



## **Pornography Regulation, Legislation and Enforcement Review**

**Evidence Submission, 7 March 2024**

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### **Summary**

- (1) **Predominant focus must be on content of mainstream, online pornography, not children's access:** The reality is that we would not be so concerned about children's easy access to pornography were it not for the sexually violent, racist and misogynistic nature of mainstream porn which is the '[cultural wallpaper](#)' to all our lives.<sup>1</sup> Coupled with fact that young people will get around restrictions on access, the focus must be on content.
- (2) **Pornography Regulation is Human-Rights Enhancing:** It is vital to frame pornography regulation as *enhancing* human rights, particularly women's rights to privacy, sexual autonomy and freedom of speech. This is essential to counter the argument that regulating pornography threatens rights. When the extreme pornography laws were adopted in 2015, **Parliament's Joint Committee on Human Rights** justified the new criminal law on the basis that it was '[human-rights enhancing](#)'<sup>2</sup>, drawing on the [submissions](#) and research of Clare McGlynn and Erika Rackley.<sup>3</sup> The Equality and Human Rights Commission also endorsed this approach (as did many other politicians and organisations). Multiple UN, CEDAW and the Istanbul Convention similarly take a human rights approach requiring proactive legislation.
- (3) **Pornography regulation positively enhances freedom and liberty:** Regulation is more than protecting 'from harm' and 'ensuring public safety', as stated in the Call for Evidence: it is about giving women freedom to make (sexual) choices; free from the fear of violence, strangulation, and abusive sexual scripts of mainstream porn. Further, the Call for Evidence anticipates challenge by stating it is not seeking to 'regulate people's private lives or sexual activity'. But this is what the criminal law *already does* and has *always* done and rightly so: most recently affirming you cannot consent to serious harm, ie 'rough sex' debates. The law prohibits a range of 'consensual' acts as it's in the person's or society's interest.
- (4) **Regulating sexually violent pornography is justified on basis of its 'cultural harm':** Sexually violent and abusive pornography is a form of cultural harm as it contributes to a climate in which sexual violence is normalized – eroticized even – and where there is less respect for women's autonomy. This in turn leads to a society where, at the very least, sexual violence is less likely to be recognized as such (by the police, juries, the victims themselves, the public), where it is less likely to be investigated, where rape myths are harder to challenge and so on. Sexually violent pornography thereby plays its part in shaping a cultural context conducive to high levels of sexual coercion.
- (5) **Move beyond 'direct effects' and focus on pornography shaping 'sexual scripts':** The focus on seeking 'evidence' of 'direct effects' and an almost exclusive focus on impact on 'viewers' (in the Call for Evidence) risks pre-determining an outcome against regulation, as there will never be a study 'proving' a direct, causal link. It is simply not possible to create an ethical study that would test this, nor is it sensible

to reduce sexual offending to one stimulus. **Rejecting a causal relationship is not the same as rejecting any relationship.** It simply does not make any sense to say that media watched by millions is having no effect at all. Instead, research now focuses on how pornography shapes the '[sexual scripts](#)' we all live by; what is sex, what is normal and expected, where are the boundaries; what is lawful.

- (6) **Pornography regulation satisfies John Stuart Mill's harm principle and criminal sanctions justified:** Criminal sanctions against pornography are commonly resisted on the basis of John Stuart Mill's 'harm principle' that no action can be justified unless there is 'harm to others'. However, there is harm in the form of 'cultural harm' and John Stuart Mill's writings support pornography regulation.<sup>4</sup> Our liberal democracy champions the values of equality and dignity which are directly challenged by much sexually violent pornography. There is also a vital precautionary role for law: to anticipate, preclude and counter the risk of harm to society and to individuals. As John Stuart Mill said: 'It is the business of the law to prevent wrongdoing, and not simply to patch up the consequences of it when it has been committed'.
- (7) **Sexually Violent Pornography is freely and easily accessible on mainstream online pornography websites, on social media such as X/Twitter and easily searchable via Google:** pornography including rape, strangulation, incest, exploitation and image-based abuse (voyeurism) is widely accessible online. In the largest study of online pornography content, Vera-Gray, McGlynn et al found that **1 in 8 titles describe sexual violence**. This is what the websites were choosing to show to first time viewers.
- (8) **Extreme pornography prosecutions:** vast majority are for bestiality imagery (85%) with half of charged cases involving other offences, mainly sexual offences. Offenders are of all ages, mostly white, 98% men.
- (9) **Fundamental reform of the criminal law** is required to shift from an obscenity law based on moral harm to viewers, to a harm-based law recognising the cultural harm of sexually violent pornography.
- (10) **Extend extreme pornography law to cover some forms of 'incest porn' and strangulation porn:** the law should be amended to clearly cover strangulation and representations of those forms of family sexual activity that are criminalised in the Sexual Offences Act 2003.
- (11) **Reform extreme pornography law to include public good defence, extend defence of personal participation:** clarify the role of the law is not to target legitimate materials in the public interest or material created for private use involving the participation of the individuals involved.
- (12) **The Online Safety Act has resulted in 8 categories of pornographic content each with their own regulation regime:** this is a confusing and complex regulatory regime in itself, but even more so as the boundaries between the categories are not clear.
- (13) **Ofcom draft guidance is weak risking ineffective implementation of the Online Safety Act:** there is a real risk the Online Safety Act will change little as the illegal harms guidance – on which the whole regime will be based – takes a minimalist approach, focuses too much on take-down rather than systems change, fails to consider victims' human rights, focuses on costs to business rather than costs to victims and society of online abuse, takes a narrow view of harms of pornography, introduces higher thresholds for regulation of strangulation material, does not even require platforms to remove known non-consensual intimate images but to consider each re-post individually.
- (14) **Require mandatory consent for all included in images/videos uploaded to pornography websites and new offence criminalising false representations:** this will help to ensure that non-consensual intimate images are not distributed without consent.

## Outline of Evidence submission

### Over-arching themes

- Evidence: beyond 'direct effects' and focus on 'sexual scripts'
- Cultural harm of sexually violent pornography justifies regulation

### Content of online pornography

- Sexually violent content on mainstream online pornography websites
- Sexually violent pornography on X/Twitter
- Sexually violence pornography easily accessible via one-click on Google

### Fundamental reform of criminal laws on pornography

- Prosecutions of extreme pornography
- Reform extreme pornography to include some forms of 'incest porn'
- Reform extreme pornography to clearly cover strangulation
- Further reforms to extreme pornography laws

### Pornography regulation after the Online Safety Act

- Pornography regulation complex and confusing after the Online Safety Act
- Real risk Online Safety Act changes little due to ineffective Ofcom guidance
- Require mandatory consent for all those in images/videos uploaded to pornography sites

## Over-arching themes: nature of 'evidence', sexual scripts and cultural harm

### Evidence: move beyond 'direct effects' and focus on 'sexual scripts'

- (15) The focus on seeking 'evidence' of 'direct effects' and an almost exclusive focus on impact on 'viewers' (as in the Call for Evidence) risks pre-determining an outcome against regulation, as there will never be a study 'proving' a direct, causal link. It is simply not possible to determine an ethical study that would test this, nor is it sensible to reduce sexual offending to one stimulus. The focus on individual 'viewers' also neglects the broader social harms and indirect effects of pornography.
- (16) Instead of trying to prove the unprovable, **the onus should be on those objecting to regulation to demonstrate there is no effect of sexually violent, racist and misogynistic pornography.** Our attitudes and behaviour are shaped by our social environment which includes porn. It is, therefore, reasonable to expect it to be one contributing factor to a culture which normalises and minimises sexual violence. Unless we really do think such attitudes are genetically predetermined, then these attitudes and actions must come from somewhere and it would be surprising if (sexually violent) pornography was not one such contributing factor.
- (17) **Rejecting a causal relationship is not the same as rejecting any relationship.** It simply doesn't make any sense to say that media watched by millions is having no effect at all. Instead, research now focuses on how pornography shapes the '[sexual scripts](#)' we all live by; what is sex, what is normal and expected, where are the boundaries.<sup>5</sup>

- (18) **Sexual scripts and pornography:** The concept of 'sexual scripts' emphasises how our sexuality, sexual activities and behaviours are developed by interacting with our social environment, such as exposure to media representations (such as pornography) and institutions (such as the criminal law) which encourage some behaviours while stigmatising and condemning others. We interact with these messages; shaping and being shaped by our social environment. This understanding challenges a linear model of watching something then leading to a specific behaviour. It also challenges the notion that pornography is a mere fantasy divorced from any real-world impact. We all develop our understandings of sexual activity through interacting with our environment, including pornography, which therefore plays a significant role in informing individuals and society about what is legitimate, what is normal.
- (19) **Sexual violence as a sexual script in mainstream online pornography:** In my study with Vera-Gray et al on sexually violent pornography, we emphasised the broader social impact of pornography, beyond individual user impacts, and how pornography informs the understandings of the boundary between sex and sexual violence.<sup>6</sup> In particular, in finding a large amount of sexually violent material on mainstream pornography sites, we suggest this blurs any understanding of the boundaries between consensual and non-consensual sexual activity. This then infiltrates society and social attitudes such that non-consent is not recognised, and sexually violent acts are not clearly understood as unlawful. That this material is on the mainstream sites creates a sexual script that sexual violence is an acceptable activity and legitimate basis for sexual arousal that then reverberates across society. In this way, pornography is constructing and reconstructing the cultural norms and practices that support rape and provide the pre-conditions for much sexually coercive behaviours.
- (20) For example, it is rare in pornography for activity that constitutes sexual violence to be explicitly labelled as such. For example, the majority of titles found in our study describing sexual activity with family members constituting what would be commonly understood as incest, were rarely described using that term. Similarly, the term 'rape' was rarely found, instead phrases such as force, or 'she woke up being fucked' are used. It was much more common for images of sexual violence to be positioned as ordinary or humorous, such as 'police takes advantage of young girl to fuck her ass' or 'surprise anal, that was no accident!'. Such acts are suggested as normal, humorous even; as socially acceptable forms of sexual activity. That's the 'sexual script' mainstream pornography is providing.

### **'Cultural harm' of sexually violent pornography justifies regulation**

- (21) The proliferation of sexually violent pornography is a form of 'cultural harm' justifying regulation.<sup>7</sup>
- (22) Sexually violent pornography presents such behaviours as a legitimate source of sexual arousal. Even if the pornographic image or video is 'simulated', that is, where the actor has said yes to saying no, these works legitimate and downplay the harm of sexual violence. In so doing, the images contribute to a culture in which sexual violence is normalized – eroticized even – and where there is less respect for women's autonomy. This in turn leads to a society where, at the very least, sexual violence is less likely to be recognized as such (by the police, juries, the victims themselves, the public), where it is less likely to be investigated, where rape myths are harder to challenge and so on. Sexually violent pornography thereby plays its part in shaping a cultural context conducive to high levels of sexual coercion.
- (23) Our attitudes and behaviour are shaped (though not exclusively) by our social environment. Where pornography is part of that environment, it is reasonable to expect it to be one contributing factor to

these attitudes. Sexually violent pornography which is eroticising abuse is pornography which is likely to encourage attitudes which take sexual violence less seriously. This is likely to create a culture where sexual violence is, if not accepted, at least normalised.

- (24) The cultural harm argument denies a simplistic link between pornography and sexual violence, such that a person who watches sexually violent pornography might then be triggered into committing such acts. Rather the argument is that this sort of pornography contributes to a culture and a set of attitudes in which rape and other acts of sexual violence are less likely to be recognised as such, and are less likely to be investigated or prosecuted.
- (25) To repeat, the argument is not that there is a direct causal connection, but our inability to prove this is not in itself a reason for thinking that these connections do not exist. Rather, as in any situation where causation is unclear, we are left having to decide on the balance of probabilities: is sexually violent pornography more, or less, likely to contribute to a culture which is conducive to problematic attitudes and practices towards rape and sexual violence?
- (26) One way we could think about this is to ask ourselves what would have to be true for sexually violent pornography to have no such impact on attitudes toward sexual violence. The cultural harm argument could be refuted if it were true that cultural factors, including sexually violent pornography, play no part at all in shaping attitudes towards and forms of sexual violence. Alternatively, while one might acknowledge a role for cultural influences on those who perpetrate such crimes, it might be argued that, of all the things that shape or influence social values and attitudes, sexually violent pornography is not one.
- (27) But both approaches are implausible. Unless we really do think that sexism and tendencies towards sexual violence are simply and exclusively genetically predetermined, then these attitudes and actions must come from somewhere. They must be, in part, a product of one's environment. If we accept that our cultural environment influences our attitudes and values, the question becomes what aspects of this environment contribute to particular attitudes. If we are concerned specifically with attitudes towards sexual violence, then it would be surprising if sexually violent pornography was not one such contributing factor due to its prevalence and millions accessing material daily.
- (28) It seems likely that sexually violent pornography is indeed a factor – among any number of other factors – that is likely to encourage and sustain a way of thinking where women's sexual autonomy is less likely to be valued. And, on this basis, we have good reason for thinking that sexually violent pornography is more likely to be culturally harmful than not.

## **Content of Pornography accessible online**

### **Sexually Violent Content on Mainstream Online Pornography**

(29) Fiona Vera-Gray, Clare McGlynn and colleagues have carried out the most authoritative study to date of online pornography content with briefing [here](#) and article free to download [here](#):

(30) The study examined the content on the landing pages of the three most popular online pornography websites, XHamster, XVideos and Pornhub:

- a. In examining that landing pages, we uncovered what the *platforms themselves are choosing* to push to a first-time viewer, often a young teenager.
- b. It is the largest study to date of online pornography content.

- c. While Pornhub has removed many videos since this study, material with titles including rough, force, strangulation and featuring incest remain rife on the site.

## Findings:

### **(31) 1 in 8 titles on the landing pages described acts of sexual violence.**

- (32) Study reveals material depicting criminal acts such as *rape, incest and upskirting* are being actively pushed to the front page by the porn platforms.
- (33) **'teen' is the most common word** used across the entire dataset of 131,738 titles. Teen is therefore a more common way to describe pornography than any description of a sex act or body part and is slightly more common in content describing sexual violence.
- (34) **sexual activity between family members:** Titles describing sexual acts between family members were the most common, including titles such as 'dad and daughter fucking-homemade' and 'brother fuck sister in her sleep'. Note that we excluded titles using family terms simply as a descriptor (eg 'aunty grabs nerdy boys virginity') and only included titles that described family activity between family members. Note also that *step-relationships were less common* than blood relationships.
- (35) **Physical assault and aggression:** This was the second most common category, even though we excluded verbal aggression. It included titles such as 'crying blonde bitch takes rough cunt drilling', 'big huge white monster cock breaking open asian maid pussy'. Notably, the word 'black' was among the most frequently used terms in this category, suggesting connections between physical aggression, sexual assault and racialised descriptions of black performers. Note we excluded BDSM material (such as where so labelled or using common terms such as 'subs').
- (36) **Image-based sexual abuse:** This category includes all forms of non-consensual creation and/or distribution of sexual images including material commonly known as 'revenge porn' and 'upskirting', as well as voyeurism including hidden cameras and 'spy cams.' This included titles such as 'beach spy changing room' and 'upskirted on the train'.
- (37) **Coercive and exploitative sexual acts:** We found that words describing young women were particularly common in titles describing coercive and exploitative acts, with the top three words being schoolgirl, girl and teen. This category included titles such as 'chubby Spanish teen needs cash' and 'dopefiend hates cum in her mouth lol'.

## **Sexually Violent Content Easily Accessed on X/Twitter**

- (38) The pornography that is easily and freely accessible on X/Twitter includes rape pornography, incest porn and some child sexual abuse material.<sup>8</sup> There are also many strangulation and choking videos. This material can be found with the most basic search terms:
- (39) Rape porn material includes titles such as: 'raped behind the bin' and 'kidnapped in the wood'.
- (40) Incest material includes titles such as: 'Daddy's little girl comes home from school; let's now cheer her up'.

## **Sexually Violent Pornography Easily Accessible via one-click on Google**

- (41) **Sexually violent and bestiality pornography are easily accessible via one-click on Google.**<sup>9</sup> This easy accessibility trivialises sexual violence, making it seem a legitimate genre of pornography, by it being so easily findable. The searches below return pages and pages of websites featuring these forms

of violent pornography. This is not material on the dark web that only a determined individual can find.

- (42) **Force porn:** When I first gave evidence in Parliament regarding the Online Safety Bill, the search for 'rape porn' returned pages of websites dedicated to this genre of pornography.<sup>10</sup> During the passage of the Bill, Google down-ranked this term, meaning the material is still accessible on Google, just that you have to scroll through a few pages to get to it.
- (43) However, a simple search for 'force porn' brings up similar material. Note that Google down-ranked *forced* porn, but not force. They are investigating this issue. However, it remains the case that: (a) it took until 2022 and Parliamentary debates on this issue for them to downrank 'rape porn' and (b) the effort to reduce access to this material and similar was half-hearted, hence the ability to still search for 'force porn'.
- (44) **Incest porn, bestiality porn, strangulation porn and deepfake porn:** these search terms return dedicated pornography websites at the very top of the returns.

## **Fundamental reform of criminal laws on obscenity and extreme pornography**

- (45) **Criminal laws on pornography are outdated, confusing and piecemeal:** The current criminal law covering obscenity and pornography is confusing, piecemeal and out of date. It is based on outmoded nineteenth century case law which focuses on the moral corruption of viewers. It is unclear what is meant by 'obscenity' resulting in few prosecutions.
- (46) **Significant continuing impacts of obscenity laws:** While it might be thought that the obscenity laws have little impact today, due to there being so few prosecutions, this is not the case. The obscenity law remains the foundation for a large corpus of criminal law, including the extreme pornography provisions and malicious communications provisions. In turn, this vague and confusing patchwork of criminal laws forms the basis for regulation under the Online Safety Act.

Reform can take two main approaches:

- (47) Comprehensive revision of the criminal law so that it is harm, not obscenity-based, providing a clear, modern, comprehensive approach to the criminalisation of some forms of pornography.
- (48) More limited reform of the extreme pornography law which updates it to include incest and strangulation porn.

### **Reforming the Obscene Publications Act<sup>11</sup>:**

- (49) The definition of obscenity is based on 19<sup>th</sup> century case law focusing on the moral corruption of viewers, rather than any understanding of broader, social harms. Material is obscene if it 'depraves and corrupts' with depravity being described as 'thoughts of the most impure and libidinous kind'.<sup>12</sup> Later cases expanded on the definition, confirming the moral nature of the term: "To deprave means to make morally bad, to pervert, to debase or to corrupt morally. To corrupt means to render morally unsound or rotten, to destroy the moral purity or chastity, to pervert or ruin good quality, to debase, to defile".<sup>13</sup> There is, therefore, little clarity about exactly what constitutes 'obscenity'.
- (50) This could be said to provide flexibility, to allow the law to shift with changing technology and mores. It is true that a flexible law is important for future-proofing. But this aim can be achieved with a far clearer and harm-based definition of the law, rather than the outdated concept of obscenity.

(51) The lack of clarity at the moment is one factor in there being so few prosecutions. The confusion of the law means that police and prosecutors are reluctant to take forward cases as the boundaries of the law are unknown. The CPS guidance provides some context but ultimately also states that 'each case must be considered on its own facts and merits'.

## **Extreme Pornography: what do we know about prosecutions?**

(52) I carried out the most up-to-date study on prosecutions for extreme pornography with my colleague Hannah Bows.<sup>14</sup> Using FOIs from 23 forces for period 2015-2017, we found:

- i. Vast majority of prosecutions relate to **bestiality** images: 85%
- ii. Few rape pornography prosecutions: 1%
- iii. **High rate of attrition:** of all recorded incidents (n=500), 62% led to a charge.
- iv. Patterns of offending: in just over half of cases (59%) an additional offence was recorded, with the majority being for sexual offences.
- v. Gender: the vast majority of those charged are men (98%)
- vi. Age of defendants: men across all ages are charged from under 16s to the over 70s. It is not only committed by young people sharing 'gross' images or following sexual experimentation.
- vii. Ethnicity: accused are predominantly white (71%).

## **Reform Extreme Porn Laws to include some forms of 'incest porn'**

### **Easy availability of incest Porn:**

(53) My [research](#) with Fiona Vera-Gray found family sexual activity to be the most common form of sexually violent porn on the mainstream platforms, with titles such as 'daddy keeps fucking daughter until she likes it' and 'Brother Fucks Sister In The Ass Outdoors'. This material is also easily available on X/Twitter, such as 'Daddy's little girl comes home from school; let's now cheer her up" and one-click via a Google search for 'incest porn'.<sup>15</sup> This echoes other research such as the New Zealand classification authority whose study found that nearly half of the pornographic videos examined (the two hundred most popular porn videos in NZ) featured step or other family sexual activity.<sup>16</sup> Further, videos in that category were more likely to include more non-consensual material.

### **Criminal offences of family sexual activity:**

(54) It is currently a criminal offence to have penetrative sexual activity with a family member which includes blood relationships of siblings, parents, aunts/uncles and adoptive parents. It does not include step relationships. The extreme porn law **does not cover images of family sexual activity that are criminalised in the Sexual Offences Act 2003.**

### **Recommend extending extreme porn laws (England & Wales and Scotland) to cover incest porn that represents criminal activity:**

(55) I recommend expanding the extreme porn laws to cover forms of incest porn that represent criminal activity, such as penetrative sexual activity between blood relatives and adoptive parents/children. I previously made this recommendation in [evidence](#) to Parliament's Women & Equalities Committee inquiry into pornography. This provision should only cover representations of sexual activity between these proscribed family relationships, such as 'daughter swallows dads come then gets fucked' and



not ones where the family term is used as a descriptor (such as 'aunty grabs the nerdy boy's virginity'). It would also not cover step-relationships (unless criminalised). In this way, it is clearly the representations of criminal activity that are included.

### **Step-porn, obscene publications and BBFC guidance:**

(56) Some forms of step-porn may still be proscribed under the Obscene Publications Act (prohibiting distribution of such materials). If the Obscene Publications Act was listed as a priority offence in the Online Safety Act, this would mean porn platforms and social media would have to remove material considered obscene. At the moment, the OPA is not listed as a priority offence. Furthermore, Ofcom has not include any guidance to platforms about the OPA.

### **Why extend extreme pornography law to cover some forms of incest porn?**

(57) Incest porn normalises sexual activity between family members that is contrary to the criminal law, helping to sustain a climate in which child sexual abuse and intra-family abuse is not taken seriously.

(58) It's easy and free availability sends a message that it is legitimate and normal to find sexual abuse between family members sexually arousing.

(59) The minimisation and normalisation of child sexual abuse and intra-familial abuse contributes to the social climate in which such abuse is not taken seriously, where victims are (understandably) reluctant to report thinking they won't be believed or taken seriously (at all stages of the criminal justice system).

(60) There is an unjustifiable difference between offline and online regulation. The BBFC would not classify as R18 much of this material (as it is criminal) and it would also be unlawful to distribute under the Obscene Publications Act. However, it is freely and easily accessible online.

(61) Including forms of incest porn as a form of extreme porn would mean internet platforms and search services would have to take greater action to reduce the accessibility of such materials, if the Online Safety Act provisions are effectively enforced.

(62) This reform would have strong expressive power – sending a clear message that incest porn is not a legitimate genre of pornography and a form of cultural harm.

## **Amend English extreme porn law to clearly cover strangulation porn**

### **Strangulation porn is easily and freely accessible on mainstream online porn websites:**

(63) This material is commonplace online, with porn sites having specific categories of this content and allowing searches using terms such as strangulation. Note it is often referred to as choking, though technically that refers to internal blockage of the throat.

### **Freely accessible via Google and on X/Twitter:**

(64) this material is also easily searchable and highly ranked on Google. It's easily available on X/Twitter with simple searches.

### **English extreme porn offence could and should be interpreted to include strangulation:**

(65) The current law covers 'life-threatening' acts. The Explanatory Notes to the legislation state this includes 'hanging, suffocation, or sexual assault involving a threat with a weapon'.<sup>17</sup> The Crown Prosecution Service guidance repeats this, as well as stating that any such act 'should be obvious on

the face of the image'.<sup>18</sup> In [my study](#) (with Hannah Bows) on prosecutions for extreme pornography, 6% of charged offences were in this category, but the exact content of these images is unknown. It is not known how criminal justice personnel are interpreting the common images of strangulation pornography.

### **BBFC refuses to classify much strangulation porn for R18:**

(66) The BBFC has reported that it has cut, and therefore refuses to classify, 'depictions of throat-grabbing, choking, gagging and other plays on breath restriction, as well as verbal references encouraging such practices'.<sup>19</sup>

### **Ofcom interpretation of law and its guidance unjustifiably raises threshold for any interpretation of the criminal law:**

(67) Ofcom's draft guidance on illegal harms introduces a new, higher threshold for material portraying 'life-threatening' acts to fall within the scope of an extreme porn offence, defining this as material representing acts which are 'extreme, persistent and appears to represent a credible threat to life'.<sup>20</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 and there is no justification based on existing practice or medical opinion. However, this will provide the baseline for any action by social media and porn platforms and, in effect, means nothing will change regarding the content available online.

### **Unjustifiable gap between offline and online regulation:**

(68) That the BBFC would refuse to classify much of this material, yet it is so widely accessible online, reveals a considerable and unjustifiable gap between in regulation. Ofcom's draft guidance will only make this divergence worse and means little/no action is going to be taken regarding this material.

### **Medical consensus that strangulation is potentially extremely harmful, as well as potentially impairing memory and many other functions. There is no 'safe' way to strangle someone:**

(69) There is ample medical evidence and expert opinion on the harms and life-threatening nature of strangulation. For example: *"The medical literature and the cumulative experience of neurologists clearly indicate that restricting cerebral blood flow or oxygen delivery, even briefly, can cause permanent injury to the brain, including stroke, cognitive impairment, and even death. Unconsciousness resulting from such maneuvers is a manifestation of catastrophic global brain dysfunction."* (American Academy of Neurology, [Position Statement](#), 2021).

(70) The risks also include neck bruising, recurrent headaches, tinnitus, unconsciousness, broken blood vessels in the face, a hoarse voice, trouble swallowing. The risks are greater for some people, including those with high blood pressure and high cholesterol; significantly, these are not conditions that may be known to individuals in advance of undertaking these acts.<sup>21</sup>

(71) Research has found an association between repeated choking/strangulation during sex and working memory function and task performance.<sup>22</sup>

### **Scots Extreme Porn Law More Likely to Cover Choking/Strangulation:**

(72) Scots law is broader, including acts which 'result in, or are likely to result, in a person's severe injury' as a category of extreme pornography.<sup>23</sup> In English law, there is a category of 'serious injury', but this is limited to the anus, breasts and genitals. The Scottish provision is therefore far more likely to include strangulation as it does not need to be considered 'life-threatening' and the injury is not limited to specific body parts.

### **Amend English Law to cover 'serious injury':**

(73) English law should be amended so that it covers material that 'results in or is likely to result in a person's serious injury' removing the requirement that the injury must be to the anus, breasts or genitals.

### **Why amend extreme pornography law to clearly cover strangulation porn?**

(74) There is no safe way to strangle someone, despite there being such 'guidance' widely available online and it sometimes being labelled 'breath play'.

(75) Medical opinion is clear that this is a potentially life-threatening practice, with many risks and potential adverse consequences.

(76) Reforming the law on extreme pornography can help raise greater awareness about the harms of this practice.

(77) It is unlawful to consent to assault occasioning actual bodily harm and therefore not possible to consent to strangulation. This was clarified in law recently following debates about the so-called 'rough sex' defence.

(78) Many women and girls experience being strangled and choked by sexual partners, often without any advance warning or seeking of consent.<sup>24</sup> This appears now to be a normalised practice, despite many women stating how uncomfortable they are with it, but feeling that it is expected and 'normal'.<sup>25</sup>

(79) Clarifying that strangulation porn is a form of extreme porn will make clear that this practice is harmful and its eroticisation wrongful. *If* the Online Safety Act is effective, it should mean that this material is not easily accessible and available online.

## **Additional Reforms to Extreme Pornography Laws**

It is recommended that the extreme pornography laws are amended to include: (a) Some forms of 'incest porn' (English and Scots law) and (b) Clearly cover strangulation porn (English law).

In addition, the following reforms are recommended to ensure:

- The aims of the law are understood as not targeting legitimate public interest material
- Material produced for private use is clearly not covered
- Technical amendments included to make interpretation more straightforward and the law therefore more effective and easier to prosecute.

**Remove the additional requirement to prove an image/video is of a 'grossly offensive, disgusting or otherwise of an obscene character' (section 63(6)(b)).**

(80) This provision was added in the later stages of the legislative debates. Ironically, it was added to 'clarify the alignment' of the extreme pornography and obscenity provisions. Its effect, however, is to make the law more confusing and unclear.

(81) It is unclear exactly what material falls within this provision and it adds additional layers of confusion to the law. It also means that prosecutions engage in discussions around what material might be considered 'disgusting' or similar based on notions of conventional, often heterosexual, sexual practices. Harm, not disgust is the basis on which we should be criminally sanctioning individuals.

### **Expand the scope of the defence for personal use**

(82) The current law includes the defence of 'consensual participation' (section 66). It applies where the defendant directly participated in the act/s depicted (excluding bestiality images) and those acts did not involve infliction of any 'non-consensual harm on any person' and if the image is of a human corpse, that it was not in fact an actual corpse. This is generally interpreted as meaning that that defendant is in the image/video at issue. However, this does not cover a person who is engaged in the sexual acts, is part of a private group sharing the images/videos consensually, but who is not in the image itself.

(83) This provision should be extended to include a person participating in the sexual activity, but not in the specific photo (as per *R v Walsh*). This better reflects situations in which images may be taken for personal use.<sup>26</sup>

### **Introduce a public good defence**

(84) Neither Scots nor English law on extreme pornography include a public good defence. The Obscene Publications Act 1959 does include such a defence.

(85) Recommend including such a defence in an expanded extreme pornography offence to clarify for all that the aim is not to criminalise legitimate artistic, educational or other materials of public worth.

(86) Insert new defence: 'A person shall not be convicted of an offence... if it is proven that possession of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or other objects of general concern'. This mirrors the provision in the Obscene Publications Act.

### **Include requirement that the 'context' of an image be considered in determining scope**

(87) In England and Wales, the 'context' of an extreme image is only taken into account in relation to whether the image is pornographic (section 63(4)), the exclusion of classified films (section 64) and the defence that a person charged with the offence participated in the acts (section 66).

(88) This can give rise to difficulties regarding the consensual portrayal of non-consensual acts.

(89) Referring to the context can clarify that whether material is within the scope of the offence can be determined by reference to the context of the material, such as titles.

(90) Scots law provides for the context to be considered (section 51A(7)).

(91) Recommend: Insert a new 63(7A) as follows (based on Scots law):

'In determining whether (as found in the person's possession) an image depicts an act mentioned in subsection (6), reference may be had to—

(a) how the image is or was described (whether the description is part of the image itself or otherwise),

(b) any sounds accompanying the image,

(c) where the image forms an integral part of a narrative constituted by a series of images—

(i) any sounds accompanying the series of images, (ii) the context provided by that narrative.'

## Pornography regulation following Online Safety Act

### Pornography regulation complex and confusing following Online Safety Act

(92) The Online Safety Act was a necessary legislative attempt to reduce online harms. However, pornography was never the focus of the legislation, with the end result being a confusing, and extremely complex patchwork, of measures.<sup>27</sup>

(93) As a result of the Act, there are now **8 different categories of pornography**, each with their own specific regulatory regime and obligations.<sup>28</sup> These categories are based on the content, as well as the means of distribution (offline or online) and, importantly, the boundaries between these categories is unclear due to the opacity of the current law and varied interpretations of some elements:

- a. **Child sexual abuse imagery**: these are priority criminal offences meaning that user-to-user services must (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; and (iii) minimise the length of time for which any priority illegal content is present. Search services must minimise the risk of encountering this material.
- b. **obscene publications encouraging child sexual abuse**: listed as a priority offence, this is a new regulatory offence (ie it's not an actual criminal offence but a new category of content subject to specific regulations) seeking to capture material that encourages the commission of child sexual abuse offences (which themselves include incitement offences).
- c. **extreme pornography**: a priority criminal offence with the obligations outlined above. But only the English & Welsh definitions apply, even in Scotland. So, in Scotland, there is one law relating to the criminal offence of possession, but the English law applies in relation to online obligations.
- d. **obscene but not extreme publications**: not a priority criminal offence meaning only an obligation to effectively mitigate and manage the risks of harm and maintain proportionate systems and processes for swift removal of any illegal content upon notice. Boundaries of the obligations very unclear due to opacity of the law on obscenity and no guidance produced by Ofcom (see further below).
- e. **pornography illegal to distribute offline (BBFC guidelines)**: it is a criminal offence to distribute unclassified pornography and this is not a priority criminal offence; this category covers material that is not classified as R18 is unlawful to distribute offline, though much of this material is easily and freely available online.
- f. **non-consensual intimate imagery**: distribution of intimate images is a priority criminal offence with the obligations outlined above.
- g. **pornography lawful but harmful to children**: obligations to prevent access.
- h. **lawful pornography**: all other pornography, with obligations regarding service providers to comply with their own terms and conditions (which is not the case at the moment for pornography websites).

(94) This is a very complex and confusing regulatory regime, not least because the boundaries between each category are porous (discussed in forthcoming article by McGlynn, Woods, Antoniou). It will be a serious challenge for individuals, services and the regulator to determine the category many forms of pornography fit into and therefore the extent of the requirements.

## **Risk Online Safety Act Changes Little: Strengthened Ofcom guidance vital**

- (95) While the legislation itself is complex, there is a real risk that the Online Safety Act is futile in any attempt to bring about change due to the current approach – and choices - of the regulator, Ofcom. To be clear, this is about the choices the regulator has made in its interpretation of the Act.
- (96) Ofcom has published *draft* guidance on illegal harms which is currently out for consultation. This guidance provides the foundation for the whole regime as it determines what is harmful and provides the guidance around illegal content (for which the obligations are most significant). Therefore, the rest of the regime, such as development of risk assessments and mitigation plans, will all be based on the illegal harms guidance. If this guidance is weak (as it is), this means that the whole regime risks having little impact.
- (97) There are significant concerns with this draft guidance across civil society, including children's charities, bereaved parents, and violence against women organisations and experts.<sup>29</sup> For more details on the concerns around violence against women and girls, see the open letter to Ofcom CEO which identifies concerns based on<sup>30</sup>:
- (98) **Ofcom taking a business-centric approach:** reflected in a focus on the 'costs' & perceived burdens for tech companies, with no equivalent consideration given to the cost of the harms to individual women and girls and wider society – including the costs of their support needs. Ofcom is also privileging the freedom of speech rights of platforms and users/abusers, over victims of online abuse.<sup>31</sup>
- (99) **Ofcom is not adequately taking a systems-based approach** which would prevent abuse from happening in the first place by making services safe by design. Instead, it's focusing on content takedowns after the harm has been done, placing burden of reporting abuse on victims themselves.<sup>32</sup>
- (100) **Ofcom's definition of illegal content is ambiguous & overly narrowly**, limited to individual pieces of content & intention behind them. Instead, it should consider algorithm weighting, nudges & content revenue sharing practices, which produce the harmful online environment.
- (101) **There is too much focus on reporting as an indicator of harm**, when we know most victims don't report and this arbitrary measure should not be the marker of how safe a platform is.
- (102) Ofcom's approach to illegal content **fails to consider wider societal harms** relating to online violence against women and girls, including those additionally marginalised by race and other characteristics – despite having done so for other offences such as hate speech.
- (103) In relation to pornography in particular, I have raised considerable concerns in my evidence submission to the Ofcom consultation, including:

### **Draft Guidance not require platforms to remove all non-consensually shared intimate images (including deepfake porn):**

- (104) For example, emphasis on whether the criminal law applies to each new posting of content means that even where an intimate image is shared non-consensually, the guidance does *not* require all of those images to be removed. Platforms are told to consider the criminal law regarding *each individual reposting* (and subsequent posts may not meet threshold for criminal acts). It seems unlikely this was the intention of Ministers and politicians in making this a priority offence.

### **Draft guidance on extreme porn takes limited view of evidence and harm:**

(105) It states there is a 'lack of evidence' 'directly linking' possessing extreme porn to 'violent behaviour'. See above on limited focus on 'direct effects'. Impacts of extreme porn are far wider; it contributes towards a society where sexual violence is normalised, minimised and trivialised. Yet in other areas, such as foreign interference, emphasis is placed on 'risk of harm' to individuals even where 'lack of direct insight'.

**Draft guidance does not include obscenity offences (incest porn/strangulation):**

(106) The Obscene Publications Act is not listed as a priority offence in the Online Safety Act. It is also not included in Ofcom's illegal content guidance (which includes other non-priority offences). Porn that is obscene but not extreme includes choking/strangulation and incest porn.

**Draft guidance unjustifiably raises threshold for material to be 'life-threatening' (strangulation) in extreme pornography law:**

(107) as outline above, the Ofcom guidance raises the threshold for material to constitute 'life-threatening' images within the extreme pornography law. This will mean very little material affected by the Act's obligations.

**Require mandatory consent of all those in images/videos uploaded to pornography websites and criminalise false representations.**

(108) There is currently little regulation of material that can be uploaded to pornography websites, despite the widespread availability of non-consensual material on the sites.

**Prevalence of image-based sexual abuse on porn sites:**

(109) The Revenge Porn Helpline reports that the main destination for the distribution of non-consensual material is pornography websites, making up 52% of reports to their service in 2021.<sup>33</sup> Notably this was an *increase* in material being distributed on porn sites from previous years. My research with colleagues found that 1 in 5 victims had their images distributed onto pornography websites.<sup>34</sup> Analysis of the content of mainstream pornography websites found many titles suggesting non-consensual porn on the landing pages of the mainstream, online pornographic websites.<sup>35</sup> Many victims have spoken out about their experiences of having sexual images of them shared on pornography websites and their difficulties of getting the material removed.

**Impose obligation on pornography websites to verify the consent of every person in images/videos:**

(110) While the Terms and Conditions of pornography websites say that they do not allow non-consensual material on their sites, it is still easily accessible. Moreover, when victims seek to get material removed, it can be very challenging and time-consuming. Accordingly, an obligation should be placed on pornographic websites that they must secure the consent of all parties in videos/images before they are uploaded. Such a provision was put forward by the Canadian Parliament's Standing Committee on Access to Information, Privacy and Ethics in June 2021 in the following terms: 'That the Government of Canada mandate that content-hosting platforms operating in Canada require affirmation from all persons depicted in pornographic content, before it can be uploaded, that they are 18 years old or older'. A private member's bill was also put before the Canadian Parliament. The Canadian Information Commission, in a ruling against Pornhub, has now also called on such a practice

to be required.<sup>36</sup> This was also an amendment to the EU's Digital Services Act though this was not included in the final text.<sup>37</sup>

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

(111) In addition, a new offence could be introduced to criminalise an individual user making a false representation that they have the consent of all those featured in any user porn to be uploaded to a service provider. This was recommended by a coalition of violence against women organisations in their evidence regarding the Online Safety Bill and in my evidence.<sup>38</sup> This would mirror current laws where making false representations can constitute the criminal offence of fraud. A similar provision was recommended by the Canadian Parliament's Standing Committee on Access to Information, Privacy and Ethics in June 2021: 'That the Government of Canada set requirements for uploaders of content to provide proof of valid consent of all persons depicted and that the new regulations include penalties severe enough to act as an effective deterrent.'

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<sup>1</sup> Clare McGlynn, Evidence to Women and Equalities Committee, Oral evidence: Pornography and its impact on violence against women and girls, HC 87, 11 May 2022: <https://committees.parliament.uk/oralevidence/10219/html/>

<sup>2</sup> Joint Committee on Human Rights, Legislative Scrutiny of Criminal Justice and Courts Bill, <https://publications.parliament.uk/pa/jt201314/jtselect/jtrights/189/18904.htm#n45>

<sup>3</sup> Clare McGlynn and Erika Rackley, Evidence to Joint Committee on Human Rights, Criminal Justice and Courts Bill, 27 March 2014: [https://www.parliament.uk/globalassets/documents/joint-committees/human-rights/McGlynnRackley\\_March\\_2014\\_final.pdf](https://www.parliament.uk/globalassets/documents/joint-committees/human-rights/McGlynnRackley_March_2014_final.pdf)

<sup>4</sup> Clare McGlynn and Ian Ward, 'Would John Stuart Mill have Regulated Pornography?' (2014) 41 *Journal of Law and Society* 500-522.

<sup>5</sup> Fiona Vera-Gray, Clare McGlynn et al, 'Sexual Violence as a Sexual Script in mainstream online pornography' (2021) 61 *British Journal of Criminology* 1243-1260.

<sup>6</sup> Fiona Vera-Gray, Clare McGlynn et al, 'Sexual Violence as a Sexual Script in mainstream online pornography' (2021) 61 *British Journal of Criminology* 1243-1260.

<sup>7</sup> See further: Erika Rackley and Clare McGlynn, 'The cultural harm of rape pornography' *Free Speech Debate* 22 May 2015 <https://freespeechdebate.com/en/discuss/the-cultural-harm-of-rape-pornography/>; Clare McGlynn and Erika Rackley, 'Criminalising Extreme Pornography: a lost opportunity' (2009) *Criminal Law Review* 245-260.

<sup>8</sup> As detailed in my oral evidence to the House of Commons, Public Bill Committee for the Online Safety Bill, 24 May 2022, p 63 (PBC Bill 4 2022-2023).

<sup>9</sup> See my oral evidence (above). 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>.

<sup>10</sup> See my oral evidence (above). 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>.

<sup>11</sup> See further Clare McGlynn and Erika Rackley, 'Criminalising Extreme Pornography: a lost opportunity' (2009) *Criminal Law Review* 245-260 and Fiona Vera-Gray and Clare McGlynn, (2020). [Regulating pornography: Developments in evidence, theory, and law](#). In C. Ashford, & A. Maine (Eds.), *Research Handbook on Gender, Sexuality, and Law* (471-483). Edward Elgar Publishing.

<sup>12</sup> *R v Hicklin* (1868) 3 QB 371.

<sup>13</sup> *Penguin Books Ltd* [1961] Crim LR 176.

<sup>14</sup> McGlynn, C., & Bows, H. (2019). [Possessing Extreme Pornography: policing, prosecutions and the need for reform](#). *Journal of Criminal Law*, 83(6), 473-488.

<sup>15</sup> See my [Online safety Bill Committee evidence](#).

<sup>16</sup> Office of Film and Literature Classification (2019) [Breaking down porn](#).

<sup>17</sup> Explanatory Notes to Criminal Justice and Immigration Act, para 457.



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<https://www.frontiersin.org/articles/10.3389/fnbeh.2022.881678/full>
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- 25 Rachel Thompson, *Rough – how violence has found its way into the bedroom*, Penguin 2021.
- 26 See further Erika Rackley and Clare McGlynn (2013) '[Prosecuting the Possession of Extreme Pornography: A Misunderstood and Misused Law](#)' *Criminal Law Review*, 400-405 for discussion of the case *R v Walsh* which raised these issues.
- 27 McGlynn evidence to Public Bill Committee, Online Safety Bill, 17 June 2022 on pornography provisions in the Bill and options for reform: <https://bills.parliament.uk/publications/46963/documents/2016>
- 28 See further Clare McGlynn, Lorna Woods, Alexandros Antoniou, 'Pornography and the Online Safety Act 2023 and the need for further reform' *Journal of Media Law* forthcoming.
- 29 See further the Open letter from 22 civil society organisations and experts from the Online Safety Act Network: <https://www.onlinesafetyact.net/analysis/osa-network-statement-on-illegal-harms-consultation/>
- 30 Open letter from 44 organisations and experts to Ofcom: <https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/2024/02/VAWG-letter-to-OFCOM.pdf>
- 31 See Online Safety Act Network analysis of human rights in the illegal harms consultation: <https://www.onlinesafetyact.net/analysis/ofcom-s-approach-to-human-rights-in-the-illegal-harms-consultation/>
- 32 See further Online Safety Act Network statement on Ofcom interpretation of illegal content: <https://www.onlinesafetyact.net/analysis/ofcom-s-illegal-content-judgements-guidance/>
- 33 Revenge Porn Helpline, *Intimate Image Abuse – an evolving landscape* (2021).
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- 35 Fiona Vera-Gray, McGlynn et al, above.
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