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# Pornography, the Online Safety Act 2023 and the need for further reform

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## ABSTRACT

The UK's Online Safety Act 2023 regulates pornography in a range of new ways which could radically alter both how pornography is accessed and the nature of the content available. However, while the Act ostensibly represents a new form of regulation focusing on the systems and processes of online platforms, in practice it is content-based. Our analysis reveals that the Act generates eight new classifications of pornography, each associated with a distinct legal framework, thereby creating a confusing and unnecessarily complex regulatory regime. Accordingly, we recommend further reforms to fortify and clarify the regulatory regime, as well as a more comprehensive review of pornography regulation in general, with the overall aim of reducing the harms of pornography.

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**KEYWORDS** Obscenity; Online Safety Act; pornography; extreme pornography; online abuse

## Introduction

Recent years have seen mounting international concern over the easy availability of online, mainstream pornography and the nature of its content. These dual issues of access and content have sparked extensive debate around the broader impact of pornography, accompanied by proposals for various legislative responses. Pornography has been controlled through a variety of criminal laws focussing on obscenity and more extreme forms of pornography, together with regulatory mechanisms drawn from media and broadcasting laws.<sup>1</sup> However, these approaches, largely designed for

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<sup>1</sup>Fiona Vera-Gray and Clare McGlynn, 'Regulating Pornography: Developments in Evidence, Theory and Law' in Chris Ashford and Alexander Maine (eds), *Research Handbook on Gender, Sexuality and the Law* (Edward Elgar 2020) Ch 33; Alexandros Antoniou and Dimitrios Akrivos, *The Rise of Extreme Porn: Legal and Criminological Perspectives on Extreme Pornography in England and Wales* (Palgrave MacMillan 2017).

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offline pornography, fall short in addressing the current landscape of online pornography which boasts millions of users, operates without national borders, and features considerable amounts of user-generated content.

It is in this context that the UK's Online Safety Act 2023 (OSA) sets out new ways of regulating online pornography.<sup>2</sup> The OSA focuses on the design and operation of internet services, emphasising how their nature, systems and processes contribute to online harms. It emphasises the need for safety by design, with a focus on the need to ensure a high level of protection for children.<sup>3</sup> Therefore, unlike traditional content-based mechanisms that solely mandate removal of harmful items, this approach aims to consider broader systemic issues like algorithmic amplification of harmful content, platform accountability, transparency, the ease of uploading content and financial incentives for doing so, as well as having an appropriate moderation system. However, as pornography was not the specific focus of the legislation, applying this systems-based approach to the vast array of ways pornography is created, accessed and used proved challenging. Further, the OSA does not replace the existing pornography regime(s), but adds new measures, contributing to a complex, often confusing and fragmented legal environment. While the implementation of the new online safety framework will span several years, attention has already shifted to the need for further regulation, as evidenced by the UK Government's Pornography Review.<sup>4</sup>

This article presents the first comprehensive examination of pornography regulation following the enactment of the OSA. The analysis begins by examining the nature of online pornography and associated debates over its effects, followed by an outline of the current regulation of pornography (on – and offline). The OSA is the focus of the subsequent sections which examine the scope and characteristics of the new framework and assess its potential effectiveness. We detail the complexity of the regime following the OSA, identifying eight new classifications of pornography, arising as a by-product of the different categories of content and types of service.<sup>5</sup> This analysis allows us to demonstrate not just the weaknesses in the OSA regime, but also the continuing difference in treatment between online and offline pornography. Accordingly, the concluding section sets out potential avenues for further reform.

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<sup>2</sup>Section 236 of the Act defines 'pornographic content' as 'content of such a nature that it is reasonable to assume that it was produced solely or principally for the purpose of sexual arousal'.

<sup>3</sup>Section 1 Online Safety Act (OSA).

<sup>4</sup>DSIT press release, 'Illegal Pornography, Abuse and Exploitation to be Investigated by New Reviewer' (1 December 2023) <<https://www.gov.uk/government/news/illegal-pornography-abuse-and-exploitation-to-be-investigated-by-new-reviewer>> accessed 28 February 2024.

<sup>5</sup>Due to space limitations, we do not consider in detail age assurance measures introduced by the Act to restrict under-18s' access to pornography. See further Ofcom, *Guidance on age assurance and other Part 5 duties for service providers publishing pornographic content on online services* (5 December 2023) <<https://www.ofcom.org.uk/consultations-and-statements/category-1/guidance-service-providers-pornographic-content>> accessed 15 December 2023.

## The nature and harms of online pornography

The online pornography industry is reportedly larger than Netflix and Hollywood,<sup>6</sup> Aylo, owner of Pornhub and other porn sites, recorded approximately 4.5 billion monthly visits in 2020, almost double the combined traffic of Google and Facebook.<sup>7</sup> The industry thrives on factors like anonymity, affordability, and accessibility, minimising friction and many of the controls to accessing porn offline.<sup>8</sup> While paid-for services exist, key drivers of the industry's size is a business model offering free access to pornography, with revenue generated through data-mining, on-sales and advertising. The ease of creating and uploading user-generated content ensures a constant supply of pornography, alongside professionally produced pornographic material distributed across sites.

In addition, social media sites host and promote this material with X (formerly Twitter) in particular facilitating the dissemination of explicit content with simple searches displaying sexually violent porn, 'incest porn', as well as non-photographic child sexual exploitation and abuse material (CSEAM) below the criminal threshold, such as cartoons.<sup>9</sup> Additionally, search services like Google yield numerous websites dedicated to explicit content categories like bestiality and force porn in response to related queries.<sup>10</sup>

### The nature of online pornography

The content of online, mainstream pornography is a significant concern. Many studies have demonstrated the racist, sexist and sexually violent nature of the pornographic materials most easily and commonly accessed. For example, one study identified a substantial portion of popular videos legitimising and even celebrating aggression by portraying these acts as both consensual and sensual.<sup>11</sup> Another found that videos labelled as

<sup>6</sup>John Naughton, 'The Growth of Internet Porn Tells Us More About Ourselves than Technology' *The Observer* (London, 30 December 2018) 29.

<sup>7</sup>Sheelah Kolhatkar, 'The Fight to Hold Pornhub Accountable' *The New Yorker* (New York, 13 June 2022) <<https://www.newyorker.com/magazine/2022/06/20/the-fight-to-hold-pornhub-accountable>> accessed 23 June 2022.

<sup>8</sup>Al Cooper, 'Sexuality and the Internet: Surfing into the New millennium' (1998) 1(2) *Cyber Psychology and Behaviour* 187.

<sup>9</sup>HC OSB 24 May 2022 (Public Bill Committee, second sitting), vol 715, col 64 (evidence by Clare McGlynn).

<sup>10</sup>*ibid.* In early 2022, Google returned large numbers of websites dedicated to rape pornography in response to a search for 'rape porn'; see OSB, Public Bill Committee Evidence on Pornography Regulation by Clare McGlynn and Lorna Woods (17 June 2022) <<https://bills.parliament.uk/publications/46963/documents/2016>> accessed 12 December 2023.

<sup>11</sup>Eran Shor, 'Age, Aggression, and Pleasure in Popular Online Pornographic Videos' (2019) 25(8) *Violence Against Women* 1018, 1031. Methodological debates about sampling differences and consent in violence definitions remain of ongoing concern across aggression studies; see Alan McKee, 'Methodological Issues in Defining Aggression for Content Analyses of Sexually Explicit Material' (2015) 44(1) *Archives of Sexual Behaviour* 81. There is also dispute about whether online pornography is getting more 'extreme': Eran Shor and Kimberly Seida, "'Harder and Harder?'" Is Mainstream Pornography

'teens' have titles suggesting a greater level of aggression than those with older performers.<sup>12</sup> When examining content on the three most popular pornographic websites, one study found that one in eight titles on the landing pages described sexually violent acts.<sup>13</sup> Mainstream pornography also reproduces racist tropes and stereotypes, with research finding that black men are often portrayed as aggressors, while black women are more frequently targets of abuse,<sup>14</sup> or they are portrayed as less innocent and more hypersexualised than their white peers.<sup>15</sup>

Mainstream porn sites and social media platforms also host extensive non-consensual intimate material,<sup>16</sup> including sexually explicit 'deepfakes'<sup>17</sup> and 'nudified' imagery,<sup>18</sup> generated by artificial intelligence (AI). A 'deepfake ecosystem' surfaced on Telegram, utilising AI-bots that generated fake nude images (including underage girls), on request.<sup>19</sup> Rapidly spreading across X, sexually explicit deepfake images of pop-star Taylor Swift recently garnered attention, with one image amassing 47 m views before removal due to the platform's delayed response.<sup>20</sup> Studies reveal a notable demand for non-consensual imagery, covertly filmed intimate acts, and image-based sexual abuse material,<sup>21</sup> with one major deepfake sexual abuse website receiving 14 million monthly visits.<sup>22</sup> Approximately 9,500 sites are estimated to be

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Becoming Increasingly Violent and Do Viewers Prefer Violent Content?' (2019) 56(1) *The Journal of Sex Research* 16.

<sup>12</sup>Shor (n 11).

<sup>13</sup>Vera-Gray, Clare McGlynn, Ibad Kureshi and Kate Butterby, 'Sexual violence as a sexual script in mainstream online pornography' (2021) 61(5) *The British Journal of Criminology* 1243, 1257.

<sup>14</sup>Eran Shor and Golshan Goloriz, 'Gender, Race, and Aggression in Mainstream Pornography' (2019) 48(3) *Archives of Sexual Behavior* 739; Nikky Fritz and others, 'Worse than objects: the depiction of black women and men and their sexual relationship with pornography' (2021) 38(1) *Gender Issues* 100.

<sup>15</sup>Mireille Miller-Young, 'Putting Hypersexuality to Work: Black Women and Illicit Eroticism in Pornography' (2010) 13(2) *Sexualities* 219; on 'adulteration' of black girls, see Rebecca Epstein et al, *Girlhood Interrupted: The Erasure of Black Girls' Childhood* (Georgetown Center on Poverty and Inequality 2017) 5.

<sup>16</sup>Vera-Gray and others (n 13).

<sup>17</sup>Samantha Cole and Emanuel Maiberg, 'A Popular Face Swap App Is Advertising Deepfakes on Porn Sites' *Vice* (New York, 10 May 2022) <<https://www.vice.com/en/article/epxeae/face-swap-app-on-apple-app-store-google-play-deepfakes>> accessed 28 June 2022; Olivia Snow, "'Magic Avatar' App Lensa Generated Nudes From My Childhood Photos' *Wired* (7 December 2022) <<https://www.wired.com/story/lensa-artificial-intelligence-csem/>> accessed 27 May 2024.

<sup>18</sup>Margi Murphy, "'Nudify' apps that use AI to undress women in photos are soaring in popularity' *Fortune* (8 December 2023) <<https://fortune.com/2023/12/08/nudify-apps-use-ai-popularity-deepfakes/>> accessed 27 February 2024.

<sup>19</sup>Matt Burgess, 'A deepfake porn bot is being used to abuse thousands of women' *Wired* (San Francisco, 20 October 2020) <<https://www.wired.co.uk/article/telegram-deepfakes-deepnude-ai>> accessed 2 October 2022.

<sup>20</sup>'Taylor Swift deepfakes spark calls in Congress for new legislation' *BBC News* (27 January 2024) <<https://www.bbc.co.uk/news/technology-68110476>> accessed 28 February 2024.

<sup>21</sup>Nicola Henry and Asher Flynn, 'Image-Based Sexual Abuse: Online Distribution Channels and Illicit Communities of Support' (2019) 25(16) *Violence Against Women* 1932, 1935.

<sup>22</sup>Sophie Compton and Reuben Hamlyn, 'The rise of deepfake pornography is devastating for women' *CNN* (29 October 2023) <<https://edition.cnn.com/2023/10/29/opinions/deepfake-pornography-thriving-business-compton-hamlyn/index.html>> accessed 19 December 2023.

devoted to non-consensual intimate imagery.<sup>23</sup> This material also circulates on pornography websites, with 1 in 5 victims having their content shared.<sup>24</sup> Sites like Facebook and Instagram are also destinations for non-consensually shared content, accounting for around 18% and 15% respectively.<sup>25</sup> While social networking platforms have policies against non-consensual intimate imagery, the enforcement of such guidelines varies.<sup>26</sup> Search engines contribute to the problem by returning deepfake tools and deepfake sexual abuse images featuring the likenesses of female celebrities in response to general queries about AI, deepfakes or porn.<sup>27</sup>

### **The harms of online pornography**

The widespread availability and nature of pornography online prompts important questions about the resulting harms and impact on attitudes and behaviours. While there is a broad consensus on the challenges of establishing causality between pornography and sexual violence, the continued emphasis on possible direct effects overshadows legal and policy debates.<sup>28</sup> Regrettably, Ofcom (now the regulator for online safety under the OSA) appears to reproduce outdated notions requiring a direct causal link to acknowledge the harm of pornography,<sup>29</sup> despite recognising that a positive association between pornography consumption and attitudes supporting sexual coercion<sup>30</sup> or sexually aggressive conduct,<sup>31</sup> is practically impossible due to methodological challenges and the complex nature of sexual offending motivations.<sup>32</sup>

<sup>23</sup> *Ibid.*

<sup>24</sup> Survey of 6,109 participants across Australia, New Zealand and the UK: see Nicola Henry et al, *Image-Based Sexual Abuse: a study on the causes and consequences of non-consensual sexual imagery* (Routledge 2020) 29.

<sup>25</sup> Revenge Porn Helpline, *Intimate image abuse, an evolving landscape* (South West Grid for Learning and Home Office 2021) 16 <[https://revengepornhelpline.org.uk/assets/documents/intimate-image-abuse-an-evolving-landscape.pdf?\\_id=1639471939](https://revengepornhelpline.org.uk/assets/documents/intimate-image-abuse-an-evolving-landscape.pdf?_id=1639471939)> accessed 28 June 2022 (Helpline data from 2015 to 2020).

<sup>26</sup> Caitlin Kelly, 'Facebook's Anti-Revenge Porn Tools Failed to Protect Katie Hill' *Wired* (San Francisco, 18 November 2019) <<https://www.wired.com/story/katie-hill-revenge-porn-facebook/>> accessed 3 January 2024; note Meta Oversight Board has opened two cases on deepfakes and women in public life: <<https://oversightboard.com/news/361856206851167-oversight-board-announces-two-new-cases-on-explicit-ai-images-of-female-public-figures/>> accessed 24 April 2024>.

<sup>27</sup> Kat Tenbarge, 'Google and Bing put non-consensual deepfake porn at the top of some search results' *NBC News* (11 January 2024) <<https://www.nbcnews.com/tech/internet/google-bing-deepfake-porn-image-celebrity-rcna130445>> accessed 22 January 2024.

<sup>28</sup> Karen Boyle, 'The Pornography Debates: Beyond Cause and Effect' (2000) 23(2) *Women's Studies International Forum* 187.

<sup>29</sup> Ofcom Consultation, *Protecting People from Illegal Harms Online, Vol 2: The Causes and Impacts of Online Harm* (9 November 2023) para 6L.16.

<sup>30</sup> Gert Hald, Neil Malamuth and Carlin Yuen, 'Pornography and Attitudes Supporting Violence Against Women: Revisiting the Relationship in Nonexperimental Studies' (2010) 36(1) *Aggressive Behaviour* 14.

<sup>31</sup> Jochen Peter and Patti Valkenburg, 'Adolescents and Pornography: A Review of 20 Years of Research' (2016) 53(4–5) *The Journal of Sex Research* 509, 522.

<sup>32</sup> Ofcom, *Protecting people from illegal harms online, Vol 2* (n 29) paras 6L.16–6L.19. Ofcom refers to the limited evidence on extreme pornography due to the 'ethical and legal limitations on conducting' research in this area (see paras 5.16 and 6L of Vol 2).

Recent analysis considers the social functions of pornography and its impact on sexual autonomy and expression rather than causal effects.<sup>33</sup> The ‘sexual script’ theory provides a framework for understanding the harms of pornographic content,<sup>34</sup> by emphasising the normative expectations for sexual behaviours and preferences it creates.<sup>35</sup> Studies, especially among young people, indicate a significant interest in using pornography to ‘learn’ more about sexual activity, with pronounced implications for the LGBTQI community.<sup>36</sup> A UK government-commissioned review highlighted ‘substantial evidence of an association between the use of pornography and harmful sexual attitudes and behaviours towards women’,<sup>37</sup> including permissive attitudes towards sexual coercion and aggression.<sup>38</sup> Girls particularly express concerns over the impact of boys’ consumption of pornography on perceptions of ‘normal’ behaviour, with a notable percentage agreeing that watching it made people ‘less respectful of the opposite sex’.<sup>39</sup> Beyond these specific impacts, pornography is also argued to have a more pervasive influence due to common sexual scripts that legitimise non-consensual activities,<sup>40</sup> posing social challenges in distinguishing between sexual pleasure and harm. Further confusion is sown by the prohibition of sexually violent material in website Terms of Service (ToS, more on this below), a prohibition often not enforced, thereby contributing to the distortion of the boundary between what is and is not considered sexual violence on mainstream online platforms.<sup>41</sup>

Non-consensual sexual imagery inflicts extensive harm, causing victims to suffer devastating consequences across various aspects of their lives, personal and professional. It can lead to a ‘social rupture’ which divides their existence into ‘before’ and ‘after’ the abuse,<sup>42</sup> resulting in isolation, shattered trust, and considerable mental and psychological distress.<sup>43</sup> Non-consensual intimate

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<sup>33</sup>Fiona Vera-Gray, ‘The Authority of Pornography’ in Adele Bardazzi and Alberica Bazzoni (eds), *Gender and Authority across Disciplines, Space and Time* (Palgrave Macmillan 2020) 291.

<sup>34</sup>Ethan Marshall, Holly Miller and Jeffrey Bouffard, ‘Bridging the Theoretical Gap: Using Sexual Script Theory to Explain the Relationship Between Pornography Use and Sexual Coercion’ (2021) 36(9-10) *Journal of Interpersonal Violence* NP5215-NP5238.

<sup>35</sup>Yanyan Zhou and Bryant Paul, ‘Lotus blossom or dragon lady: A content analysis of “Asian women” online pornography (2016) 20(4) *Sexuality & Culture* 1083; Vera-Gray and McGlynn (n 1) 471.

<sup>36</sup>BBFC, *Young People, Pornography and Age-Verification* (BBFC 2020) 32.

<sup>37</sup>Government Equalities Office, ‘The relationship between pornography use and harmful sexual attitudes and behaviours’ (GEO 2020) 6; Miranda Horvath et al, *Basically ... Porn Is Everywhere: A Rapid Evidence Assessment on the Effects that Access and Exposure to Pornography has on Children and Young People* (Children’s Commissioner for England 2013) <[https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/07/Basically\\_porn\\_is\\_everywhere.pdf](https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/07/Basically_porn_is_everywhere.pdf)> accessed 1 July 2022.

<sup>38</sup>Elly Hanson, *What is the Impact of Pornography on Young People?* (PHSE Association 2020) 2.

<sup>39</sup>BBFC, *Young People, Pornography and Age-Verification* (n 36) 48.

<sup>40</sup>Vera-Gray and others (n 13).

<sup>41</sup>ibid 1257.

<sup>42</sup>Clare McGlynn and others, ‘“It’s Torture for the Soul”: The Harms of Image-Based Sexual Abuse’ (2021) 30(4) *Social & Legal Studies* 541.

<sup>43</sup>Yanet Ruvalcaba and Asia Eaton, ‘Non-consensual pornography among US adults: a sexual scripts framework on victimization, perpetration, and health correlates for women and men’ (2020) 10(1) *Psychology of Violence* 68.

images, including deepfakes, are used to intimidate public figures, particularly women politicians,<sup>44</sup> casting a shadow over their lives<sup>45</sup> as an ‘ongoing, existential threat’<sup>46</sup> and restricting women and girls’ autonomy and engagement with public life.<sup>47</sup> The UN Special Rapporteur on Freedom of Expression has noted the silencing effect this has on women.<sup>48</sup>

Moreover, the evidence highlights broader adverse effects, including impacts on young people’s body image and well-being, as well as diminished enjoyment and connection in sexual activity.<sup>49</sup> Pornography use is also associated with ‘risky’ consensual sexual behaviour, involving alcohol use and unclear communication.<sup>50</sup> Studies on extreme pornography prosecutions suggest a potential correlation to CSEAM,<sup>51</sup> with over half of extreme pornography cases involving charges related to sexual offences.<sup>52</sup> Similarly, a recent Australian study revealed that men with sexual feelings for, or offences against children, were significantly more likely to view violent or bestiality pornography.<sup>53</sup>

Overall, while this is a multifaceted field, the ubiquity of pornography online, prevalent on dedicated websites and social media, reproduces violent, abusive content, while reinforcing sexist and racist attitudes. The concern is that the pornography industry, given its considerable role in people’s lives, perpetuates a culture that normalises and minimises these harms.

## Regulating pornography before the Online Safety Act

Over many decades, a variety of approaches to controlling pornography have been adopted across the civil and criminal law. Criminal sanctions in the UK

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<sup>44</sup>Brigitte Filion, *Sexism, harassment and violence against women parliamentarians* (Inter-Parliamentary Union 2016) 3.

<sup>45</sup>Clare McGlynn, ‘Deepfake Porn: Why We Need to Make It a Crime to Create It, Not Just Share It’ *The Conversation* 9, April 2024, <<https://theconversation.com/deepfake-porn-why-we-need-to-make-it-a-crime-to-create-it-not-just-share-it-227177>> accessed 23 April 2024; Girl Up Edinburgh podcast, ‘Addressing the Issue: Revenge Porn and Deepfakes’ (November 2023) <<https://open.spotify.com/episode/4Foz4WuAij3JfUA95e5h05?si=11TQHSIBS1Cm1fUL63Mxlg>> accessed 12 December 2023.

<sup>46</sup>Clare McGlynn and others, ‘It’s Torture for the Soul’ (n 42) 553.

<sup>47</sup>See e.g., Julie Posetti et al, *The Chilling: global trends in online violence against women journalists* (UNESCO 2021).

<sup>48</sup>Irene Khan, *Gendered disinformation and its implications for the right to freedom of expression* (A/78/288), 7 August 2023 <<https://www.ohchr.org/en/documents/thematic-reports/a78288-gendered-disinformation-and-its-implications-right-freedom>> accessed 23 January 2024.

<sup>49</sup>Hanson (n 38) 2.

<sup>50</sup>ibid 3.

<sup>51</sup>Antoniou and Akrivos (n 1) 240–241.

<sup>52</sup>Clare McGlynn and Hannah Bows, ‘Possessing Extreme Pornography: Policing, Prosecutions and the Need for Reform’ (2019) 83(6) *The Journal of Criminal Law* 473, 486–487.

<sup>53</sup>Michael Salter et al, *Identifying and understanding child sexual offending behaviours and attitudes among Australian men* (Australian Human Rights Institute 2023) <<https://www.humanrights.unsw.edu.au/news/worlds-largest-child-sexual-abuse-perpetration-prevalence-study-recommends-significant-investment-early-intervention-measures>> accessed 15 December 2023.



are grounded in the prohibition of ‘obscene’ materials, governed specifically in England and Wales by the Obscene Publications Act (OPA) 1959.<sup>54</sup> This Act defines obscenity by reference to nineteenth-century case law that centres on materials tending to ‘deprave and corrupt’ their likely audience.<sup>55</sup> This vague definition has faced criticism for its focus on the moral corruption of viewers (rather than harm in any wider sense) and its failure to reflect contemporary understandings of the varying impacts of pornography.<sup>56</sup>

The Crown Prosecution Service offers some guidance, indicating that content relating to criminal conduct is ‘likely’ to be obscene; with non-criminal conduct ‘unlikely’ to be obscene, unless the audience is young or vulnerable.<sup>57</sup> Material showing or depicting the infliction of serious harm, including ‘dismemberment and graphic mutilation’, as well as ‘asphyxiation causing unconsciousness, which is more than transient and trifling, and given its danger is serious’, may be considered obscene ‘because they show criminal assault notwithstanding the consent of the victim’.<sup>58</sup> On the other hand, material clearly demonstrating ‘full and freely exercised consent’ and where no ‘serious harm’ is caused, is unlikely to constitute obscenity. However, the lack of clarity is underlined by the guidance summarising that obscenity depends on individual circumstances and harm is to be assessed by applying ‘contemporary social standards’. Accordingly, the boundaries of the law remain uncertain, with few prosecutions.<sup>59</sup> In addition, the criminal law targets the possession of ‘extreme’ pornography,<sup>60</sup> namely explicit, realistic and obscene depictions of rape, life-threatening injury, necrophilia, bestiality and serious injury to the anus, breasts and genitals.<sup>61</sup> As with the concept of ‘obscenity’, the scope of the extreme pornography provisions lack clarity and there are few prosecutions.<sup>62</sup> Charges have predominantly centred on bestiality material, given its relative ease of detection.<sup>63</sup>

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<sup>54</sup>Section 51 of the Civic Government (Scotland) Act 1982 states offences very similar to those to the English and Welsh legislation. There are equivalent provisions in the laws of Northern Ireland, specifically targeting the distribution of obscene material.

<sup>55</sup>OPA 1959, s 1. Possession is not covered unless it is for financial gain; *R v Hicklin* (1863) LR 3 QB 360. For a contemporary interpretation of the obscenity test, see *R v Penguin Books Ltd* [1961] Crim LR 176.

<sup>56</sup>Vera-Gray and McGlynn (n 1) 471.

<sup>57</sup>CPS Legal Guidance, *Obscene Publications (revised)* <<https://www.cps.gov.uk/legal-guidance/obscene-publications>> accessed 15 December 2023.

<sup>58</sup>See also *R v Brown & Ors* [1994] 1 AC 212.

<sup>59</sup>CPS, *Violence Against Women and Girls (VAWG) Report 2018–19* (CPS 2019) A53; Jacob Rowbottom, ‘The transformation of obscenity law’ (2018) 27(1) *Information and Communications Technology Law* 4, 9.

<sup>60</sup>Criminal Justice and Immigration Act (CJIA) 2008, s 63 and Criminal Justice and Courts Act 2015, s 37.

<sup>61</sup>For the Scottish equivalent offences, see Criminal Justice and Licensing (Scotland) Act 2010, s 42 amending the Civic Government (Scotland) Act 1982, s 51 on obscene material. The CJIA 2008 also applies in Northern Ireland.

<sup>62</sup>CPS, *VAWG Report 2018–19* (n 58); Antoniou and Akrivos (n 1) 201–227; Clare McGlynn and Erika Rackley, ‘Criminalising extreme pornography: a lost opportunity’ [2009] 4 *Criminal Law Review* 245.

<sup>63</sup>McGlynn and Bows (n 52).

Pornography is also controlled through media and communications regulation which deals with content that lies below the criminal threshold. This includes rules governing the distribution of films and video games, as well as of broadcasting, video-on-demand and advertising.<sup>64</sup> The British Board of Film Classification (BBFC) classifies films for cinema and DVD release (and also video games), by reference to the age groups for which the audience is appropriate. For ‘sex works’ produced primarily for sexual arousal, an R18 certificate may be granted. R18 material is available only through licensed sex shops. The guidelines for R18 exclude materials likely to be breaking the criminal law, as well as any material ‘likely to encourage an interest in sexually abusive activity which may include adults role-playing as non-adults’. Material involving ‘real or apparent lack of consent’ or acts likely to cause serious physical harm, penetration by objects likely to cause harm and ‘sexual threats, humiliation or abuse’ not part of consensual role-playing is ‘not acceptable’.<sup>65</sup> The BBFC has also reported that it refuses to classify ‘depictions of throat-grabbing, choking, gagging and other plays on breath restriction, as well as verbal references encouraging such practices’.<sup>66</sup> This certification regime is supplemented by criminal offences limiting offline distribution of material deemed unsuitable for classification.<sup>67</sup>

This regime remains pertinent for two main reasons. First, it provides a benchmark for the regulation of on-demand programme services (e.g. Prime Video) which extends to on-demand online pornography providers. They are subject to specific content standards<sup>68</sup> pertaining to ‘prohibited material’<sup>69</sup> and ‘specially restricted material’,<sup>70</sup> defined by reference to the BBFC classification rules<sup>71</sup> (though limited to UK-established service providers).<sup>72</sup>

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<sup>64</sup>Video Recordings Acts 1984 and 2010, Communications Act 2003, Indecent Displays (Control) Act 1981, Theatres Act 1968, and some other related provisions e.g., in the Digital Economy Act 2010 (ss 40–41), Customs Consolidation Act 1876 (s 42), Postal Services Act 2000 (s 85) etc.

<sup>65</sup>BBFC Classification Guidelines, pp 26–28 <<https://www.bbfc.co.uk/about-classification/classification-guidelines>> accessed 20 December 2023.

<sup>66</sup>BBFC, *Annual Report and Accounts 2022* (BBFC 2023) 41 <[bbfc-annual-report-and-accounts-2022.pdf](https://www.bbfc.co.uk/annual-report-and-accounts-2022.pdf)> accessed 28 February 2024.

<sup>67</sup>Video Recordings Act 1984, ss 9–15.

<sup>68</sup>Communications Act 2003, Part 4A inserted by the Audiovisual Media Services Regulations 2009 (SI 2009/2979). Note that the protection of audiences accessing TV-like video-on-demand programme content is, at the time of writing, under review with the intention to level the rules between larger on-demand streaming services and traditional broadcasters; see Media Bill 139 (2023–24), Part 4 and Sch 5.

<sup>69</sup>Communications Act 2003, s 368E(3).

<sup>70</sup>ibid, s 368E(5) and ss 368E(4) and (4A).

<sup>71</sup>E.g., Ofcom used its powers under s 368K of the 2003 Act to suspend ‘Jessica Presley’, a ‘TV-like’ video-on-demand service which offered free-to-view R-18 equivalent content without a robust payroll; ‘Ofcom’s enforcement action against the “Jessica Pressley” service’ (Ofcom, 15 November 2013) <<https://webarchive.nationalarchives.gov.uk/ukgwa/20160704225615/http://stakeholders.ofcom.org.uk/enforcement/content-sanctions-adjudications/jessica-presley-statement/>> accessed 3 January 2024.

<sup>72</sup>When these rules were introduced, several porn providers that might have been caught relocated abroad. The age-verification requirements under the 2017 Digital Economy Act partly addressed

Moreover, UK-established video-sharing platforms (e.g. TikTok, OnlyFans) must implement appropriate measures protecting under-18s from potentially harmful content, and the general public from unlawful user-generated material<sup>73</sup>, also based on BBFC standards<sup>74</sup> In practice, therefore, the offline pornography classification system currently governs UK-based video-on-demand and video-sharing platforms, as well as material available in sex shops.

Second, it highlights the differences between material available online and offline. Vast swathes of material on pornography websites would violate the offline classification system. For example, pornography depicting sexual activity between blood-related family members would likely breach the prohibition on promoting criminal and ‘sexually abusive activity’, while non-consensual material (e.g. rape and force porn), as well as deepfake sexual abuse material and other forms of intimate image abuse, would be proscribed. The prevalence of acts of choking and strangulation would prove a classification challenge. Even pornography that does not depict abuse or criminality might fail to satisfy R18 standards, e.g. material featuring degrading acts could be seen as constituting ‘sexual threats, humiliation and abuse’.<sup>75</sup>

These differences challenge the Government’s mantra, commonly repeated during the passage of the OSA, that offline prohibitions should extend online.<sup>76</sup> This is not the case currently. Significantly, when the video-sharing platform rules are repealed as part of the OSA, the BBFC classifications will no longer apply to those services to be regulated under OSA, arguably expanding the gap between online and offline regulation.<sup>77</sup>

Overall, the controls on pornography content and access are relatively weak and dispersed across several regimes resulting in complexity and confusion. Criminal sanctions, the main vehicle for controlling user-generated porn (as opposed to ‘professional porn’), are rarely employed. Other regulatory measures, predominantly tailored for offline environments, have limited territorial reach, significantly reducing their impact and effectiveness. Considering this regulatory inefficiency, the pressure from politicians, policy

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this loophole but were shelved pending further review of online regulation: HC Deb 16 October 2019, vol 666, col 17WS. The Media Bill (n 67) may provide some extra-territoriality for the regime.

<sup>73</sup>Part 4B of the Communications Act 2003, introduced by The Audiovisual Media Services Regulations 2020 (SI 2020/1062) to implement the revised Audiovisual Media Services Directive 2018/1808. For whether a provider falls within UK jurisdiction, see s 368S of the Act.

<sup>74</sup>*ibid*, s 368Z1(8) and Sch 15A.

<sup>75</sup>Ana Bridges and others, ‘Aggression and Sexual Behavior in Best-Selling Pornography Videos: A Content Analysis Update’ (2010) 16(10) *Violence Against Women* 1065.

<sup>76</sup>E.g., DCMS press release, ‘Government Outlines Next Steps to make the UK the Safest Place to Be Online’ (6 February 2018) <<https://www.gov.uk/government/news/government-outlines-next-steps-to-make-the-uk-the-safest-place-to-be-online>> accessed 22 December 2023; DSIT press release, ‘Britain makes internet safer, as OSB finished and ready to become law’ (19 September 2023).

<sup>77</sup>OSA 2023, Sch 17; Ofcom, *Repeal of the VSP regime* (3 May 2023) <<https://www.ofcom.org.uk/online-safety/information-for-industry/vsp-regulation/repeal-of-the-vsp-regime>> accessed 3 January 2024.

makers and civil society to strengthen online harms regulation more broadly (including online porn) has intensified. This culminated in the OSA which aimed to make the UK ‘the safest place in the world to be online’.<sup>78</sup>

## An overview of the Online Safety Act

The OSA is the culmination of a lengthy policy development process. Originating in the 2017 Internet Safety Strategy Green Paper,<sup>79</sup> the 2019 Online Harms White Paper proposed a regulatory model addressing online safety through a statutory duty of care on internet companies, including social media.<sup>80</sup> This approach was taken forward into the Act which aims to reduce online harms caused by ‘user-to-user’ (U2U) services (essentially, social media) and ‘search services’ (which allow users to search more than one website and/or database) by imposing ‘duties of care’. In essence, these duties require companies: (a) to conduct risk assessments and (b) mitigate identified risks (the risk mitigation obligations are termed ‘safety duties’). All in-scope services must protect all UK users from illegal content<sup>81</sup> (‘Illegal Content Safety Duties’); and children from certain online harms (‘Children Safety Duties’),<sup>82</sup> if their services are ‘likely to be accessed by children’<sup>83</sup> (whether U2U or search). The inclusion of extra rules in relation to children highlights the fact that their protection was a key focus of the legislation. In general, stricter duties apply in respect of content of each type that is categorised as ‘priority’ and the obligations are more stringent for the largest or riskiest service providers (known as Category 1 services).<sup>84</sup> Beyond those categories, service providers are obliged to comply with what are referred to as the ‘Triple Shield’ protections which encompass (i) improvements in the environment effected through Illegal Content Safety Duties; (ii) consistent enforcement of services’ ToS; and (iii) user-empowerment tools for limiting access to certain types of content.<sup>85</sup> While these obligations apply to all in-scope content, thus including pornography, the impact on actual content and access is likely to be minimal, as discussed further below.

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<sup>78</sup>DSIT press release, ‘UK Children and Adults to Be Safer Online as World-Leading Bill Becomes Law’ (26 October 2023).

<sup>79</sup>DCMS, *Internet Safety Strategy Green Paper* (HM Government, 2017) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/650949/Internet\\_Safety\\_Strategy\\_green\\_paper.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/650949/Internet_Safety_Strategy_green_paper.pdf)> accessed 20 June 2022.

<sup>80</sup>DCMS, *Online Harms White Paper* (CP 57 2019), partly based on the model proposed by Carnegie UK Trust; see Lorna Woods and William Perrin, ‘Obliging Platforms to Accept a Duty of Care’ in Martin Moore and Damian Tambini (eds), *Regulating Big Tech* (OUP 2021).

<sup>81</sup>OSA, ss 9–10.

<sup>82</sup>*ibid* ss 11–12.

<sup>83</sup>*ibid* s 37.

<sup>84</sup>*ibid* Part 7, Ch 2.

<sup>85</sup>*ibid* ss 14–16.

Importantly, the regime applies to service providers even if not based in the UK, provided they have ‘links with the UK’.<sup>86</sup> A service is treated as such if it has a significant number of UK users, or such users form one of its target markets, or if the service is accessible in the UK and there is a material risk of significant harm to individuals in the UK. This means that the largest social media, search and pornography platforms, as well as small non-UK based ‘free speech’ platforms (e.g. Gab, Rumble or Minds) are in scope.<sup>87</sup>

The primary focus of the OSA duties lies in the service’s design and operation, emphasising how its nature, systems and processes contribute to online harms.<sup>88</sup> While the Act distinguished between different categories of content, the focus should *not*, therefore, be on specific items of content. Unlike traditional content-based approaches that mandate removal of harmful items, this systems-based approach considers broader systemic issues like algorithmic amplification of harmful content,<sup>89</sup> platform accountability, transparency, or the ease of uploading content and financial incentives for doing so as well as having an appropriate moderation system. The Act’s approach recognises that design features, user nudges, commercial incentives to creators and similar are not neutral technological choices;<sup>90</sup> they influence user behaviour and impact content creation and prioritisation, beyond solely providing the means for content dissemination. For example, the business model of many internet-based services is optimised to prioritise user engagement for advertising revenue,<sup>91</sup> minimising obstacles to communication and favour (often provocative) content that drives user engagement. As noted, pornography has benefitted from this business approach.

Ofcom, the UK’s communications regulator, is tasked with the implementation and monitoring of the regime. It must provide guidance on risk assessments,<sup>92</sup> based on risk profiles it will derive from a market-wide evaluation,

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<sup>86</sup>ibid s 4(5)–(6).

<sup>87</sup>See further Alexandros Antoniou, ‘Bringing small high-harm platforms into the online safety regime: how one word changed the game’ (OSA Network, 19 October 2023) <<https://www.onlinesafetyact.net/analysis/bringing-small-high-harm-platforms-into-the-online-safety-regime-how-one-word-changed-the-game/>> accessed 27 December 2023.

<sup>88</sup>OSA, ss 9(5)(h) and 11(6)(h).

<sup>89</sup>See e.g., a recent study revealing that young Australian males’ avatar accounts were algorithmically recommended content featuring explicit misogyny and other hateful messages, promoting negative perspectives on women’s rights and feminism: Elise Thomas and Kata Balint, *Algorithms as a Weapon Against Women* (Institute for Strategic Dialogue, 2022) <<https://www.isdglobal.org/wp-content/uploads/2022/04/Algorithms-as-a-weapon-against-women-ISD-RESET.pdf>> accessed 6 January 2023.

<sup>90</sup>Lorna Woods, William Perrin and Maeve Walsh, *Ad hoc advice from Carnegie UK to UN Special Rapporteur on Minority Issues Concerning Guidelines on Combatting Hate Speech Targeting Minorities in Social Media* (CUKT 2021) para. 5

<sup>91</sup>Described as a form of ‘surveillance capitalism’: Shoshana Zuboff, *The Age of Surveillance Capitalism* (Profile Books 2019).

<sup>92</sup>OSA ss 98–99.

and produce Codes of Practice to detail the safety duties.<sup>93</sup> Compliance with these Codes fulfils the safety duties; otherwise, services can adopt ‘alternative measures’ that meet Ofcom’s guidance (akin to a ‘comply or explain’ model seen in financial reporting).<sup>94</sup> Ofcom must also issue guidance on several other issues, including the impact of the online environment on women and girls,<sup>95</sup> a requirement added following sustained advocacy efforts.<sup>96</sup> The implementation timeline suggests full operationalisation by 2025.<sup>97</sup> Clearly, Ofcom has a critical role in determining whether risk assessments and mitigation plans are ‘suitable and sufficient’<sup>98</sup> and in identifying different risks associated with different types of service. The Act empowers Ofcom with investigatory and enforcement capabilities. If a platform fails in its safety duties, the regulator can issue corrective orders and impose fines.<sup>99</sup>

While the Online Safety Bill initially failed to engage in detail with concerns around pornography (except in relation to CSEAM, extreme pornography and intimate image abuse), amendments during its passage strengthened its provisions on children’s access to pornography; indeed the issue of pornography was mainly discussed from this perspective.<sup>100</sup> The age assurance obligations on U2U and search services are to be found in Part 3 of the Act, with Part 5 added to cover pornography providers who publish only ‘professional pornography’ and do not host U2U content (‘Regulated Provider Pornographic Content’).<sup>101</sup> This means that service providers covered by the Act’s core duties that carry non-user-generated porn will be subject to the Act’s overall regulation of U2U activity, as well as age assurance obligations. Platforms that only provide professional porn are only subject to the age assurance measures in Part 5. It is worth noting that Part 5 applies to services that have ‘links with the UK’,<sup>102</sup> so are not limited to only

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<sup>93</sup>ibid Part 3 (Ch 6) and Part 7 (Ch 3).

<sup>94</sup>ibid ss 23(4), 34(4), 49(5); see further Alexandros Antoniou and Lorna Woods, ‘OSA Codes of Practice: bridging duties and compliance’ (OSA Network, 13 February 2024) <<https://www.onlinesafetyact.net/analysis/osa-codes-of-practice-bridging-duties-and-compliance/>> accessed 27 February 2024.

<sup>95</sup>ibid s 54.

<sup>96</sup>End Violence Against Women and Girls, ‘Campaign Win: New Online Safety Bill Guidance to Tackle Online Violence Against Women and Girls’ (30 June 2023) <<https://www.endviolenceagainstwomen.org.uk/campaign-win-new-online-safety-bill-guidance-to-tackle-abuse-of-women-and-girls/>> accessed 28 February 2024.

<sup>97</sup>Ofcom, *How Ofcom is preparing to regulate online safety* (15 June 2023) <<https://www.ofcom.org.uk/online-safety/information-for-industry/roadmap-to-regulation/0623-update>> accessed 3 January 2024.

<sup>98</sup>OSA, ss 9(2), 11(2), 14(2), 26(2), 28(2).

<sup>99</sup>In serious cases, Ofcom reserves the power to apply to the courts for business disruption measures requiring third parties to impede access to (or withdraw their services from) non-compliant services; ibid Part 7, Chs 4-6.

<sup>100</sup>DCMS, *Government Response to the Report of the Joint Committee on the Draft OSB* (CP 640, 2002), paras 136, 138; DCMS press release, ‘World-leading measures to protect children from accessing pornography online’ (8 February 2022).

<sup>101</sup>OSA, s 79. At the time of writing, these provisions had not been commenced.

<sup>102</sup>ibid s 80(2)(c).

UK-established services, though links arise in narrower circumstances than for Part 3. Although not part of the core safety duties, Part 5 provisions will be enforced by Ofcom with providers facing the same enforcement measures as other in-scope services.

However, challenges relating to the content of online pornography, and particularly the gulf between online and offline regulation, were rebuffed by the Government. In the House of Lords, a coalition sought alignment between offline and online porn regulation, proposing an amendment to prevent the online upload of content failing to attain an R18 certification offline.<sup>103</sup> While this proposal was rejected, the Government agreed during final legislative discussions to undertake a Pornography Review, due to report in 2024.<sup>104</sup>

### **Pornography regulation and the OSA**

While in principle the OSA provides mechanisms that could transform the regulation of pornography, its effectiveness hinges on its ability to appropriately address the range of content and associated harms. Despite the Act ostensibly focusing on service providers' systems and processes, the reality is that the scope and application of duties vary based on the content type, as well as between services. In particular, obligations vary depending on the specific type of content which itself depends on the application of a range of criminal offences; Ofcom's approach in its consultation on the Illegal Content Safety Duties reinforces the significance of categorising content. The need to identify particular types of priority content can also be seen in relation to content harmful to children. Our analysis reveals eight different categories of pornographic content, each with their own regulatory obligations. The first six of these categories relate to illegal pornographic content, with the remaining two encompassing all other forms of lawful pornography on search and user-to-user services. While the analysis below sets out the detail of these categories, a key point is that the boundaries between classifications are uncertain, resulting in a complex and potentially confusing regulatory regime. Note that we do not examine the obligations set out in Part 5 of the OSA which regulate access to other pornography services.

Before setting out the specific categories, we outline first the obligations in relation to illegal content. Regulated services have safety duties to mitigate the risks from 'illegal content'.<sup>105</sup> This is a new regulatory concept created

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<sup>103</sup>HL Deb 19 April 2023, vol 829, col 713; see the position of the coalition of 14 organisations in 'Online Safety Bill: Illegal and prohibited pornographic material' <<https://www.barnardos.org.uk/sites/default/files/2023-04/Online%20Safety%20Bill%20-%20Illegal%20and%20prohibited%20pornographic%20material%20briefing%20-%202026042023.pdf>> accessed 18 December 2023.

<sup>104</sup>See Review's terms of reference in the DSIT press release (n 4).

<sup>105</sup>To some extent, these decisions may be avoided where a provider's ToS cover the content caught by the definition of illegal content; the provider then could make (as they often do now) decisions based on their ToS rather than the criminal law.

by the Act, defined as ‘content that amounts to a relevant offence’<sup>106</sup> The legislation, therefore, draws on the current criminal law which gives rise to particular challenges. Illegal content is that where the use, possession, viewing, accessing, or public dissemination constitutes a relevant offence.<sup>107</sup> This definition reflects the fact that the criminal law does not attach to the content itself but to actions in relation to that content. A relevant offence is either an offence identified in the OSA as a ‘priority’ offence (to which preventative duties apply)<sup>108</sup> or any other relevant non-designated (non-priority) offence which meets the baseline condition of ‘where the intended victim is an individual or individuals’.<sup>109</sup> While services ‘are not required to make findings to a criminal standard or to make decisions that the law has been broken in a given case’,<sup>110</sup> defining illegal content based on whether it ‘amounts to’ a criminal offence has proved problematic. On one reading it suggests a requirement to assess whether an offence has been committed in an individual case, but such an approach is inconsistent with the systems-based nature of the obligations.

For illegal content, U2U services must use proportionate measures<sup>111</sup> to effectively mitigate and manage the risks of harm as identified in the risk assessment,<sup>112</sup> as well as maintaining proportionate systems and processes for swift removal of *any* illegal content upon notice.<sup>113</sup> This convoluted language means that the duties relate to the systems used rather than take-down actions (though the sufficiency of the system may be judged by reference to the number of appropriate take-downs) and mitigation measures should not be just about content removal. There are additional duties concerning priority illegal content to take proportionate measures to: (i) prevent individuals from encountering such content by means of the service; (ii) effectively mitigate and manage the risk of service misuse for the commission/facilitation of such an offence;<sup>114</sup> and (iii) minimise the length of time for which any priority illegal content is present.<sup>115</sup> The qualification ‘proportionate’ suggests that perfection is not required, allowing for tailored responses depending on the severity of risks based on a provider’s size and capacity.<sup>116</sup>

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<sup>106</sup>OSA s 59.

<sup>107</sup>ibid s 59(3).

<sup>108</sup>ibid Schs 5–7 and s 59(4).

<sup>109</sup>ibid s 59(5)(b).

<sup>110</sup>Ofcom Consultation, *Protecting people from illegal harms online, Vol 1: Background to the new Online Safety regime* (9 November 2023) para 2.11.

<sup>111</sup>OSA s 236(1)

<sup>112</sup>ibid s 10(2)(c).

<sup>113</sup>ibid s 10(3)(b).

<sup>114</sup>ibid s 10(2)(a) and (b)

<sup>115</sup>ibid s 10(3)(a).

<sup>116</sup>ibid s 10(10)(b). Measures to be considered in satisfying these obligations are listed in s 10(4).



Search results containing pornographic content are regulated ‘search content’<sup>117</sup> for search engines’ duties of care. In addition to the mitigation and management of the risk of harm identified in risk assessments,<sup>118</sup> they must employ systems and processes designed to minimise the risk of individuals encountering priority illegal content and other non-designated illegal content of which the service has knowledge.<sup>119</sup> This obligation is likewise tempered by the requirement for proportionate measures, meaning it is not an absolute duty to prevent all priority illegal content from search results entirely. Nevertheless, this is a reduced obligation compared to user-to-user services (where the obligation is to *prevent*), as search engines do not host third-party content and consequently cannot remove it. However, their power lies in influencing accessibility through down-ranking and/or de-indexing content. A considerable concern lies in the comparatively weaker obligations on search services, given their foundational role in content access, including pornography.

### ***Child sexual exploitation and abuse material (CSEAM) (priority illegal content)***

The first of the eight pornography categories identified is CSEAM, with Schedule 6 of the OSA listing those CSEAM offences which are categorised as priority illegal content.<sup>120</sup> The list encompasses offences relating to the making, possession, and distribution of ‘indecent’ images of children, along with ‘prohibited’ images, namely non-photographic images, like computer-generated images, cartoons, manga images and drawings. U2U service providers must prevent user exposure to such content and minimise the duration of any such material being present. Search services must employ systems to reduce the risk of encountering CSEAM.<sup>121</sup> While debates persist about the effectiveness of industry practices in tackling the online prevalence of child sexual abuse imagery, the obligations and scope of these measures are relatively clear due to the widespread consensus on the identification and importance of removing such material.<sup>122</sup> This clarity contrasts with other categories of pornography, discussed below.

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<sup>117</sup>ibid s 57(2).

<sup>118</sup>ibid s 27(2); cf. s 10(3)(b) in re U2U.

<sup>119</sup>ibid s 27(3).

<sup>120</sup>ibid s 59(10)(b).

<sup>121</sup>For example, Ofcom’s draft Code of Practice on Illegal Harms provides that search engines should ensure that CSEAM URLs are deindexed based on a list produced by an expert body and which is regularly updated: Ofcom, *Consultation: Protecting people from Illegal Harms Online* (9 November 2023), Annex 4, A4.24-27

<sup>122</sup>See e.g., the Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the ‘Lanzarote Convention’).

### **Obscene publications encouraging child sexual abuse (priority illegal content)**

The second category of content stems from Schedule 6 of the OSA which lists, among others, the criminal offence of distributing obscene materials under the OPA 1959. However, this offence is only a ‘priority offence’ where it can be shown that the obscene material in question would ‘encourage’ an individual to commit the child sexual abuse offences listed in the Schedule which include the CSEAM-related offences as well as several child sexual offences under the 2003 Sexual Offences Act (e.g. inciting a child to engage in sexual activity and sexual communication with a child). This is a new category of sexually explicit material, namely obscene materials which may be said to encourage child sexual abuse and it seems that Ofcom does not expect the same measures to be taken here as for CSAEM.

As discussed above, the meaning of obscenity itself is unclear, and while the criminal law offers some guidance on what constitutes ‘encouraging’ the commission of offences (e.g. giving advice about how to commit an offence or avoiding detection),<sup>123</sup> it is unclear how this will apply in this regime. The criminal law, for example, requires an intention to encourage the commission of the offence. But the OSA is a civil, regulatory regime. This could mean that material which ostensibly ‘encourages’ child sexual abuse is included, even where a criminal standard of proof cannot be met. It is therefore very unclear what materials will fall within the scope of this regulatory category. It is arguable that adult actors being portrayed as under-18 encourage child sexual abuse, as do child-like scenes which seek to replicate locations and items associated with young childhood. It may also be that material labelled ‘tiny teens’ may be encouraging of child sexual abuse.<sup>124</sup> Some explicit material depicting unlawful family sexual activity (‘incest porn’) may also be included such as material easily accessible on X/Twitter with titles such as ‘Daddy’s little girl comes home from school; let’s now cheer her up’.<sup>125</sup>

The OPA covers text-based communications. This provision could therefore also include written materials that may be said to encourage the commission of child sexual abuse offences. Ofcom’s guidance suggests that text messages are included, such as those which are ‘part of a chat room conversations involving explicit internet conversations concerning sadistic paedophile sex acts on children encouraging these acts to be carried out’.<sup>126</sup>

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<sup>123</sup>See Serious Crime Act 2007, ss 44–46, which create three inchoate offences, enabling the prosecution of individuals aiding in the commission of an offence, irrespective of whether the substantive offence is ultimately carried out or attempted.

<sup>124</sup>Vera-Gray and others (n 13); BBFC (36) 42; Salter and others (n 53).

<sup>125</sup>HC OSB 24 May 2022 (Public Bill Committee, second sitting), vol 715, col 63 (evidence by Clare McGlynn).

<sup>126</sup>Ofcom, Consultation (n 121) Annex 10, A4.50.

Ofcom states that the person posting must either intend that the commission of the offence will be encouraged or assisted or believe that an offence will be committed and that the act will encourage or assist its commission.<sup>127</sup>

Furthermore, this new regulatory category includes the ‘encouragement’ of child sexual abuse offences which themselves involve inciting criminal conduct, e.g. inciting a child to engage in sexual activity.<sup>128</sup> Therefore, this category applies to material that may be seen as encouraging the incitement of an offence, a double inchoate regulatory offence yet on a civil standard of proof. A proactive regulatory approach could leverage this provision to mandate considerably more robust efforts in preventing exposure or reducing material that minimises or normalises child sexual abuse.

### **Extreme pornography (priority illegal content)**

Extreme pornography constitutes the third category of illegal pornographic content. The extreme pornography offence under English and Welsh law is designated as a ‘priority offence’ in Schedule 7 of the Act. It criminalises possessing an ‘extreme pornographic image’, defined as ‘grossly offensive, disgusting, or otherwise of an obscene character’ material that portrays ‘in an explicit and realistic way’ (a) life-threatening acts; or (b) acts that result (or are likely to result) in serious injury to a person’s anus, breasts or genitals; or (c) rape or other forms of non-consensual sexual penetration; or (d) acts involving sexual interference with a human corpse; or (e) intercourse or oral sex with an animal (dead or alive).<sup>129</sup> It is critical to emphasise that these provisions apply to *representations* of the relevant acts, encompassing all ‘realistic’ images, not just recordings of ‘real’ activities.<sup>130</sup> Additionally, Schedule 7 includes inchoate offences, such as attempts, assistance, encouragement etc, significantly expanding the scope of the actual possession offence.

It should be noted that the Scottish extreme pornography law is broader than the laws in England, Wales, and Northern Ireland, as it encompasses material depicting acts likely to result in severe injuries, not limited to specific body parts. It also covers images of sexual activity with animals, extending beyond intercourse or oral sex. Despite these differences, the Act prioritises the comparatively narrower English law offence, stating that the criminal legislation of the devolved administrations applies only with the Secretary of State’s consent.<sup>131</sup> Until consent is granted, English law takes precedence. The wider Scottish offence does not thus provide the

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<sup>127</sup>ibid.

<sup>128</sup>OSA, Sch 6, para 5.

<sup>129</sup>CJA 2008, s 63 (as amended by the Criminal Justice & Courts Act 2015).

<sup>130</sup>HL Deb 30 April 2008 vol 701, col 271; HL Deb 30 June 2014 vol 754, col 1600-1601; Home Office, *Consultation on the Possession of Extreme Pornographic Material: Summary of Responses and Next Steps* (Aug 2006) paras 10-11. McGlynn and Bows (n 52) 478.

<sup>131</sup>OSA, s 59(5)(c)

standard for interpreting duties of care relating to illegal extreme pornographic content even in relation to Scottish users.

For U2U services, including general services (e.g. X/Twitter) and pornography services (e.g. Pornhub), extreme pornographic content will trigger the Illegal Content Safety Duties. Preventing bestiality material is likely to be straightforward due to its clear detection through images and descriptors. It is less clear, however, how other material will be identified and managed. For instance, distinguishing consensual from non-consensual acts may be challenging based solely on video content. Nonetheless, labels and titles can play a significant role in clarifying what the video is representing and therefore portraying. Ofcom's list of reasonably available information that services can use when determining the nature of content includes text linked to the content itself.<sup>132</sup> Current research highlights the abundance of such material on popular adult websites, often using explicit titles and descriptions, like 'force' or scenarios such as 'Brother forces sister in her sleep'.<sup>133</sup> This content is also prevalent on platforms like X/Twitter, with videos titled 'raped behind the bin'.<sup>134</sup> Such material is easily identifiable and should be subject to the strict application of the Illegal Content Safety Duties, so that it is no longer easily accessible or available.

The extreme pornography law also extends to depictions of 'life-threatening' acts.<sup>135</sup> The legislation's explanatory notes state this includes 'hanging, suffocation, or sexual assault involving a threat with a weapon'.<sup>136</sup> The CPS guidance repeats this, as well as stating that any such act 'should be obvious on the face of the image'.<sup>137</sup> While some may mis-categorise such behaviours as 'breath play', medical opinion affirms that it poses a life-threatening risk.<sup>138</sup> It is also a common and unwanted experience for many women.<sup>139</sup> However, despite the medical evidence, mainstream pornography often features suffocation themes under categories like 'rough', choking, and strangulation. The widespread presence of this material on mainstream social media and pornography platforms suggests a lack of understanding and ambivalence towards the serious adverse impacts, predominantly on women. Unfortunately, this is replicated in Ofcom's draft guidance which

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<sup>132</sup>Ofcom, *Consultation* (n 121), Vol 5, para 26.26(a).

<sup>133</sup>Vera-Gray et al (n 13) 1250.

<sup>134</sup>HC OSB 24 May 2022 (Public Bill Committee, second sitting), vol 715, col 63 (evidence by Clare McGlynn).

<sup>135</sup>CJIA 2008, s 63(7)(a); CGA (Scotland) 1982, s 51A(6)(a).

<sup>136</sup>*ibid* (CJIA EN, para 457).

<sup>137</sup>CPS Guidance, *Extreme Pornography* (15 November 2021) <<https://www.cps.gov.uk/legal-guidance/extreme-pornography>> accessed 28 February 2024.

<sup>138</sup>Nicole Ullrich et al, 'The choking game': self-induced hypoxia presenting as recurrent seizure like events' (2008) 12(3) *Epilepsy & Behavior* 486.

<sup>139</sup>Anna Moore and Coco Khan, 'The fatal, hateful rise of choking during sex' *The Guardian* (London, 25 July 2019) 4; Debby Herbenick et al, 'Young Women's Experiences with Choking During Sex' (2022) 51 (2) *Archives of Sexual Behavior* 1103.

introduces a new, high threshold for material portraying ‘life-threatening’ acts, defining this as material representing acts which are ‘extreme, persistent and appears to represent a credible threat to life’.<sup>140</sup> This is a new interpretation, raising the threshold beyond the explanatory notes to the legislation and CPS guidance. It is not clear why Ofcom has taken this approach.

The extreme pornography provisions also encompass depictions of acts likely to cause ‘serious injury’ to specific body parts. Determining what qualifies as serious, particularly in the context of bondage, domination, submission and masochism (BDSM), raises complex questions. As noted above, the law in this area covers representations of serious injury, including when there is consent to such acts.<sup>141</sup>

Overall, therefore, the extreme pornography provisions implicate a potentially extensive array of online content. This raises important questions for Ofcom and service providers. For example, it is clearly arguable that material depicting forced sex and strangulation constitutes extreme pornography and should be restricted. Service providers taking this approach would need to prevent users from encountering such content. Their decision might hinge on their perception of harm and the regulator’s willingness to intervene. This is worrying against a backdrop in which some services are reducing investment in trust and safety.<sup>142</sup>

This leads on to consideration of the implications for search services. As noted above, the obligation involves minimising the risk of individuals encountering extreme pornography (rather than preventing exposure, as mandated for user-to-user services). This is obviously a variable standard and the extent to which this obligation will bring about change is unclear. For example, during the passage of the OSA between early 2022 and autumn 2023, Google down-ranked some extreme content like ‘rape porn’, meaning that such websites were still accessible via Google, but required users to scroll past numerous other sites first.<sup>143</sup> These changes might be beneficial in relation to users accidentally stumbling on content, but other similar sites remain available when searching for ‘force porn’.<sup>144</sup>

While some forms of content are easily identifiable, addressing other forms of extreme content (especially depicting serious injury) is more

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<sup>140</sup>Ofcom, *Consultation* (n 121) Annex 10, A10.14.

<sup>141</sup>English law does not permit consent to injury constituting actual bodily harm; *R v Brown* [1994] 1 AC 212.

<sup>142</sup>E-Safety Commissioner, ‘Report reveals the extent of deep cuts to safety staff and gaps in Twitter/X’s measures to tackle online hate’ (11 January 2024) <<https://www.esafety.gov.au/newsroom/media-releases/report-reveals-the-extent-of-deep-cuts-to-safety-staff-and-gaps-in-twitter/xs-measures-to-tackle-online-hate>> accessed 28 February 2024.

<sup>143</sup>Results on file with authors; see also HC OSB 24 May 2022 (Public Bill Committee, second sitting), vol 715, col 63–4 (evidence by Clare McGlynn).

<sup>144</sup>Ofcom suggests that search engines should have a ‘search moderation function’ to deindex or down-rank illegal content of which it is aware. However, it is not clear whether the two responses are seen as comparable despite down ranking being less effective than deindexing in respect of specific searches.

complicated due to the uncertain extent of the obligation. The adequacy of search filters like Google's 'safe search' in fulfilling the obligation to minimise the risk of encountering extreme pornography is questionable. Further, while the OSA is clear that auto-completes on search terms are controlled, Ofcom has not thus far encouraged proactive measures (e.g. user nudges) in this area.

### ***Non-consensual intimate imagery (priority illegal content)***

The fourth out of the eight categories of illegal content is adult non-consensual intimate imagery.<sup>145</sup> While not appropriately characterised as 'pornography' due to its non-consensual nature, this material is nonetheless prevalent on U2U services including social media and pornography platforms. The rise of AI has further exacerbated the issue, with deepfake pornography websites and nudification apps leading to a proliferation of sexually explicit, non-consensual deepfake imagery. Thus, there has been an explosion of material now falling within the scope of these offences.

The English criminal law in this area was revised in the OSA to cover the non-consensual disclosure of, or threats to disclose, intimate images, including the sharing of manufactured intimate images (deepfakes), regardless of the perpetrator's motive.<sup>146</sup> This expansion broadens the scope to cover a wide range of behaviours, including when images are hacked and distributed, shared for financial gain or sexual gratification. The reforms arguably make the implementation of the Illegal Content Safety Duties more straightforward, as all forms of non-consensual distribution of intimate imagery constitute a priority offence and a more extensive range of materials (incl. deepfakes) falls within the purview of regulated providers' obligations.

Definitional issues will challenge implementation, particularly in discerning non-consensual content which will not always be obvious from the material itself. There may be a clear presumption with respect to dedicated platforms (or where so labelled), but elsewhere providers will need to understand factors allowing them to infer such lack of consent. A precautionary approach is important for mitigating the harm from intimate image abuse but Ofcom's approach thus far to making illegal content judgments is unnecessarily cautious and has focussed on take-down measures.<sup>147</sup> It has

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<sup>145</sup>Schedule 7 lists both the Scottish and English law, namely Abusive Behaviour and Sexual Harm (Scotland) Act 2016, and the now repealed ss 33–35 of the Criminal Justice and Courts Act 2015 by s 190 of the OSA.

<sup>146</sup>OSA, s 187 which creates a new base offence of sharing an intimate image without consent, two more serious offences based on intent to cause humiliation, alarm, or distress and for obtaining sexual gratification and a specific offence for threatening to share these images. The previous offence required proof that perpetrators shared sexual images to cause distress. English law now has the widest application of this offence type compared to the other UK jurisdictions.

<sup>147</sup>For example, in their draft guidance, Ofcom suggests service providers consider grounds to infer a criminal act in relation to each time material is posted, meaning that a service would not be obliged to remove images even when it has identified that they were first posted without consent.

not given much consideration to the impact-changing features of the service which facilitate or encourage users to share and disseminate widely offending content.

Regarding search services, the Act's safety duties should primarily impact the ease of accessibility to websites dedicated to distributing non-consensual intimate imagery. It is hoped that Ofcom will not consider tools like 'safe search' suffice in fulfilling the OSA obligations to minimise the risk of encountering priority illegal content. As a minimum, we would expect search services to down-rank websites dedicated to non-consensual intimate imagery such as deepfake pornography. We would also argue that more comprehensive measures, that focus on safety by design, are needed to genuinely reduce harms associated with these offences.

### ***Obscene (but not extreme) publications (non-designated illegal content)***

The fifth category of pornographic content falls within the scope of the OPA 1959 but is not 'extreme pornography'.<sup>148</sup> The obscenity offence is *not* listed as a priority offence, meaning that there are reduced obligations on service providers compared to extreme pornography; specifically, there is no obligation to prevent users encountering it. Nonetheless safety duties require U2U services to operate a service allowing them to promptly remove any obscene content once they become aware of its presence. Similarly, search services are required to minimise the risk of users encountering obscene content of which they are aware. Given the potential significance of obscenity in this regard, it is unfortunate that Ofcom has chosen not to include it in its draft Guidance on Illegal Content.<sup>149</sup> It would nonetheless seem that the general recommendations relating to illegal content in the draft Codes of Practice in this regard would in principle apply.

As noted above, what constitutes 'obscenity' is unclear, with the test being materials tending to 'deprave and corrupt' the viewer. There are few prosecutions, and the CPS guidance provides little clarity other than that depictions of criminal activity are likely to be considered obscene. There is an overlap with the extreme pornography provisions, with the effect that material that is extreme pornography is likely to also be deemed obscene. This raises the question of what kind of material might be obscene, but

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See discussion by Lorna Woods and Clare McGlynn in EVAW et al, *Illegal Harms Consultation VAWG Sector Roundtable Transcript* (6 February 2024) 26–29 <<https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/2024/02/Ofcoms-Illegal-Harms-Consultation-VAWG-Roundtable-public.pdf>> accessed 28 February 2024.

<sup>148</sup>As well as the Scottish equivalent CGA (Scotland) 1982, s 51. The law differs in Northern Ireland.

<sup>149</sup>It has similarly not considered material falling within s 127(1) Communications Act 2003 which could be a relevant offence and deals with material that is 'grossly offensive or of an indecent, obscene or menacing character'.

not extreme. It also means that obscenity will address some of the gaps in the extreme pornography offence.

For example, bestiality pornography not classified as ‘extreme’ will be obscene, such as masturbation of (or by) an animal.<sup>150</sup> Also, explicit content featuring serious bodily injury, not including the anus, breasts or genitals (the focus of the extreme porn offence), will likely be included; such acts may constitute criminal conduct, given that it is not possible to consent to injury constituting actual bodily harm (or worse) for sexual gratification.<sup>151</sup> For depictions of choking, suffocation and strangulation that are not deemed ‘life-threatening’, such material might be classed as obscene due to constituting actual bodily harm to which it is not possible to consent. Infliction of actual bodily harm includes any hurt calculated to interfere with the victim’s health or comfort and need not result in permanent harm, though its effects must be more than ‘transient and trifling’.<sup>152</sup> Given medical evidence around choking and strangulation, it would seem clear that such acts likely cross the threshold for constituting actual bodily harm and therefore obscenity.

Obscenity provisions also cover some forms of ‘incest porn’. Specifically, representations of penetrative activity between proscribed family members (including most obviously parents and their children) should constitute obscene materials due to their depiction of criminal conduct.<sup>153</sup> While the Sexual Offences Act 2003 excludes step relationships involving adults, it does apply to blood relationships and step-relationships with under 18s. Importantly, as with the extreme pornography offence, obscenity laws cover depictions and representations of criminal activity (i.e. they are not limited to images of actual acts of incest and other forms of intra-familial sexual violence). This broad application impacts online platforms hosting incest porn, a prevalent genre on mainstream websites and social media.<sup>154</sup>

### ***Pornography illegal to distribute offline (unclassified porn) (non-designated illegal content)***

The sixth category of pornographic content concerns material distributed offline without the appropriate certification by the BBFC. As discussed above, material that the BBFC refuses to classify as R18 includes material constituting extreme pornography and many forms of obscene materials, all of which fall within the regulatory scope of the OSA. However, the

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<sup>150</sup>The extreme pornography offence only covers intercourse and oral sex with an animal; CJA 2008, s 63 (7)(d).

<sup>151</sup>Domestic Abuse Act 2021, s 71 (consent to serious harm for sexual gratification not a defence); *R v Brown* [1994] 1 AC 212.

<sup>152</sup>*R v Donovan* [1934] 2 KB 498.

<sup>153</sup>These are offences under the Sexual Offences Act 2003, ss 64–65.

<sup>154</sup>*Vera-Gray and others* (n 13) 1255–1256.



BBFC R18 guidance precludes certification to a wider range of materials, as outlined above, including the depiction of ‘sexual threats, humiliation or abuse’, as well as imagery likely to encourage abusive behaviours and serious physical harm. It may, therefore, include strangulation material that is deemed neither extreme nor obscene, depending on how such offences are interpreted, as well as other forms of abusive acts. The distribution of pornography offline which falls outside of the R18 guidance is an offence.<sup>155</sup> It is however unclear whether, given these offences are drafted in a technology specific way, they are relevant offences for the purpose of the Illegal Content Safety Duties.<sup>156</sup> This regulatory category of pornography, therefore, exemplifies the disparity between what is permissible in offline pornographic content on DVD/Blu-ray or streamed services and the kind of material that is commonly found online. This challenges claims that restrictions offline are mirrored online. The attempts to align the regulatory environments based on the BBFC R18 guidelines in the OSA were rejected by the Government.<sup>157</sup>

### ***Lawful pornography harmful to children***

For pornography that is outside of the criminal law, there remain obligations in relation to children’s access to such material. Specifically, pornography is designated as ‘primary priority content that is harmful to children’,<sup>158</sup> requiring U2U services to prevent children from encountering this content.<sup>159</sup> Search services need only implement systems to minimise the risk of children encountering primary priority content (e.g. down-ranking such content in search results for child users or preventing predictive searches from leading children to harmful content).<sup>160</sup> These are, nonetheless, stronger obligations than those that apply to non-designated illegal content.

Ofcom is tasked with producing guidance clarifying the scope of what will constitute ‘pornography’ for these purposes.<sup>161</sup> The definition of ‘pornographic content’ under the Act 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’, excluding text.<sup>162</sup> In addition, the OSA also requires ‘highly effective’<sup>163</sup> age verification (or estimation) by service providers when

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<sup>155</sup>The supply of videos without a classification or outside the terms of the classification is a criminal offence under s 9 of the Video Recordings Act 1984, re-enacted as the Video Recordings Act 2010.

<sup>156</sup>Note that Ofcom’s draft Guidance does not address the question.

<sup>157</sup>HC Deb 12 September 2023 vol 737, col 839.

<sup>158</sup>OSA s 61.

<sup>159</sup>*ibid* s 12(3).

<sup>160</sup>*ibid* s 29(3).

<sup>161</sup>*ibid* s 53(1).

<sup>162</sup>*ibid* ss 61(6) and 236. The definition seems borrowed from s 63(3) of the CJA 2008 (extreme pornography).

<sup>163</sup>*ibid* s 12(6).

preventing children from accessing primary priority content. The exact nature of these requirements is subject to consultation,<sup>164</sup> though recent failures to enforce age verification indicate the need for a step change in practices if restrictions are to be effective.<sup>165</sup>

### **Lawful pornography accessed by adults**

The eighth, and final, category is a residual category covering all pornography not falling in the illegal content categories and accessed by adults. While children's access to lawful pornography is restricted (as above), in relation to adults, two elements of the 'Triple Shield' tools may impact on access to pornography and content available.

First, the largest and the riskiest U2U service providers (Category 1) must have clearly written and consistently enforced ToS<sup>166</sup> and they must have provisions for complaints to be made about ToS-violating content.<sup>167</sup> Given the serious concerns over lax compliance, and the very liberal enforcement approach taken by pornography websites to interpretation and enforcement of their own ToS,<sup>168</sup> these provisions may require a step-change in the approach where they are designated as Category 1. For example, at present there is a considerable difference between the range of materials prohibited by ToS and the actual material available online. If services are to comply with their own ToS, as currently published, considerable amounts of material would need to be removed. On the other hand, there is no minimum content requirement for these ToS in the Act. Accordingly, many services could simply re-write their terms in the most minimal way, thus enabling them to claim they comply with this requirement and without removing any material currently available.<sup>169</sup> Conversely, if a provider adopts a wider definition of pornography than required by the Illegal Content Safety Duties, it may be able to avoid having to expressly determine the scope of illegal content or make decisions based on an illegal content decision. Further, for Category 1 services, the 'Triple Shield' also requires that they cannot take down or restrict content, except as stated in their

<sup>164</sup>Ofcom Consultation (n 121) Vol 4, 21.103.

<sup>165</sup>Simone van der Hof and Sanne Ouburg, "We take your word for it": A review of methods of age verification and parental consent in digital services' (2022) 8(1) *European Data Protection Review* 61; Ofcom, 'A third of children have false social media age of 18+' (11 October 2022) <<https://www.ofcom.org.uk/news-centre/2022/a-third-of-children-have-false-social-media-age-of-18>> accessed 19 December 2023.

<sup>166</sup>OSB s 72(3)-(4)

<sup>167</sup>OSB s 72(5)-(6)

<sup>168</sup>Vera-Gray and others (n 13) 1255–1256; Clare McGlynn and Fiona Vera-Gray 'Porn Website T&Cs are Works of Fiction' *HuffPost* (London, 28 June 2019) <[https://www.huffingtonpost.co.uk/entry/porn-website-tcs\\_uk\\_5d132febe4b09125ca466358](https://www.huffingtonpost.co.uk/entry/porn-website-tcs_uk_5d132febe4b09125ca466358)> accessed 28 December 2023.

<sup>169</sup>For examples in ToS changes, see Amanda Yeo, 'Tumblr will allow nudity again. Bring on the female-presenting nipples' *Mashable* (1 November 2022) <<https://mashable.com/article/tumblr-nudity-ban-adult-content>> accessed 28 February 2024.

ToS.<sup>170</sup> This is a potential weakness as it will mean that ToS would need to be regularly updated to respond to emerging harms, enabling swift removal of abusive material and they are under no obligation to do this. Indeed, their business models may militate against any such restrictions.

Second, the largest service providers (designated as Category 1) must offer user-empowerment tools, giving adult users enhanced control over content preferences and interactions. These include features allowing users to filter out content from non-verified users and limit exposure (and alert them) to specified types of content.<sup>171</sup> However, the types of content to be included within user empowerment tools do not include images circulated without the subject's consent or pornography (though abuse based on sex, sexual orientation etc is included). This has the consequence that users may lack the means to block unwanted pornography. Indeed, services may only provide additional tools that target pornography if included in their ToS.<sup>172</sup> This reduction in control is potentially significant.

## Conclusions and the need for further reform

This article provides the first comprehensive examination of pornography regulation following the OSA 2023. Despite the Act's potential impact on the nature of pornographic content available online and how it is accessed, it is unlikely to bring about significant change. First, although originally designed on a systems-based approach, which could potentially tackle the harms of pornography at a more systematic level, in practice the Act implements a regulatory framework based on categories and sometimes items of content. This content-centric approach means the regulatory regime is less future-proofed and less adaptable to the evolving trends in pornography. The possibility to tackle problematic design supporting an ad-based business model has not, as yet, been taken up by the regulator.

This leads us to the second principal concern: the complexity of the regime. Our analysis reveals that eight different categories of pornographic content emerge from the structure of the new regime. This is complicated enough, but, in addition, the boundaries between these categories are uncertain and subject to considerable interpretation and potential controversy. Further, these categories arise from a patchwork of existing legal regimes, with OSA requirements layered on top. These pre-existing legal requirements herald from very different times, with obscenity laws still being defined through nineteenth-century case law and other provisions regulating offline distribution pre-dating the internet. The longstanding critiques of pornography regulation,

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<sup>170</sup>OSA, s 72(3).

<sup>171</sup>ibid ss 15(2)-(3), 15(10) and 16.

<sup>172</sup>Restrictions arising from user-empowerment tools are permissible only in service of the duty relating to the listed content categories or as specified in the ToS.

particularly challenges around defining obscenity, persist and are indeed further embedded through their integration into the OSA regime via its reliance on existing criminal offences. There is, therefore, no clear overarching purpose to the measures regulating pornography, meaning that interpretation of the varying provisions, and their enforcement, will be more challenging.

Finally, there remains a considerable gulf between what is permissible offline versus what is readily accessible online. This belies repeated Government assertions that what is illegal offline should similarly be prohibited online. Addressing this issue is challenging, especially considering the substantial volume of online content that would violate offline regulations. But it is a dissonance that is conceptually unjustified.

Given these concerns, there is a need for further reform, specifically targeting the OSA and the underpinning criminal regime. The principal obligations in the Act relate to the specific lists of priority illegal content, namely extreme pornography and non-consensual intimate imagery in the pornography context. A broader approach to definitions of priority illegal content, decoupled from specific criminal offences, would provide greater protection against online harms. So long as the list approach continues, a major gap is the exclusion of the Obscene Publications Act 1959 from designated priority offences, as this would help to address a wider range of harmful pornography. This point is particularly important given the lack of protections for adults in relation to content that is not criminal.

Furthermore, the impact of the Act relies heavily on how the regulator Ofcom approaches its responsibilities and whether it proactively seeks change from pornography platforms, addressing not only children's access but also content. It is worth underlining that there would not be such concern over children's access, were it not for the sexually violent, racist and sexist content easily accessible through social media and mainstream pornography platforms. Ofcom's role in determining the extent and nature of change is pivotal, including its approach to: challenging services to engage with safety by design throughout their services, but specifically search services to demand greater action and prevent easy access to harmful porn sites beyond simply providing 'safe search' or similar tools; addressing the risk of serious harm posed by pornographic videos of strangulation and choking and thus warranting removal; confronting pornography companies about the disparity between their ToS and actual content available online; and recognising that our understanding of the harms associated with pornography should evolve beyond outdated assumptions requiring proof of 'direct effects'.

Enhancing the Act's impact involves reforming the foundational criminal laws. Criticism persists regarding the antiquated moral focus of obscenity

laws, emphasising viewers' corruption rather than a harm-oriented approach.<sup>173</sup> It is time to shift the law away from nineteenth-century notions of depravity towards a focus on the broader societal harm and equality ideals affected by pornography. Reforms should extend to extreme pornography laws, including incest content, to broaden the actions required by platforms in terms of content reduction and removal.<sup>174</sup>

Ultimately, the current patchwork and prevailing disjointed approach to pornography regulation must end. A comprehensive strategy, considering modes of creation, distribution, possession, and content, is critical. Historically, there has been little appetite to reform pornography regulation, other than in relation to children's access, and even change in that area has been a long time coming. The proliferation of sexually violent, racist, and sexist online pornography, easily accessible to millions daily, has profound societal implications. In the absence of meaningful regulation, such content influences sexual education and shapes broader society's sexual perceptions, irrespective of individual viewer habits. The prevalence of sexually violent pornography normalises and trivialises such acts, contributing to a climate in which sexual abuse is not taken seriously. The threats posed by non-consensual intimate imagery, particularly deepfake sexual abuse material, extend to democratic values and public life, with women and girls being targeted and threatened. The surge in virtual reality porn compounds these issues, as its heightened sensory experience intensifies not only pleasures but also harms. Addressing the current pornographic landscape is vital to pre-empt increasing regulatory challenges associated with escalating harms.

## Disclosure statement

No potential conflict of interest was reported by the author(s).

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<sup>173</sup>See Clare McGlynn and Erika Rackley, 'Criminalising Extreme pornography: a missed opportunity' (2009) *Criminal Law Review* 245–260; Clare McGlynn and Ian Ward, 'Would John Stuart Mill Have Regulated Pornography?' (2014) 41(4) *Journal of Law and Society* 500.

<sup>174</sup>HC OSB 24 May 2022 (Public Bill Committee, second sitting), vol 715, col 64 (evidence by Clare McGlynn).

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