts to" a "relevant offence" (cl 52(2)). Relevant offences are terrorism offences listed in Schedule 5, child sexual exploitation and abuse offences listed in Schedule 6, priority offences listed in Schedule 7⁷ and a fall-back category of offences comprising offences "where the intended victim is an individual".

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. 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.⁸ In essence, it is challenging to determine from the content of material whether a criminal offence has been committed.

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.

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.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 mean more leeway to avoid obligations and greater requirements on service providers to make assessments as to whether illegality duties apply.

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'.

Recommend amending definition of illegal content:

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 or where 'content is of a type likely to constitute' an offence.

Obligations regarding illegal content

For illegal content, there are general obligations to mitigate the risks from such content (see cl 9(2)). These would seem to apply to priority content too. Additionally, there are more specific obligations. That includes an obligation to operate a service using proportionate systems and process designed to

- a) prevent individuals from encountering priority illegal content by means of the service;
- b) minimise the length of time for which any priority illegal content is present;
- c) where the provider is alerted by a person to the presence of any illegal content, or becomes aware of it in any other way, swiftly take down such content.

It is not clear whether each category of priority content has to be treated the same way under each of (a) and (b). Article 9(4) lists the sorts of measures that a service provider could consider in order to satisfy these obligations, including design of functionalities as well as content moderation. Measures can include 'proactive technologies', defined in cl 184; indeed, OFCOM may require the use of such technologies (cl 116). There are also obligations to have reporting and complaints systems in place.

Defining Content Harmful to Adults and to Children

Content that is harmful to children or harmful to adults is either content listed as priority content 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)).

In defining harm, cl 187(4) recognises that harm may arise where individuals do or say something as a result of content that is 'related to the other person's individual characteristics or membership of a group'. However, the language used implicitly assumes that there will be a single characteristic defining the group, and thus does not deal with intersecting characteristics, for example racism and sexism. 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.

Moreover, the definition of harmful content, 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.

Recommend amending harm definition and OFCOM obligations:

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

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.

What are the obligations regarding non-designated (non-priority) illegal content?

For non-designated illegal content, a service provider must first carry out a risk assessment (cl 8) and then 'take or use proportionate measures to effectively mitigate and manage the risks of harm to individuals' (cl 9(2)).¹⁰ The obligation, therefore, is to 'mitigate and manage risks', compared with priority content where the requirement is to prevent users from encountering the content, and to minimise the length of time it is available. Mitigating and managing risks might involve measures such as "arrangements for compliance and risk management, service design, policies on access and use (eg preventing repeat offenders using their services), content moderation (for example content removal), user empowerment and support measures and staff policies",¹¹ and can include "proactive technologies"¹².

Further, where service providers are 'alerted by a person to the presence of any illegal content, or becomes aware of it in any other way, swiftly take down such content' (cl 9(3)(c)). There is no guidance on "swiftly"; it is unclear whether 'swiftly' is less onerous in relation to non-designated illegal content than priority illegal content – the systems should be proportionate.

Service providers must also outline in their terms of service how illegal content of various types are dealt with, as well as the use of any "proactive technology" and to enforce those terms of service consistently. There are also general duties about protecting freedom of expression and, to a lesser extent, privacy – these apply to all types of illegal content.

User-to-user duties of care

The user-to-user duties of care (Part 3, chapter 2, sections 6-20) apply to a user-to-user service that includes user porn and provider porn. But, these duties do not extend to provider porn or to 'the design, operation of use of the service so far as relating to that [provider] content' (section 7(1)). This means that a porn service that includes provider and user porn would need to separate out its functions, operation, impacts according to whether they are part of the user-to-user elements of the service, or provider elements.

What this suggests is that the user-to-user duties of care could apply to mainstream commercial porn sites, but only in relation to user-generated content likely to be encountered by other users, and not in relation to any content that is the service providers' content. Moreover, the duties do not apply to any of the systems or processes (eg recommender tools) of the porn platform in relation to service provider content (provider porn).

Search services and duties of care

Search results containing pornographic content, as well as ads for porn placed via the search engine ad distribution functionalities, could be "regulated content" for the search engines' duties of care. Search services have safety duties (cl 24) to operate their services using proportionate systems and processes designed to minimise the risk of individuals encountering priority illegal content and other illegal content about which the search service has been notified. This includes search content (cl 24(4)). This is a lesser obligation compared to user services which, regarding illegal content, are required to ensure individuals do not encounter the material and remove it swiftly. The obligations on the providers of search services are also narrower than the user-to-user obligations in terms of excluding the category of content harmful to adults.

Taking priority illegal content, this includes extreme pornographic images such as rape pornography. On Google, for example, rape porn is freely and easily accessible via a one-click search for 'rape porn'. Such a search provides images of rape porn, horrific titles of material (including titles describing incest, teens and race) and links to numerous websites dedicated for rape and forced pornography. Similarly horrific results are instantly displayed for incest porn including references to force.

Search services are also subject to the children's safety duties when they are likely to be accessed by children (cl 26). This requires services to 'minimise the risk of children of any age encountering search content that is primary priority content that is harmful to children' and to 'mitigate and manage' the risks of encountering content harmful to children. The Government has indicated that all pornography

will be priority content harmful to children. This means that search services must take such steps to mitigate and manage risk. This may involve controlling access, perhaps through parental controls.

Age Assurance and Pornography Services

Background to age verification/assurance obligations:

There have been long-standing concerns over children and young people's access to pornography online, with provisions first recommending age verification included in the Digital Economy Act 2017. Those measures focussed on the largest commercial pornography websites, meaning that access to pornography across social media, blogging and image-sharing sites was largely untouched. The measures were put on hold, and later re-introduced as part of the Government's Online Harms proposals.

The first proposals for the bill would have required age assurance of service providers in scope, but as that was limited to user-to-user and search services, not all porn providers were covered, and the risk was that pornography providers could remove user functions in order to evade regulation and age assurance requirements. Responding to the considerable criticism of this approach, the current Bill (April 2022) provides additional measures to cover a wider range of pornography service providers which do not publish or display user porn and which are obligated to restrict children's access.

However, the access obligations differ in Part 5 regarding provider porn and Part 3 regarding safety duties. Part 3 (applying to search and user-to-user services) includes in cl 31(2) a requirement "that it is not possible for children to access a service" and age verification or another means of age assurance is given as an example of how this will be met. The obligation in part 5 on porn providers, in cl 68(2) is lower – only that "children are not normally able to encounter" the material, giving the example of age verification (but with no ref to other forms of age assurance).

In relation to access, it is important to note some key findings from surveys and research regarding the means by which young people access pornography.

Extent of children's access to porn:

A BBFC study in 2019 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.¹³ Overall, the recent evidence suggests pornography exposure could be 'daily' for 'most' 16-to 18-year-old boys and young men.¹⁴

Where are children accessing porn:

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%).¹⁵ 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.¹⁶

Possible ease of evading age assurance:

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.¹⁷ 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:

It is important to ensure a gendered analysis and understanding of these issues, 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).¹⁸ 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:

It should also be noted that even if age assurance provisions are enacted, implementation is not guaranteed. Experience so far from France and Germany shows that despite legal requirements to introduce age restrictions and pressure from regulators, pornography platforms are strongly resisting and are not acting, including Pornhub, despite it publicly stating its support for age verification.¹⁹ While there are enforcement mechanisms in the Bill, including business disruption measures and fines for executives, regulatory enforcement will be a challenge due to the lack of transparency regarding the ownership and control of the largest pornography platforms.²⁰

Part 5 Children's access restrictions for 'regulated provider porn content'

Part 5 only applies to those services *not* showing or displaying user content. Therefore, if a porn service is a 'regulated provider of pornographic content' (see below), then it must comply with the children's access obligations, but note that the general safety duties do *not* apply to it (though the service will still be subject to ordinary criminal laws). 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)'. Further provisions require Ofcom to produce guidance on meeting these obligations.

Note that the duty in Part 5 requires that children are not normally able to encounter *regulated provider pornographic content*, not pornography generally. On platforms with both user porn and provider porn, the service provider will be subject to children's safety duties which include restrictions on children's access to priority content which is likely to include all pornography.

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 limits on access.²¹ 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').

The definitions in Part 5 are as follows:

'Pornographic content': This is content of such a nature that it is reasonable to assume that it was produced solely or principally for the purpose of sexual arousal (sec 66(2)). This is the same definition used in the extreme pornography laws and, in the context of this Bill, is relatively unproblematic.²²

'Provider pornographic content' ('provider porn'): This term introduced by the Bill is defined as pornographic content that is published or displayed on the regulated service by the provider of that service or by a person acting on behalf of the provider (including content published or displayed by means of software, or an automated tool, or algorithm) (section 66(3)).

This definition is given to separate provider porn from content uploaded or shared by users ('user porn' which is a sub-set of regulated user-generated content (cl 49(2))), as different regulatory rules are to be applied to these different types of porn.²³ This is emphasised by section 66(6) which states that pornographic content that is 'user-generated content in relation to an internet service is not to be regarded as provider pornographic content in relation to that service'.

What is not precisely clear is exactly what will be covered by 'acting on behalf of the provider'. It might be assumed that this includes contractual agreements with professional porn companies to display their material. Provider porn, therefore, includes porn by that service provider, as well as porn on the service by means of various contractual agreements.

It is also not clear what happens when provider porn is then used on other platforms. For example, porn may be 'provider porn' on the provider's website, but that same porn provider then uploads the same material onto another platform, eg Twitter. In this situation, does provider porn become user porn because it is uploaded onto a different user-to-user platform? We would assume this is the case as the service provider (eg Twitter) is not providing the content and on that service, it is user material. Essentially, the key point here is that the person providing the content and the person providing the service by which the content is disseminated are different.

Therefore, while the Explanatory Notes for the Bill state that user porn and provider porn are 'mutually exclusive' this is not always the case with material that is then made available on other sites. Accordingly, the age-verification rules for provider porn would not stop the same material being subject to safety duties when uploaded to user-to-user sites or being returned in search engine results. The rules applying to the content on the third-party sites would not have an impact on the content when disseminated via the porn provider's own site.

'regulated provider pornographic content': This is defined as all provider porn except content only consisting of text and 'paid-for adverts' (section 66(4)). Adverts are a vital revenue stream for many porn platforms, particularly those free to view. Such adverts commonly display pornographic images or gifs. This definition means that such images or videos shown as part of an advert are excluded from this part of regulation. It may be, however, that adverts which are criminal or harmful constitute regulated content for the purposes of the duties of care.

Why is provider porn excluded from the duties of care and what are the implications?

Pornography on a service that includes user porn (and perhaps also provider porn) is subject to the duties of care in the Bill. However, a service only showing or displaying provider porn is *not* subject to the safety duties, only to obligations to restrict children's access. The assumption appears to be that, in relation to adults, it is only user porn that may be harmful and require regulation.²⁴ The basis for such an assumption has not been made clear.

Additional regulation of pornography

Nonetheless, some porn providers might fall within the 'On-demand Programme Services' regime in the Communications Act, though that only applies to porn providers within the jurisdiction.²⁵ The Government's impact assessment for the Digital Economy Act had estimated that there were around 100 of these based in the UK. More recent estimates suggest around 150, with 40-50 of these being adult services. This regime contains some basic content standards, including protecting children from pornography as well as wider duties related to product placement, sponsorship, and incitement to racial hatred.²⁶ The BBFC ratings regime for on demand video not within the Communications Act regime is voluntary.²⁷ The Government has recently issued a White Paper on the revision of this regime as part of its overhaul of the broadcasting rules; it is not however aimed primarily at the regulation of porn. Note that the BBFC also classifies films and videos, providing some level of content control in the off-line environment.

Porn service providers will remain subject to the criminal law (as before the Bill) which means being subject to the Obscene Publications Act 1959. CPS guidance confirms that where a 'defendant uploads a material outside England or Wales, and a person then downloads the material in England or Wales, the courts will have jurisdiction to try the defendant'.²⁸ However, it should be noted that there are very few prosecutions under this Act and none of the large commercial pornography companies, despite the content freely and easily accessible online that quite likely constitutes obscene materials.²⁹

OFCOM Code of Practice on age assurance and VPNs:

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 to harmonise definitions of age assurance/verification and consider VPNs

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'.

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

Children's Safety Duties

For user-to-user services that are likely to be accessed by children, there are safety duties (cl 11) which essentially provide:

- Primary priority content: to prevent children of any age from encountering this material, for example by age verification or another means of age assurance;
- Priority content: to protect children in age groups judged to be at risk of harm from encountering this content, for example by using age assurance; and
- Non-designated harmful content in relation to which the service provider must take steps to mitigate and manage risks as well as to mitigate the impact of harm to children of various ages.

Search engines are likewise under children's safety duties (cl 26). While the obligations with regard to non-designated harmful content are similar to those in cl11, there are lesser obligations in relation to primary priority and priority content. In such cases, the obligation is to minimise the risk of a child encountering such content, rather than to prevent such encounters happening.

The Bill envisages a range of measures that could be used in addition to age assurance, such as parental controls and staff policies and practices.

What forms of pornography are regulated in the Bill and how?

The regulatory regime differs depending on the type of pornography content.

- Child sexual abuse imagery (illegal content, listed as priority offences in Schedule 6)
- Obscene publications encouraging child sexual abuse (illegal content, listed as priority offence in Schedule 6)
- Extreme pornography (illegal content, listed as priority offence in Schedule 7)
- Some forms of intimate image abuse material (non-consensual pornography) (distribution of intimate images without consent with intent to cause distress) (illegal content, listed as priority offence in Schedule 7)
- Obscene publications regarding adults (which are not extreme pornography) (non-designated illegal content)
- Pornography that is lawful but harmful to children (including primary priority, priority and non-designated content)
- Pornography that is lawful but harmful to adults (including priority harmful and non-designated)
- Lawful pornography that is not harmful

Child sexual abuse imagery (illegal content, listed Schedule 6)

Schedule 6 lists offences relating to child sexual abuse imagery as illegal content and includes offences relating to the making, possessing and distribution of 'indecent' images of children, as well as 'prohibited' images which includes cartoon child sexual abuse images. Note that Schedule 6 does include the equivalent offences for Northern Ireland and Scotland (unlike Schedule 7).

Obscene publications encouraging child sexual abuse (illegal content, listed Schedule 6)

In addition to the child sexual abuse imagery offences listed in Schedule 6, this schedule adds a new category of pornography: 'An offence under section 2 of the Obscene Publications Act 1959 relating to an obscene article tending to deprave and corrupt others by encouraging them to commit an offence specified in paragraph 2, 4, 5, 7 or 8.'

Section 2 of the Obscene Publications Act 1959 provides for the offence of publication of an obscene article (see further below). While there are concerns regarding the scope of the Obscene Publications Act (see below), there is an added layer of complexity here. That is because the offence listed is not distribution of obscene articles per se, but only those obscene materials 'tending to deprave and corrupt others by encouraging them to commit' the further offences listed in the schedule which include the child sexual abuse imagery offences and most child sexual offences.

Importantly, this is a new form of offence and so its boundaries are unclear. It is not certain what material may be classed as 'encouraging' others to commit specific offences child abuse offences. This might be assumed from the fact of the content, as child sexual abuse imagery legitimises and

normalises child sexual abuse. But that would render the provision largely unnecessary. The Obscene Publications Act itself covers text, so perhaps text encouraging child abuse offences could be included? Perhaps porn created with adults who are dressed/look like children might be included as that could be said to encourage child sexual offences? That would encompass a considerable amount of material on mainstream pornography sites as exemplified by common descriptors of 'very young', teen, pigtailed, braces, homework and schoolgirl for content.³⁰ A more limited interpretation would be that there has to be active text or images specifically inciting child abuse.

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

Ubiquity and accessibility of extreme pornography including rape porn:

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.

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

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'.³¹

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'.³²

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

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, such as 'again and again forced', 'Boyfriend forced gf for sex', 'Brother fuck her sister in her sleep' and 'so horny she fucked a horse', is less readily available and, when identified, is removed.³³

In terms of search services, typing 'rape porn' into Google provides reams of links to dedicated rape porn websites, together with images including the use of knives and guns, such as Bestrapeporn.com,

Realrapeporn.pro, Rapeinass.com, Pornrapetube.net, Rapevideo.net, Cruelrape.com, with titles such as 'young rape porn kidnapped schoolgirl forced', 'brutal daddy daughter rape porn'.

Note, however, that the Schedule only lists the offence applying in England, Wales and Northern Ireland and that Scots law on extreme pornography differs in important respects, though this gap is being remedied by Government amendments.³⁴

Regulatory challenges of different criminal laws across the UK:

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'

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 vague and the English Crown Prosecution Service guidance provides little elaboration beyond stating that 'obscene' has an 'ordinary meaning ("repulsive", "filthy", "loathsome" or "lewd")'.³⁵ It is not obvious that these words further any real understanding of what might constitute an 'obscene' image.³⁶ 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.³⁷

What constitutes 'life-threatening' acts?

It is not clear what constitutes 'life-threatening' acts. The Explanatory Notes to the legislation refer to this category as being intended to include 'hanging, suffocation, or sexual assault involving a threat with a weapon'.³⁸ 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 as the material found on the landing pages of the largest porn sites such as 'Fat Dick Choking My Tiny Throat', 'intense choking until her tongue pops out' or 'crying, gagging, choking as he brutally face fucks'?³⁹ Such material is also freely available on sites such as Twitter, including videos with titles such as 'if your not frothing from the mouth, you're not choking it hard enough'. Note some of the material available via one-click on Google brings up pornographic images of rape with weapons including knives and guns.

Uncertain scope of acts resulting in serious injury:

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 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 Crown Prosecution Service simply stating

that the words 'ordinary meaning' should be applied.⁴⁰ Porn involving weapons is likely to be included (and may constitute 'life-threatening images'). Images of choking referred to above will not be included as they do not constitute injury to the 'anus, breasts or genitals', similarly strangulation. It might include material with titles such as 'Extreme Torture Anal'.⁴¹ The Explanatory Notes refer to the mutilation of breasts or genitals, or insertion of sharp objects.

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 'severe injury', without the limitation to specific body parts.⁴² This definition is therefore far more likely to include strangulation or choking and would therefore be illegal content for the whole of the UK.

AI challenging definitions of what is a 'realistic' image:

An image must be 'realistic', a criterion included in the original legislation to ensure that acted scenes were included (ie *realistic*, not real), though debate ensued about such matters as obviously fake blood.⁴³ The complication now is new AI technology making the creation of fake porn material ever more straightforward and common. Much of the debate about 'deepakes' or fakeporn is about how realistic they are becoming, and therefore difficult to distinguish from 'real' videos. Nonetheless, there remains much material that is also noticeably faked, particularly to those more familiar with the technology and genre. It is likely, therefore, that among a category of deepfake porn, some would be considered realistic, other material may not.

Recommendations

A more general review of the scope of extreme porn laws, though outside the scope of the Bill, would be desirable, particularly considering inclusion of material depicting unlawful incest relations. Such a review could help the functioning of the regime here. See also recommendations on obscene publications (below) and on definitions of 'illegal' material.

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

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.⁴⁴ 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.

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 on their services and swiftly remove any such content.

Prevalence of image-based sexual abuse on porn sites:

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.⁴⁵ 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.⁴⁶ Analysis of the content of mainstream pornography websites found many titles suggesting non-consensual porn on the landing pages of the websites.⁴⁷ 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.⁴⁸ 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.⁴⁹ For example, the recent study of the content of mainstream porn sites found titles such as 'Cheated GF fucked on webcam in revenge porn'.⁵⁰ 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.⁵¹ 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 section 33 non-consensual distribution offence:

Therefore, while it is vital that porn services are mandated to take proactive and swift action in relation to this material, this 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.⁵² 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.⁵³

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 52⁵⁴, in practice constitute the relevant standard for the regime, it is still limited in scope.

Limits of criminal law offence the English section 33 offence:

This offence, which the Government problematically describes as 'revenge porn'⁵⁵, is limited in its scope and has been subject to criticism for many years. It is the subject of an on-going review by the Law Commission which was initiated three years ago in 2019.

Current English law not include deepfakes and altered/photoshopped images:

Further, 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. As noted, the Scottish offence is broader.

Current law excludes many cases of non-consensual distribution where range of motives:

The current law is limited as it requires proof of a specific motivation to cause distress (or in Scotland being reckless as to causing distress), despite evidence that perpetrators distribute images without consent for many reasons. Uploading non-consensual porn to a porn service for sexual gratification, for financial gain, for 'fun', or to gain kudos from friends etc do not fall within the current law. The motive requirements in section 33 have been identified by police and victim organisations as being one of the reasons why prosecutions are so low.

Limited definition in current law as to what constitutes a 'private, sexual image':

The current 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.⁵⁶

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

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.⁵⁷ 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:

Schedule 7 did not originally list the corresponding offences for Northern Ireland and Scotland, though there are Government amendments now to correct this gap.

Recommendations:

Deepfake/altered images: 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.⁵⁸

Amend law on intimate image abuse: 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)

Offences under the Obscene Publications Act 1959, as well as the Scottish equivalent⁵⁹, 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.⁶⁰

That the 1959 Act is not listed as a priority offence must be assumed to be an attempt to limit the scope of the priority offences, likely due to the Obscene Publications Act 1959 being opaque. 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.⁶¹ 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'.⁶²

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.

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)⁶³
- *Incest porn*: depictions of acts which constitute criminal offences, such as penetrative sexual activity between proscribed family members including parents, children, aunts and uncles.⁶⁴ There is an extensive amount of such material freely and easily accessible online such as 'Daughter swallows Dads cum than gets fucks' and 'Brother Fucks Sister In The Ass Outdoors'.⁶⁵ Complications may arise in relation to material seeking to evade regulation such as 'Amateur Bathroom Dick Sucking not Sister and Brother'.⁶⁶ Some such material should come within definitions of extreme pornography where it portrays rape, such as 'Daddy keeps fucking daughter till she likes it'.⁶⁷
- *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 worse⁶⁸
- *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: Obscene Publications Act:

Add Obscene Publications Act and equivalent UK offences to list of priority offences in Schedule 7.

Pornography that is lawful but harmful to children

Content that is lawful but harmful to children is 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.

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.

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?

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).⁶⁹ 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.⁷⁰

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.⁷¹

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.⁷² 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.⁷³

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 R18 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:

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.

primary priority content,

priority content and non-designated content. There are, as yet, no schedules or lists which outline what material will be included in each of these categories. However, the Government has indicated that it 'intends to designate pornography as a priority harm to children'.⁷⁴

In relation to user-to-user services which are likely to be accessed by children, this means an obligation (cl 11) to prevent children of any age encountering pornography, for example using age verification or another means of age assurance. There are likewise obligations on search engines to minimise the risk of children of any age encountering such content.

Pornography that is lawful but harmful to adults

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.

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 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.

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?

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).⁷⁵ 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.⁷⁶

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.⁷⁷

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.⁷⁸ 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.⁷⁹

Recommendation listing content lawful but harmful to adults:

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

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

- 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.
- 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.’⁸⁰
- These provisions are now included in a Private Member’s Bill currently before the Canadian Parliament.⁸¹

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

- 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.
- 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.⁸²
- 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 Timbini (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 Titheradge, N., & Croxford, R. (2021). The children selling explicit videos on OnlyFans. BBC News Online, 27 May [The children selling explicit videos on OnlyFans - BBC News](#) See also Waterson, J. (2019). UK's porn age-verification rules can be circumvented in minutes. *The Guardian*, 19 April [UK's porn age-verification rules can be circumvented in minutes | Child protection | The Guardian](#)

² A recent survey of 16–17-year-olds in the UK found that 46% had used a VPN (Virtual Private Network) or Tor browser, and another 23% knew what they were: 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. See also 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.

³ For information on the content and harms of pornography, see Government Equalities Office, [The relationship between pornography use and harmful sexual attitudes and behaviours](#) February 2020.

⁴ Note that pornography is regulated in many different ways, including provisions regarding video on demand, currently under review as part of the broadcasting White Paper. In terms of regulating pornography content, such dedicated regulatory regimes may be more appropriate forms of governance.

⁵ Clare McGlynn and Fiona Vera-Gray, *Huffington Post*, 28 June 2019: [Porn Website T&Cs Are A Works Of Fiction. We Need Radical Measures To Take Them On.](#) | *HuffPost UK Life* (huffingtonpost.co.uk)

⁶ [#NotYourPorn Is The Campaign Fighting To Get Non-Consensual Content Removed From UK Porn Sites \(bustle.com\)](#) and [Pornhub: The ongoing revenge porn investigation \(openaccessgovernment.org\)](#).

- ⁷ The Secretary of State's power to add to these schedules has come under criticism (cl 55 and cl 176).
- ⁸ 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 \(independent.gov.uk\)](#)
- ⁹ 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'.
- ¹⁰ Explanatory Notes, para 82
- ¹¹ See c I9(4) and associated Explanatory Notes, para 91.
- ¹² "Proactive Technology" is defined at cl 184 and includes "content moderation technology", "user profiling technology" and "behaviour identification technology".
- ¹³ A representative sample of 1,142 UK children: BBFC (2020), [Young people, pornography & age-verification](#) p 15.
- ¹⁴ 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.
- ¹⁵ 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>
- ¹⁶ BBFC (2020) [Young people, pornography & age-verification](#) p 26.
- ¹⁷ 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.
- ¹⁸ Children's Commissioner (2013) [Basically porn is everywhere.pdf \(childrenscommissioner.gov.uk\)](#).
- ¹⁹ Thurman et al (2022) (above) and [Twitter Has Started Blocking Porn in Germany | WIRED](#)
- ²⁰ [Mysterious owner of Pornhub found living in London - The Globe and Mail](#)
- ²¹ 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.'
- ²² Section 66(3) of the Criminal Justice and Immigration Act 2008.
- ²³ There may be a query about the boundary between provider porn and journalistic content (see cl 49(2)(g) and 50) in relation to a publication like the Sunday Sport.
- ²⁴ In oral evidence before the DCMS select committee the then Secretary of State stated that: 'I believe that the preponderance of commercial pornography sites have user-generated content on them, so most of them will be in scope', quoted in para 216 in Joint Committee report regarding Online Safety Bill: [Draft Online Safety Bill \(parliament.uk\)](#).
- ²⁵ Part 4A Communications Act 2003 – some services notified under this regime are adult services: https://www.ofcom.org.uk/data/assets/pdf_file/0021/67710/list_of_regulated_video_on_demand_services.pdf
- ²⁶ Online Safety Bill, [Impact assessment](#), Jan 2022, p 28.
- ²⁷ <https://www.bbfco.uk/industry-services>
- ²⁸ CPS Guidance citing [Perrin \[2002\] EWCA Crim 747: Obscene Publications | The Crown Prosecution Service \(cps.gov.uk\)](#).
- ²⁹ There were only 54 charges under the Obscene Publications Act 1959 in 2018-2019: [COVER PAGE \(cps.gov.uk\)](#).
- ³⁰ Fiona Vera-Gray, Clare McGlynn et al (2021) [Sexual violence as a sexual script in mainstream online pornography](#) *British Journal of Criminology* 61: 1243-1260, pp 1254-1255. See also Fiona Vera-Gray and Clare McGlynn, [Opinion: Sexually violent pornography is being promoted to first-time users of top sites \(thejournal.ie\)](#) 'Teen' was the most common way to describe pornography than any description of a sex act or body part, and it appears to be slightly more common in content describing sexual violence (1249).
- ³¹ 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.
- ³² Section 51A Civic Government (Scotland) Act 1982.

- ³³ These titles are taken from videos found on the largest mainstream commercial porn sites in the UK, as discussed in Vera-Gray, McGlynn et al (above).
- ³⁴ Section 51A Civic Government (Scotland) Act 1982.
- ³⁵ [Extreme Pornography | The Crown Prosecution Service \(cps.gov.uk\)](#)
- ³⁶ 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.
- ³⁷ 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.
- ³⁸ [400672 CH4-EN TEXT \(legislation.gov.uk\)](#)
- ³⁹ Titles from Fiona Vera-Gray, Clare McGlynn et al (2021).
- ⁴⁰ [Extreme Pornography | The Crown Prosecution Service \(cps.gov.uk\)](#)
- ⁴¹ Titles from Fiona Vera-Gray, Clare McGlynn et al (2021).
- ⁴² Section 51A Civic Government (Scotland) Act 1982.
- ⁴³ Home Office, *Consultation: on the possession of extreme pornographic material* (2005) para 38.
- ⁴⁴ 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 \(hateaid.org\)](#)
- ⁴⁵ Revenge Porn Helpline, *Intimate Image Abuse – an evolving landscape* (2021): [RP report full final AW \(revengeporn-helpline.org.uk\)](#)
- ⁴⁶ 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.
- ⁴⁷ 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.
- ⁴⁸ [#NotYourPorn Is The Campaign Fighting To Get Non-Consensual Content Removed From UK Porn Sites \(bustle.com\)](#) and [Pornhub: The ongoing revenge porn investigation \(openaccessgovernment.org\)](#).
- ⁴⁹ [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 \(nytimes.com\)](#).
- ⁵⁰ 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
- ⁵¹ 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 \(huffingtonpost.co.uk\)](#)
- ⁵² The law in Northern Ireland replicates English law, see Northern Ireland (Justice Act (Northern Ireland) 2016, ss.51- 53.
- ⁵³ Section 2, Abusive Behaviour and Sexual Harm Act (Scotland) Act 2016.
- ⁵⁴ Clause 52 and Explanatory Notes para 299
- ⁵⁵ Government Press release, 4 February 2022: [Online safety law to be strengthened to stamp out illegal content - GOV.UK \(www.gov.uk\)](#). For a short blog on the problems with terminology 'revenge porn', see Clare McGlynn and Erika Rackley, [Not 'revenge porn', but abuse: let's call it image-based sexual abuse by @McGlynnClare & @erikarackley | Everyday Victim Blaming](#) and Clare McGlynn and Erika Rackley, 'Image-Based Sexual Abuse' (2017) 37 *Oxford Journal of Legal Studies* 534-561.
- ⁵⁶ See discussion in the Law Commission [Consultation on Intimate Image Abuse](#), para 6.51.
- ⁵⁷ For more information, see the Law Commission website for this project: [Taking, making and sharing intimate images without consent | Law Commission](#)
- ⁵⁸ 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.
- ⁵⁹ S 51 Civic Government (Scotland) Act 1982
- ⁶⁰ 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.
- ⁶¹ 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.
- ⁶² Section 63(5A).

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

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

⁶⁵ 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).

⁶⁶ Titles from study Vera-gray, Clare McGlynn et al (2021).

⁶⁷ Titles from study Vera-gray, Clare McGlynn et al (2021).

⁶⁸ 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 \(cps.gov.uk\)](#)

⁶⁹ Titles from study Vera-Gray, Clare McGlynn et al (2021).

⁷⁰ For the extent of such material on mainstream porn sites, see 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 \(huffingtonpost.co.uk\)](#))

⁷¹ 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).

⁷² [Nudification Internet Trend: AI Tools Which 'Undress' Womens Photos | Glamour UK \(glamourmagazine.co.uk\)](#)

⁷³ DCMS Committee, Online Safety Bill Report: [Online safety and online harms \(parliament.uk\)](#) p 3.

⁷⁴ Letter from Chris Philp, Parliamentary Under-Secretary of State for Tech and the Digital Economy to Age Verification Providers Association, 19 April 2022.

⁷⁵ Titles from study Vera-Gray, Clare McGlynn et al (2021).

⁷⁶ For the extent of such material on mainstream porn sites, see 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 \(huffingtonpost.co.uk\)](#))

⁷⁷ 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).

⁷⁸ [Nudification Internet Trend: AI Tools Which 'Undress' Womens Photos | Glamour UK \(glamourmagazine.co.uk\)](#)

⁷⁹ DCMS Committee, Online Safety Bill Report: [Online safety and online harms \(parliament.uk\)](#) p 3.

⁸⁰ 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.'

⁸¹ [Bill C-302 432 An Act to amend the Criminal Code \(pornographic material\) | Projet de loi C-302 432 Loi modifiant le Code criminel \(matériel pornographique\) \(parl.ca\)](#)

⁸² 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.