

# Pornography Regulation and the Online Safety Act 2023

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## Summary

- While the UK's Online Safety Act 2023 (OSA) marks a step forward, introducing potentially significant changes, its rhetoric does not live up to reality. The Act results in eight different pornography classifications, each with its own legal obligations.
- Consequently, the Act is unnecessarily complicated and additional reforms are urgently required if effective action is to be taken to reduce the harms of mainstream, online pornography.
- The OSA's obligations in relation to 'priority illegal content' need to be expanded to cover pornography more comprehensively.
- Ofcom's role in relation to search services needs to be strengthened to elevate online safety beyond 'safe search'.
- Obscenity laws need modernisation, prioritising a shift of focus on broader societal impacts and a cohesive strategy covering creation, distribution, and consumption of pornography.

Full reference to the research

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# Eight categories of Pornographic content

We identified eight new categories of pornography each with their own legal regime.

## 1. Child sexual abuse material (priority illegal content):

- This includes offences concerning indecent images of children and 'prohibited' non-photographic content.
- Regulated user-to-user service providers must prevent user exposure to such material, and search services must reduce the risk of encountering it.
- There is relative clarity regarding the obligations to address this category.

## 2. Obscene publications encouraging child sexual abuse (priority illegal content):

- This is a new category of sexually explicit material, i.e., obscene material that may be said to encourage child sexual abuse (created by Sch. 6 of the OSA).
- Problems will arise with determining what constitutes obscenity and 'encouragement'.
- This category likely encompasses materials featuring adult actors as minors or depicting child-like scenarios, as well as text-based communications which aim to encourage child sexual abuse.
- It also covers materials that encourage offences like inciting minors to engage in sexual activity.
- A proactive regulatory approach could leverage this to effectively curb exposure to such content.

## 3. Extreme pornography (priority illegal content):

This category covers 'grossly offensive, disgusting or otherwise obscene' material that 'explicitly and realistically' shows life threatening injury, serious injury to a person's anus, breasts or genitals, bestiality, necrophilia, rape or assault by penetration.

- For user-to-user services, extreme pornographic content triggers preventative obligations:

- Preventing *bestiality* material is likely to be straightforward but it is less clear how other material will be identified and managed.
- *Life-threatening* acts include hanging, suffocation, or sexual assault involving a weapon but Ofcom's draft guidance raises the threshold for defining life-threatening acts (thereby excluding some material), deviating from existing legislation and CPS guidelines, without clear justification.
- Determining what qualifies as *serious injury*, including in BDSM contexts, can be complex, even where consent appears to be present.
- Search services are required to minimise the risk of encountering extreme pornography, but this standard varies, and its effectiveness remains uncertain.
- The impact of search filters, like Google's 'safe search', in meeting this obligation is questionable, and while the OSA addresses auto-completes on search terms, Ofcom has not yet pushed for proactive measures (e.g., user nudges).

## 4. Non-consensual intimate imagery (priority illegal content):

- This category concerns increasingly prevalent non-consensual adult intimate imagery, including sexually explicit deepfakes, often distributed via social media and pornography platforms.
- Platforms have obligations to reduce the presence of this material online and to have a system to remove it.
- Ofcom's current approach predominantly relies on take-down measures rather than on reduction.
- Implementation challenges include defining non-consensual content, which may not be evident from the material itself and Ofcom's guidance mandates a fresh examination of each reposting to determine its criminality. This means platforms are not required to delete all copies once an image is flagged as non-consensual, placing the burden on victims to continuously monitor and report reappearances.
- An amendment to the Act could introduce a 'stay-down' provision, ensuring that once a non-consensual intimate image is removed, any further posting of such imagery is similarly taken down without further moderation.

- For search services, the Act mandates minimising the risk of encountering websites distributing non-consensual intimate imagery which should include down-ranking these sites and focussing on safety by design.

### 5. Obscene (but not extreme) publications (non-designated illegal content):

- The fifth category of pornographic content (governed by the Obscene Publications Act 1959) does not carry the same obligations for service providers to prevent user exposure, only that regulated user-to-user providers must promptly remove such content once identified.
- Search services must minimise the risk of users encountering known obscene content.
- Some uncertainty around the 'deprave and corrupt' test remains, but obscenity offences address certain gaps in extreme pornography, covering non-extreme yet obscene materials such as certain forms of bestiality, depictions of choking and strangulation not deemed 'life-threatening', and 'incest porn', extending to both real acts and representations of criminal activity. This broad application affects online platforms hosting such content.
- Despite its potential significance, Ofcom's draft Guidance on Illegal Content omits obscenity.

### 6. Pornography illegal to distribute offline (non-designated illegal content):

- This category involves materials distributed offline without BBFC certification, including extreme and obscene content.
- The BBFC R18 [guidelines](#) also prohibit certification for a **broader** range of materials, e.g., certain strangulation content and other abusive acts.
- Although the distribution of uncertified pornography offline is an offence, its relevance to the new online safety regime is uncertain due to its technology-specific drafting.
- This category highlights the **disparity** between what is permissible offline vs. online, challenging claims of mirrored restrictions (the government rejected

efforts to harmonise regulations based on BBFC guidelines in the OSA).

### 7. Lawful pornography harmful to children:

- Non-criminal pornography still requires protections against children's access: types of pornographic content that Ofcom considers to be harmful to children include explicit depictions of sexual activity, full frontal nudity or depictions of genitals, breasts or buttocks and fetish material when it is 'clear and obvious' that the content (assessed holistically) is intended to elicit sexual arousal.
- User-to-user services must prevent children from encountering this content.
- Search services must minimise exposure e.g., by down-ranking such content.
- The OSA mandates 'highly effective' age verification or estimation to restrict access in respect of user-to user services (but not search), emphasising a need for improved enforcement practices.

### 8. Lawful pornography accessed by adults:

- For this residual category of pornography (adult-accessed content outside illegal categories), the OSA's 'Triple Shield' tools may impact access and content availability.
- The largest and the riskiest user-to-user services (Category 1) must enforce clear Terms of Service (ToS) and address complaints about ToS violations, potentially leading to significant content removal. **But** there is no minimum content requirement for ToS, allowing providers to rewrite terms minimally while leaving objectionable content intact.
- The 'Triple Shield' poses a challenge in that providers cannot remove content outside their ToS, potentially hindering swift responses to emerging harms (unless ToS are regularly updated).
- Category 1 providers must offer user-empowerment tools for enhanced control over specified types of content, but non-consensual images and pornography are not included, potentially limiting users' ability to block unwanted content (unless explicitly stated in the ToS).

## Why is the current law still complicated?

### **The online safety Act was not designed with pornography in mind:**

The OSA was primarily aimed at broader online safety, not specifically targeting pornography. Enforcement is complicated by eight categories of pornographic content stemming from various legal frameworks that create unclear boundaries.

### **Reliance on existing criminal laws:**

The OSA builds on pre-existing, out-dated laws, creating a patchwork regulatory framework that is overly complex and difficult to interpret and enforce.

### **Offline vs. online discrepancies:**

Legal standards continue to differ significantly between offline and online pornography

## Proposals for reform

Despite the OSA's potential impact on the nature and accessibility of pornography, substantial change is required. Without meaningful reform, the proliferation of violent and discriminatory pornography will continue to have profound societal implications, normalising violence.

### **Reforms targeting the Online Safety Act**

#### Expand reach of service providers' obligations:

- The most significant obligations on service providers are in relation to 'priority illegal content'. This category should be expanded to cover the full range of pornography subject to criminal sanctions such as obscenity.

#### Enhanced role for Ofcom:

- Demand stronger actions from search services to limit access to harmful sites beyond simple tools like 'safe search'.
- Ensure the removal of content posing serious harm, such as videos depicting strangulation and choking.
- Tackle problematic business models that prioritise ad revenue over user safety.

- Confront platforms about discrepancies between their ToS and actual content.

### **Comprehensive legal review and reforms**

#### Update pornography-related foundational laws:

- Modernise obscenity laws to shift the focus from moralistic perspectives to addressing the broader societal harms and promoting equality.
- Extend extreme pornography laws to compel platforms to remove more types of harmful material such as incest material.

#### Comprehensive review:

- Replace the current fragmented approach to controlling pornography with a more cohesive strategy that addresses creation, distribution, possession, and content.
- Implement meaningful regulation to combat societal impacts of easily accessible sexually violent, racist, and sexist online pornography.
- Recognise and address the impact of the normalisation of sexual violence and the threats posed by non-consensual intimate imagery and virtual reality porn.