Victims' Commissioner for England and Wales

Submission to the Call for Evidence on Pornography Regulation, Legislation and Enforcement

March 2024

The Victims' Commissioner for England and Wales is dedicated to promoting the interests of victims and witnesses.

The role of Victims' Commissioner is set down in the Domestic Violence, Crime and Victims Act 2004. The Commissioner must:

> 1. promote the interests of victims and witnesses;

> 2. take such steps as they consider appropriate with a view to encouraging good practice in the treatment of victims and witnesses;

> 3. keep under review the operation of the code of practice issued under section 32.

In October 2023, Baroness Helen Newlove was named as the interim Victims' Commissioner for England and Wales for a one-year term.

Summary of submission

The Prevalence of Illegal Pornography Online, and the Impact of Legal Online Pornography

The bulk of our response is in this section. I discuss the prevalence of violent porn and porn which depicts illegal acts. I outline the need for the Review and for government to consider sexual scripts evidence and research. This is necessary because it is impossible to create a study which would ever be able to prove or disprove a direct causal link between violent porn and violent real word actions. I assert that such material is causing harm to wider society by normalising violence and coercion against women.

Comparing the Regulation of Pornographic Content accessed via physical media, broadcast or video-on-demand, against the regulation of Online Pornographic Content accessed via Commercial Pornography Websites and User-to-user Sites

I discuss the regulation of porn which is complicated following the Online Safety Act. In particular, I focus on the limitations of the Ofcom illegal harms guidance. Unless amended, this guidance will not be effective in preventing online harms which disproportionately impact women and girls, such as online VAWG. Regulation must address content, rather than focussing on preventing children from viewing pornographic material, as it is almost inevitable that they will.

The Response to Illegal Pornographic Content and Exploitation and Abuse in the Pornography Industry

Here I suggest reform to the criminal law which I assert, as per Professor Clare McGlynn, may assist in terms of broader regulation.

Education and Information Resources on Pornography

I do not have the expertise to address these questions but I endorse the concept of preventative education, whilst also asserting that content needs better regulation. This complex problem requires multiple solutions, no one activity will sufficiently address the harm.

The Prevalence of Illegal Pornography Online, and the Impact of Legal Online Pornography (Q1- 20)

Attitudes amongst the public towards pornography (Q1)

Pornography is now freely and easily accessible to anybody who can access the internet, including, as has been well explored in public discourse and by policy makers, children.

The way in which porn is consumed has changed dramatically in the last few decades. Prior to digitisation, consumers were limited to analogue mediums; accessing pornography was logistically far more difficult and thus was generally considered to be unusual. Consumption was therefore, compared to now, relatively low.[1] There has, however, been considerable attention paid to rises in use of internet pornography during the Covid-19 pandemic.[2]

The popularisation of the internet has meant that accessing pornographic material has become much easier; this can now be done in the privacy of the home, without the possible 'shame' of being spotted at a specialist establishment. As quoted in the paper '*Assessment of attitudes toward Internet pornography in emerging adults using the Internet Pornography Questionnaire*', the emergence of the internet has created a 'triple A engine' of accessibility, affordability, and anonymity, which fuels porn consumption.[3]

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[1] There have been relatively few longitudinal studies looking at this but it is widely accepted that the accessibility and ease of the internet has increased use. Some studies do look at increases during the life of the internet for example – Lewczuk K, Wójcik A, Gola M. '*Increase in the Prevalence of Online Pornography Use: Objective Data Analysis from the Period Between 2004 and 2016 in Poland*' (2021)
[2] Lau WK, Ngan LH, Chan RC, Wu WK, Lau BW. '*Impact of COVID-19 on pornography use: Evidence from big data analyses.*' (2021); Zattoni, F., Gül, M., Soligo, M. et al. '*The impact of COVID-19 pandemic on pornography habits: a global analysis of Google Trends.*' (2021)
[3] Laura K. Noll, Sarah J. Harsey & Jennifer J. Freyd (2022). Assessment of attitudes toward Internet pornography in emerging adults using the Internet Pornography Questionnaire (uoregon.edu). *Computers in Human Behaviour*, 131. Quoting Cooper, A. (1998). Sexuality and the internet: Surfing into the new millennium. *CyberPsychology and Behavior*, 1, 181–187, and Cooper, A., Delmonico, D. L., & Burg, R. (2000). Cybersex users, abusers, and compulsives: New findings and implications. Sexual Addiction & Compulsivity, 7, 5–29.

Alongside this increase in porn consumption, the audience for porn has diversified with increasing numbers of women and girls accessing and consuming porn. Pornhub claims that around a third of its' users are women.[4] Recent research by the Children's Commissioner suggests that a significant number of girls aged 16-21 are seeking out online pornography.[5]

Attitudes to pornography have been researched and, in general, have become more accepting and liberal. Some differences can be seen depending on gender, with women being slightly less accepting than men.[6] There is limited research which suggests a link between attitudes towards women and acceptance of porn. For example, a survey of over 200 Indian men found that those who expressed more negative attitudes toward pornography also indicated more positive and egalitarian views of women.[7]

Research by Ipsos in 2019 found that only 1 in 5 adults in the UK think soft porn is immoral, which compared to previous research suggests a prevailing liberal attitude to some forms of pornographic material.[8]

Ipsos also compared porn acceptance with global data, finding that Britons are amongst the most accepting of porn internationally.[9] Within this, however, there is a significant difference (around 20%) between men and women, with men being more accepting. It is also important to note that the question used to illicit this data was couched in terms of moderate use, and it is unclear whether porn was defined; respondents therefore may have provided views based on their own perceptions of what is depicted in mainstream porn, regardless of whether they actually consume porn or are aware of what is actually depicted.

Much research shows that high volumes of material available online depict violent, coercive, painful, exploitative and degrading acts. This quote from The Children's Commissioner summarises this point well:

"Let me be absolutely clear: online pornography is not equivalent to a 'top-shelf' magazine. The adult content which parents may have accessed in their youth could be considered 'quaint' in comparison to today's world of online pornography." Children's Commissioner Jan 2023.

There has rightly been increased attention on the accessibility of porn and how this impacts children and young people (CYP). Pornography exposure is widespread and normalised – to the extent that children cannot 'opt-out'. Research by the Children's

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[4] Pornhub publishes yearly data insights which include some demographics information on users.
[5] 'A lot of it is actually just abuse'- Young people and pornography | Children's Commissioner for England (childrenscommissioner.gov.uk) Half (50%) of survey respondents, 58% of boys and 42% of girls, aged 16-21 said that they sought out online pornography themselves.
[6] Assessment of attitudes toward Internet pornography in emerging adults using the Internet Pornography Questionnaire (uoregon.edu)
[7] Chettiar, C., & Syed, S. (2016). A study of the relationship between the attitudes towards pornography and women amongst urban males. Indian Journal of Mental Health, 3, 162–166. https://doi.org/10.30877/IJMH.3.2.2016.162-166
[8] British attitudes to moral and social issues have become significantly more liberal in the last 30 years | Ipsos
[9] Global study finds Britons most accepting of porn | Ipsos

Commissioner found that 64% of children interviewed had seen porn.[10] The average age at which children first see pornography is 13. By age nine, 10% had seen pornography, 27% had seen it by age 11 and half of children who had seen pornography had seen it by age 13.[11]

Pornography is also not confined to dedicated adult sites. The Children's Commissioner found that X (formerly known as Twitter) was the online platform where young people were most likely to have seen pornography. Fellow mainstream social networking platforms Instagram and Snapchat rank closely after dedicated pornography sites.

It is important that policy makers and government are considering ways to prevent children accessing this material, such as age verification. However, due to the ubiquity of digital devices, the fact that children are digital natives and that there are many work arounds for things like age verification, it is virtually impossible to stop access. This is why the nature of the material must be regulated.

The impact of legal online pornography (Q 2-5)

I am concerned about the emphasis placed on evidence and direct effects when attempting to establish the impact of legal online pornography. It is not, and will never be, possible to create a study which could prove or disprove a direct, causal link between porn consumption and certain types of behaviour due to obvious ethical and academic limitations. Therefore, reliance on such evidence to inform regulation risks pre-determining an outcome against any regulation at all. As such I would urge the review to consider evidence of the impact of porn on societal norms and sexual scripts.[12]

Research shows that online mainstream pornography is "overwhelmingly centred on acts of violence and degradation towards women."[13] Content analysis of best-selling pornographic videos revealed that over 88% of scenes involve acts of physical aggression, with 70% of the aggressive acts being perpetrated by men, and 87% of the acts being committed against women.[14] So-called 'gonzo' porn, which attempts to place the viewers directly into the scene and which is the most prevalent form found on mainstream porn sites, is hallmarked by a common set of violent behaviours including choking, gagging slapping and spanking.

A government literature review which considered the academic research in this area found that:

'There is substantial evidence of an association between the use of pornography and harmful sexual attitudes and behaviours towards women. The nature and strength of

[10] Young people and pornography | Children's Commissioner for England
[11] Ibid
[12] Sexual violence as a sexual script in mainstream online pornography | The British Journal of Criminology | Oxford Academic (oup.com)
[13] Sun, C., Bridges, A., Johnson, J. & Ezzell, M. (2014). Pornography and the Male Sexual Script: An Analysis of Consumption and Sexual Relations. *Archives of Sexual Behavior*, 45(4).
[14] Bridges, A. J., Wosnitzer, R., Scharrer, E., Sun, C., & Liberman, R. (2010). Aggression and sexual behavior in best selling pornography videos: A content analysis update. *Violence Against Women*, 16: 1065–1085.

this relationship varies across the literature, and there are many potential moderating (potentially even mediating) variables that require further investigation. However, it is clear that a relationship does exist, and this is especially true for the use of violent pornography.'[15]

The same review argues that, while it cannot be said that there is a direct causal link, pornography use is a factor, amongst other potential factors, that appears to contribute to a permissive and conducive context that allows harmful sexual attitudes and behaviours to exist against women and girls.[16]

In 2020, BBC Disclosure and BBC Radio 5 Live commissioned a survey of 2,049 men in the UK aged 18 to 39 to assess the prevalence of so-called "rough sex". Seventy-one per cent of the men who took part said they had slapped, choked, gagged or spat on their partner during consensual sex. Of those who had engaged in such activity, about one third said they would not obtain consent for the activity either before or during sex. Importantly, around 60% of those who did engage in this type of activity agreed that porn had influenced them.[17]

The Children's Commissioner also found that frequent users of porn are more likely to engage in physically aggressive acts. The research also found that young people are frequently exposed to violent pornography, depicting coercive, degrading or pain-inducing sex acts; 79% had encountered violent pornography before the age of 18.[18]

Research conducted by Professor Clare McGlynn and Dr Fiona Vera-Gray explored the nature of the material available on the three most popular porn sites (XHamster, XVideos and Pornhub).[19] They examined the content on the landing pages of the sites, which allowed them to see what material was being promoted to completely new users by the sites. This research showed that:

- 1 in 8 of the titles on the landing pages described acts of sexual violence.
- 'Teen' is the most common descriptor word used across the dataset examined (131,738 titles).
- Material depicting criminal acts such as rape, incest and upskirting are being actively pushed to the front page of platforms.

Of this material:

- Titles describing intra-family sexual activity (incest) was the most common.
- Titles which describe physical assault and aggression were the second most common even though the researchers excluded verbal aggression and

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[15] [The relationship between pornography use and harmful sexual attitudes and behaviours: A literature review prepared by The Behavioural Architects (Joanne Upton, Alya Hazell, Rachel Abbott and Kate Pilling) for the Government Equalities Office (2020) (publishing.service.gov.uk)](#)
[16] Ibid
[17] ['I thought he was going to tear chunks out of my skin' - BBC News](#)
[18] [cc-a-lot-of-it-is-actually-just-abuse-young-people-and-pornography-updated.pdf (childrenscommissioner.gov.uk)](#)
[19] [Sexual violence as a sexual script in mainstream online pornography | The British Journal of Criminology | Oxford Academic (oup.com)](#) and [Sexually Violent Prn (wordpress.com)](#)

obvious BDSM (Bondage and Discipline, Dominance and Submission, Sadism and Masochism) titles.

- Titles which described image-based abuse was the third most common. It is accepted that most (but by no means all) of the material is likely consensual, however this finding is significant as the research suggests that this type of abuse is being presented as a normative script.
- The final category analysed was sexual scripts using coercion and exploitation. This included sexual activity that may be missed when focussing solely on aggression or physical assault, but which meets the WHO definition of sexual violence. Word frequency analysis showed the particular commonality of youth descriptors in the material coded as coercive and exploitative.

Further researchers in this field have outlined how sexually violent porn as described above is easily and freely accessible on X (formerly Twitter) and via one click on Google.[20] Bestiality and rape porn is also easily accessible.[21]

Prof. McGlynn and Dr Vera-Grey also assert that much of this material contravenes the terms and conditions of the sites themselves, which demonstrates at best ambivalence and at worse prioritisation of profit over harm. It also demonstrates that self-regulation is not working. Indeed the problems of commercial companies self-regulating was part of the reasoning for creating a regulator and regulatory framework under the Online Safety Bill. So far, the guidance created by Ofcom as regulator is built on a premise that internet companies are good faith actors and will largely self-regulate. This approach is inarguably flawed, as I will expand on later in this submission.

Illustrating the above point, during 2022 due to parliamentary debates on the Online Safety Bill taking place, Google downranked the terms 'rape porn' and 'forced porn'. This meant that the material was still available but accessing it was made slightly harder due to having to scroll further. The same was not done for the term 'force porn' which brings up similar material.[22] Searches for incest porn, bestiality porn, strangulation porn and deepfake porn will bring up dedicated sites at the top of the listed sites.

The ready availability and active promotion to new users on mainstream porn sites of this sexually violent material is a form of cultural harm as it presents such behaviours as a legitimate source of sexual arousal. Sexual violence becomes normalised, which creates a society in which this problematic behaviour it is less likely to be recognised as unacceptable.

Illegal pornography viewing habits and AI-generated pornography (Q 6-18)

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[20] Evidence provided on the Online Safety Bill – Public Bill Committee Evidence on Pornography Regulation 17 June 2022 by Professor Clare McGlynn, Durham Law School, Durham University, and Professor Lorna Woods, School of Law, University of Essex
[21] Ibid
[22] Ibid

The lines between pornography which is illegal and that which is legal but harmful are often blurred, with consumers not knowing or understanding what constitutes illegality due to much of this content being easily accessible online.

Strangulation is a key example of physical aggression which exemplifies the blurred lines between illegal and legal but harmful content. There is a clear medical consensus that strangulation is always a life-threatening act, and the British Board of Film Classification (BBFC) refuses to classify pornographic films which depict throat-grabbing, choking, gagging and other plays on breath restriction.[23]

Recognising increasing incidents of strangulation during sex and in domestic abuse, Government has now legislated to create a criminal offence of non-fatal strangulation.[24]

However, pornographic material depicting strangulation is commonplace online, with porn sites having specific categories of this content and allowing searches using terms such as strangulation. This material is also easily searchable and available on non-porn sites such as Google and X (formerly known as Twitter). There is an unjustifiable and growing gap between regulation of online and offline content, demonstrated by the fact that much of this material would not be considered for classification by the BBFC in traditional media form.

The ubiquity of strangulation and other abusive actions in porn creates an effect of normalisation and acceptance. Specifically, the availability of such material on mainstream porn sites creates a perception amongst consumers that this material is legal and acceptable.

There is also evidence that consumers of 'soft' pornography eventually become desensitised to this material and begin to seek out 'hardcore' porn to fulfil their sexual desires.[25] This, combined with freely available material depicting life-threatening acts such as strangulation, leads to a desensitisation towards physical abuse and degradation exhibited in porn. This is exacerbated by the belief that this material is not extreme or illegal. This escalation can partly explain how legal pornography viewing habits can inadvertently lead to a person both deliberately and inadvertently viewing illegal pornography.

The Internet Watch Foundation (IWF) has also reported that it received a significant number of reports of pornography depicting child sexual abuse material (CSAM) from members of the public, who inadvertently viewed such material whilst browsing porn sites looking for adult porn.[26] The number of reports they received increased exponentially during the Covid pandemic lockdown, because people were spending more time at home online. This material is easily available on the open internet, not hidden on the dark web, and image host sites are amongst the most popular

[23] British Board of Film Classification: Annual Report and Accounts (2022)
[24] Domestic Abuse Act 2021 (legislation.gov.uk) Section 70
[25] Donevan, M, Magdalena, M (2017). The relationship between frequent pornography consumption, behaviours, and sexual preoccupancy among male adolescents in Sweden. *Sexual & Reproductive Healthcar*e, 12: 82-87
[26] 'These images are a crime scene … it's massive for us to find the child' | Child protection | The Guardian (2020)

platforms for this material. It can be reasonably anticipated, therefore, that accidental exposure to CSAM on both porn sites and non-porn sites will occur the more time a person spends online.

Additionally, as outlined CEASE's 'Big Porn Report', there have now been numerous exposes which demonstrate high levels of illegal porn hosted on mainstream porn sites.[27] As with CSAM, it can be reasonably anticipated that users of mainstream porn sites are likely to come across illegal pornographic material the more they use these sites.

These trends can also be observed in the consumption of AI-generated pornography. For ease, I will be referring to AI-, AR- and VR-generated porn as discussed in the Call for Evidence using the collective term "AI-generated porn".

AI-generated porn ('deepfake' porn) is becoming increasingly commonplace online. A survey by Home Security Heroes found that, between 2019 and 2023, the number of deepfake videos online has increased by over 550%. At the same time, over 98% of all deepfake videos are deepfake pornography. 48% of respondents reported having seen deepfake pornography at least once.[28]

This year has seen a leap in the level of detail and realism in AI-generated images, including AI-generated pornography. The prevalence of pornography on the internet means that there is lots of content, easily accessible, for use in AI training datasets. It is therefore relatively easy for individuals to create and access AI-generated porn depicting virtually anything they want, to achieve near-instant sexual gratification. We know that there is demand for violent porn, because this is already commonplace online; therefore, it can be assumed – and, to some extent, already evidenced – that increased access to AI-generative technology will lead to an increase in the prevalence of pornography depicting violent sexual activity.

This is likely to have a negative impact on attitudes towards consent. As is arguably also the case with non-AI-generated porn, consent in AI-generated porn is not a consideration. Whilst it is true that porn exists which intentionally depicts rape and non-consensual sexual activity, the vast majority alleges to depict consensual activity even when this involves violence, abuse and degradation. A perception is created that the performer on the receiving end of the violence – almost always a woman – has consented to this because they want it to happen and they enjoy it.

Porn can hardly be described as an ethical industry in any circumstance, but 'fake' porn takes this to a new level, as there are no 'real' people involved and therefore no need to consider the ethics of performers. Indeed, Home Security Heroes' study of deepfakes found that the two most common reasons why consumers of deepfake porn do not feel guilty about doing so is that, 1) They know there is not a real person involved, and 2) They don't think it hurts anyone as long as it is only for their personal interest.[29] Therefore, the boundaries of what can be depicted can be pushed even further, because a perception is created that there is no impact on

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[27] Expose Big Porn | CEASE / Centre to End All Sexual Exploitation (2021)
[28] 2023 State Of Deepfakes: Realities, Threats, And Impact (homesecurityheroes.com)
[29] Ibid

anyone other than the consumer. AI-generated porn can be created and manipulated to depict virtually anything, to gratify any sexual demand. This gratification can also be delivered almost instantly. As with 'traditional porn', this will create a sexual script that the absence of consent and the presence of violence within sexual activity are both normal and legitimate.

Similar issues arise from AI-generated pornography where the subject has not necessarily consented to their image/ likeness/ voice being used. This genre of porn is not new; a report carried out in 2019 by AI firm Deeptrace found that pornography depicting an individual who has not consented for their image to be shared accounts for 96% of all deepfake videos online.[30] Its prevalence is growing at an alarming rate. Independent research showed that non-consensual AI-generated videos and images, on the 35 most popular deepfake porn sites, increased by 54% between January 2022 and September 2023.[31] There have already been instances of deepfake revenge porn being used to instigate targeted campaigns of harassment against individuals, such as the investigative journalist Rana Ayyub.[32]

Many of the existing, well-documented impacts and issues associated with intimate image abuse apply to non-consensual-AI-generated porn. My predecessor conducted research into online harms including intimate image abuse (IIA) in 2022. This research found that some of the most common harms experienced by those subjected to IIA included: problems with severe lack of confidence; loss of trust in people; difficulty building relationships; self-imposed isolation due to fear of encountering people who had seen the images, and; depressive and suicidal thoughts.[33]

To compound the problem, this research found that women who reported intimate image abuse involving fake porn, were actually less able to get sites to take the images down because technically, the images were not of them.[34] As is frequently the case with other forms of online abuse, the effect is that women are silenced and self-censor their presence online.

Sharing deepfakes is now illegal under the Online Safety Act. However, the creation of these materials is not prohibited. This approach has led to an overwhelming reliance on takedowns to deal with this content. This is problematic as it places the onus on the victim to instigate action against the perpetrator, rather than encouraging safety by design. It also does not address the psychological harm caused to the victim.

I will discuss the issues surrounding existing legislation and regulation in greater detail later in this submission. However, it is clear that what is currently in place does not come close to dealing with the scale of the problems posed by AI-generated

[30] 'The State of Deepfakes: Landscape, Threats, and Impact.' Henry Ajder, Giorgio Patrini, Francesco Cavalli, Laurence Cullen (2019)
[31] Deepfake Porn Is Out of Control | WIRED UK (2023)
[32] I Was The Victim Of A Deepfake Porn Plot Intended To Silence Me | Huffington Post UK News (2018)
[33] 'The Impact of Online Abuse: Hearing the Victims' Voice.' Office of the Victims' Commissioner (2022)
[34] Ibid

porn. AI models must be subject to proper regulatory oversight when being made open source and/or must have in-built protections if closed source.

Some open-source AI models which are available to everyone in the public domain, such as Stability AI and Midjourney, have terms of use or content policies which are aimed at preventing the creation of criminal material. There are two broad forms of moderation for text-to-image models. The first is restricting training data. This restricts the model's exposure to certain content such as pornography and therefore prevents it from being able to generate new content based off this. The second is banning prompts which include terms and words that would contravene content policies. Despite this, the IWF argues that in practice no company can absolutely prevent its models from generating images that would contravene its terms of use.

There are also concerns about what the spread of AI-generated pornography will mean for societal and interpersonal relationships. AI chatbot apps such as Replika and RealDollX have already demonstrated the growing demand for companionship and relationships which are simulated and can be manipulated to fulfil any desire.[35] Given the speed at which this kind of technology has already developed, it seems inevitable that AI-generated porn and AI chatbox apps will eventually combine, allowing users to artificially generate effectively all components of what they consider a normal relationship. The prevalence of AI porn will only serve to normalise sexual and romantic gratification from AI-generated material. This will likely contribute further to the deterioration of healthy attitudes amongst men towards women and girls, when 'real-world' relationships and sexual encounters do not follow the same patterns they have become accustomed to through AI-generated porn.

The increased prevalence in AI-generated pornography and the associated 'improvements' in detail and realism also have significant implications for CSAM prevalence. In the words of the IWF: "If AI models can now generate photorealistic images, they can generate photorealistic images of children. If AI models can generate pornographic images, they can generate photorealistic CSAM."[36]

In their analysis of dark web CSAM forums, the IWF found that the levels of realism in AI-generated CSAM is closely associated with discussions among perpetrators about whether this material satisfies their desires. In some forums, AI-generated CSAM is shared alongside real CSAM (a 'mixed' environment), and users frequently respond to this with expressions of preferences for realistic imagery. The IWF also found that some users expressed a distaste for AI-generated CSAM, precisely because it was not real and lacked a "sense of danger". This counters the argument put forward by users of AI-generated porn, that it is not harmful because there is not a real person involved, as it suggests that AI-generated CSAM can only go so far in providing gratification to consumers of this material. There are obvious concerns about how AI generated CSAM may act as a gateway into real CSAM for individuals who find themselves seeking more extreme porn over time.

[35] Artificial Intimacy: How AI-Generated Pornography is Changing Society | Emerj Artificial Intelligence Research (2023)
[36] 'How AI is being abused to create child sexual abuse imagery.' Internet Watch Foundation (2023)

As AI-generated porn becomes even more realistic, it will become increasingly difficult to differentiate real CSAM from AI-generated CSAM. This will pose a significant problem for law enforcement in victim identification. The resources associated with identifying AI-generated CSAM are not insignificant. During their snapshot study of images uploaded during one month to a single dark web CSAM forum, 12 IWD analysts dedicated a combined total of 87.5 hours to assessing 11,108 AI-generated images.[37] These resources are therefore diverted from victim identification in real CSAM cases.

Comparing the Regulation of Pornographic Content accessed via physical media, broadcast or video-on-demand, against the regulation of Online Pornographic Content accessed via Commercial Pornography Websites and User-to-user Sites (Q21-25)

The regulatory framework is piecemeal and complicated. As a result of the Online Safety Act, there are now eight different categories of 'porn' each with their own regulatory regime. The categories are based on content and means of distribution but the boundaries between these categories are often unclear, some are 'illegal' while some are not:

- **Child sexual abuse imagery**: Under the act 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 or 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.

- **Obscene publications encouraging child sexual abuse:** Listed as a priority offence, this is a new regulatory offence. This means that it is not an actual criminal offence but a new category of content subject to specific regulations. This regulation seeks to capture material that encourages the commission of child sexual abuse offences, which incite offences.

- **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.

- **Obscene but not extreme publications:** This is not a priority criminal offence. Therefore, there is only an obligation to effectively mitigate and manage the risks of harm and also to 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).

- **Pornography illegal to distribute offline (BBFC guidelines)**: It is a criminal offence to distribute unclassified pornography but this is not a priority criminal

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[37] Ibid

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.

- **Non-consensual intimate imagery:** The distribution of intimate images is a priority criminal offence with the obligations outlined above.
- **Pornography lawful but harmful to children:** Obligations to prevent access.
- **Lawful pornography:** This covers all other pornography. This places obligations on the service providers to comply with their own terms and conditions. This is not the case at the moment for pornography websites.

Such a regime will be difficult to utilise effectively because the boundaries between the different categories identified will often blend into one another. This makes it extremely difficult for individuals, services, and regulators to determine the category that the porn in question fits into and therefore what obligations are in place for regulation.

Much footage available on mainstream porn sites is image-based abuse, real rape footage, CSAM or coerced material featuring trafficked or exploited 'performers'. As Victims' Commissioner, I am very concerned that the emphasis is on victims to report the footage and then to campaign for the footage to be removed. In contrast there is a lack of consequences for the sites which host such material in contravention of their own terms and conditions and the law. This is particularly troubling as the business model of most mainstream porn sites encourages extreme material.

The Review will be aware of the Online Safety Act and the draft guidance produced by Ofcom on 'Tackling Illegal Harms'. I would like to offer a word of caution about the effectiveness of these instruments and the dangers of assuming that they provide frameworks for effective regulation. There are significant concerns with this draft guidance across civil society, including children's charities, bereaved parents, and violence against women organisations and experts.[38]

The relevant laws and powers available to tackle illegal and harmful pornographic content are inadequate. As currently drafted, the Online Safety Act and illegal harms guidance will have little impact other than in relation to age verification and children's access. The harmful content depicted in porn, and its prevalence, will not be impacted.

The draft guidance on extreme porn takes a heavily limited view of evidence and harm, on the grounds that there is a 'lack of evidence' directly linking the possession of extreme porn to violent behaviour. This is an unrealistic approach, as there are ethical concerns associated with producing evidence on direct effects of extreme porn. This mean that such evidence is likely to never exist.

The guidance on extreme and illegal porn also shows an unwillingness to engage with wider societal harms relating to online violence against women and girls, despite doing this for other offences in the guidance. There is too much focus on reporting as an indicator of harm, when we know most victims don't report. Therefore this is an

[38] OSA Network statement on illegal harms consultation – Online Safety Act Network

arbitrary measure and should not be the marker of how safe a platform is. Ofcom is not taking a systems-based approach which prevents abuse through encouraging safety by design; rather, the reliance is on takedowns of content after harm has been caused.

Furthermore, the Online Safety Act and Ofcom's illegal harms guidance do not list the Obscene Publications Act offences as a priority offences. This means that porn which falls under the categorisation of 'obscenity offences[39]' rather than 'extreme porn[40]', such as strangulation/choking, are not considered. This is concerning given that there are known links between these materials and sexual scripts which promote abusive activity towards women. Incest porn is also not covered within the current laws on extreme porn, despite family sexual activity being criminalised in the Sexual Offences Act 2003. The existing laws on extreme porn should be extended to include forms of incest porn that represent criminal activity.

Another significant issue with the Ofcom illegal harms guidance is that it is predicated on the assumption that internet companies are good faith actors, so there is little emphasis on safety by design or pre-emptive action. Much weight is also given to the flawed idea that companies are already doing a good job via self-regulation and additional measures are punitive. As outlined in CEASE's 'Big Porn' report, self-regulation is not working.[41]

Unless the guidance issued by Ofcom in respect of the Online Safety Act is strengthened, it is hard to see how the Act will bring about any meaningful change in the regulation of extreme and illegal pornography.

I would like to endorse recommendations made by Professor Clare McGlynn in her submission to this Call for Evidence.[42] She asserts that an obligation should be placed on pornographic websites that they must secure the consent of all parties in videos/images before they are uploaded. See below for further reform of the criminal law which would also assist in consistent application in regulation.

Because the Obscene Publications Act is not a priority offence, there is a significant imbalance between what is freely available online and what is regulated offline. The BBFC would refuse to classify much of this material. Ofcom's draft guidance will only make this divergence worse and means little or no action is going to be taken regarding this material. The Obscene Publications Act should also be made priority offences for the purposes of preventing illegal harms.

The Response to Illegal Pornographic Content and Exploitation and Abuse in the Pornography Industry (Q26-33)

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[39] Offences within the Obscene Publications Act 1959
[40] Section 63 Criminal Justice and Immigration Act 2008
[41] Expose Big Porn | CEASE (2021)
[42] Pornography Regulation, Legislation and Enforcement Review: Evidence Submission, 7 March 2024. Professor Clare McGlynn, Durham Law School, Durham University.

<u>The effectiveness of the criminal justice system response in tackling illegal pornographic content, and how to strengthen it. (Q26&27)</u>

As demonstrated above, the delineations between legal and illegal porn are not always clear. Many acts depicted in porn viewed online are offences in real life, such as non-fatal strangulation and incest. Additionally, the BBFC would not classify much of this material as R18, 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. This makes the job of law enforcement challenging.

In her submission to the review Prof. Clare McGlynn makes a number of recommendations for law reform which would assist in clarifying both the legal and regulatory framework.

Her work proposes two main approaches for reform:

1. Comprehensive revision of the criminal law so that it is harm based and not obscenity base, providing a clear and comprehensive approach to criminalisation of some forms of pornography.
2. More limited reform to the extreme pornography law to ensure that incest and strangulation are included.

She argues that whilst a lack of clarity about what constitutes obscenity could potentially provide flexibility in the law and thus a degree of future proofing, this could equally be achieved with a far clearer harm-based definition of the law. The legal definition of obscenity is mostly incepted by 19th century case law, making it now a somewhat outdated concept.

Whilst prosecutions under the obscenity laws are few, these laws provide the foundation for other law involved in porn regulation such as the extreme porn laws and malicious communications offences. This patchwork of criminal law then provides the basis for regulation under the Online Safety Act (see above).

Further, Prof. McGlynn argues that the extreme porn laws should be expanded to cover depictions of incest which would be illegal in real life under the Sexual Offences Act 2003. She also argues that the provisions that ban material which depicts acts that 'results in or is likely to result in a person's serious injury' should be reformed to remove the requirement that the injury must be to the anus, breasts or genitals. Moreover, she argues this would ensure that porn which depicts strangulation is likely to be 'caught' by the law as currently it is only caught where it would be considered to be life-threatening (see above).

She also suggests creation of a new offence 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.[43] This would work in conjunction with the regulatory measure of requiring all porn sites to ensure that all people who appear in footage uploaded to their sites have consented.

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[43] Pornography Regulation, Legislation and Enforcement Review: Evidence Submission, 7 March 2024. Professor Clare McGlynn, Durham Law School, Durham University.

<u>Links between the pornography industry exploitation, CSAM and trafficking (Q 28-32)</u>

I commend the CEASE 'Big Porn Report' to the Review which discusses these links in detail.[44]

Education and Information Resources on Pornography (Q33-39)

I am unable to offer any evidence in response to these questions. However, I welcome the development of any educational resources which help parents and teachers talk to children about the dangers and impacts of pornography, and any resources which help adults understand the implications for their own consumption. This material should be contextualised in wider societal harms and attitudes. I would also recommend that materials are created in consultation with parents and teachers.

Education measures are obviously complimentary to more robust regulation and other policy measures and not likely to be effective in isolation.

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[44] Expose Big Porn | CEASE (2021)