Your response

Volume 2: The causes and impacts of online harm

Ofcom's Register of Risks

Question 1:
i) Do you have any comments on Ofcom's assessment of the causes and impacts of online harms?

Response:

Over-Arching themes and concerns

1. Concern at the **undue focus on takedown** of illegal content and too little on safety-by-design. In relation to many forms of VAW, the impetus must be to prevent harm in the first place.
2. **Restrictive interpretation of 'reasonable grounds to infer'** criminal activity has taken place.
3. **Inconsistent treatment of evidence-based across different offences**, with far greater 'pragmatism' and leeway given in relation to some offences such as foreign interference, weapons, drug offences, compared to violence against women offences.
4. Lack of attention and guidance on the **duty to design a safe system and process** in the Act.
5. Inadequate attention to the **fundamental rights of all users**, including victims, whose rights to privacy, freedom of speech and protection from degrading treatment are breached by online harms including extreme pornography, intimate image abuse and cyberflashing. See further Online Safety Act Network statement on fundamental rights.

Summary

Summary on intimate image abuse

Part 2 Harms

6. Expand to better reflect the harms and prevalence of deepfake pornography
7. Expand to reflect the silencing and chilling impacts on women collectively of intimate image abuse

A10 Guidance on Judgement for Illegal Content

8. Draft guidance suggests service provides examine each post of non-consensual intimate imagery afresh to see if 'reasonable grounds to infer' a criminal offence.
9. This is an unduly restrictive approach and means there will be no requirement on service providers to remove an image even when known it is non-consensual. It is inadequate for guidance to refer to the fact that platforms 'should' take down such content. They should be obligated to do so.

Summary on cyberflashing

Part 2 Harms

10. Mismatch between discussion of harms and implications for service providers

11. There is some detailed discussion and understanding of the harms of cyberflashing, its prevalence and its gendered impacts. Care has been taken in the preparation of those sections of the guidance.
12. However, this is not followed through in terms of the implications for service providers (see illegal content judgments guidance) or in the broader context and discussion of the significance of this conduct.
13. It is not clear why cyberflashing appears to be being treated differently to other criminal offences, such as weapons offences and foreign interference, in relation to harms and obligations on platforms.
14. Cyberflashing that does not fall within the specific new offence may still be criminalised under section 127 of the Communications Act or the Malicious Communications Act as it constitutes the sending of grossly offensive, indecent or obscene materials. Therefore, the full range of cyberflashing experiences and acts should be considered by the draft guidance. This is confirmed I the CPS guidance: 'Where the legal elements of section 66A SOA 2003 offence are not established, prosecutors may also consider the offences relating to indecent messages under section 127(1)(a) CA 2003, and section 1(1)(a)(i) MCA 1988.'

Illegal contents judgment Guidance:

15. Full scope of criminal law not considered
16. Unduly restrictive approach to 'reasonable grounds to infer' for a civil, regulatory regime
17. Little evidence that most/all cyberflashing is for benign reasons, yet extensive evidence of the harmful nature of cyberflashing practices.
18. Therefore, as identified in the Online Safety Act Network submission, where there is evidence about widespread negative impact of a behaviour such as cyberflashing, with little in the way of countervailing interests (contrast for example the difficulties around the suicide offences), the mental element of the offences could be inferred. This is especially so when it is understood that section 127 of the Communications Act also applies to these behaviours.
19. Reliance on victims blocking and deleting images is a wholly inadequate response to serious harms and prevalence of this criminal activity. There is an insufficient understanding of the harms of cyberflashing by referring to 'the recipient can, after all, delete' the image (26.263). The violation has already occurred by the receipt.
20. Mitigation acts by platforms, such as blurring and blocking, are not preventing the consensual sharing of genital images, just requiring approval or consent first, and therefore not significantly infringe on any rights of senders

Summary on extreme pornography

Harms part 2

21. No rationale for restricting scope of assessment of harms to 'direct effects' research
22. Examine wider impacts of extreme pornography through research on sexual scripts, harmful attitudes and behaviours, and the cultural harm of extreme pornography
23. Include evidence of Government justifications for introducing the offence ('normalises sexual violence') and popular public support for the offence as evidence of harms and need for regulation, as per many other criminal offences in the draft guidance

Summary on Appendix 10: draft guidance on judgment for illegal content:

24. Unjustified introduction of new, high threshold for acts of strangulation and choking to be considered 'life-threatening' and therefore constituting extreme pornography
25. Medical consensus is that any act of strangulation can be life-threatening and there is no 'safe' way to undertake it. It is not possible to predict what reaction individuals will have or what type of act will be 'safe'.
26. Revise guidance to align with medical opinion
27. Draft guidance on basis of this being a civil regime, aimed at designing a *system* to reduce and prevent harm. Therefore, on the balance of probabilities, it would be reasonable to infer that depictions of strangulation (not needing to be 'extreme') may constitute extreme pornography and therefore steps should be taken to reduce their prevalence.

Absence of Obscenity and Communications offences from guidance :

28. Expand guidance to include the criminal offence obscenity
29. Expand guidance to include section 127 Communications Act and Malicious Communications Act (updated CPS guidance is here).

Volume 2: The causes and impacts of online harm

30. It is acknowledged that considerable work has gone into preparing the analysis of these criminal offences and associated harms. An extensive range of materials has been examined and included in this analysis. The analysis includes much of the academic work in the field, some of which is very recent and developing. Some of the developments referred to below have become more prominent since the draft guidance will have been first drafted. These comments and recommendations, therefore, are designed to build on the considerable work already undertaken.

6M: Intimate Image Abuse

Summary comments on intimate image abuse

31. Expand to better reflect the harms and prevalence of deepfake pornography
32. Expand to reflect the silencing and chilling impacts on women collectively of intimate image abuse

Guidance - Summary

33. Revise Summary to ensure greater cognition of the life-shattering and potentially life-ending harms:

34. The summary (p 201) refers to intimate image abuse as causing 'mental health issues', considerable 'distress' and 'anxiety'. While the later analysis does engage in more depth on the severity of harms, this summary risks minimising the significant, life-shattering and often life-ending nature of harms of intimate image abuse. I recommend not using terminology such as mental health 'issues', but reference to deep psychological trauma. Only referring to 'distress' and 'anxiety' also risk minimising these harms.[1]

35. Refer to AI and deepfake porn abuse in the summary

36. Due to the exponential rise in AI deepfake pornography being shared online, and the significant harms of this practice, I recommend including this in the summary.

Introduction

37. Expand reference to harms to include societal harms

[1] Note that in 6S there is reference to 'psychological impacts' of cyberflashing.

38. The predominant focus, when considering the harms that particularly impact on women and girls, is on the individual impacts. Greater recognition is needed of the broader societal impacts, as these then have follow-on impacts and constraints on women and girls.

Relevant offences

39. **Relevant offences: expand specific reference to altered/deepfake images in discussion of offences**
40. As the criminal law has now changed, so that distribution of deepfake pornography without consent is now a criminal offence, this should be emphasised in the outline of the law. This is a significant change and vital when considering risks and mitigations of online harms. See further below.
41. Footnote 1048 (p 203) does refer to deepfakes. Reference is made to deepfakes being made through superimposing the face of a person onto the body/video of another. This has been the most common form of abuse. It is now also possible to use generative AI, from text to image, to produce an entirely new sexually abusive image, such as in the case of Taylor Swift. approach.
42. The later section on 'editing visual media' (6M.73) should also be developed to give greater insights into the ease, nature and harms of using AI to alter media with harmful consequences.

How intimate image abuse offences manifest online

43. **Expand the ways in which these offences arise to include hacking and non-consensual distribution of images of those known perpetrators (but not intimately connected) (6M.12):**
44. When referring to possible financial gain, include non-consensual distribution from hacking. Hacking is referred to in 6M.13 but it should also be included in the summary given in 6M.12.
45. It is positive to see the acknowledgement that non-consensual sharing can arise from sexual gratification, misogyny, and humour, this is stated to be in relation to 'unknown perpetrators'. These motivations are not limited to unknown offenders. For example, in relation to collector culture (referred to in 6M.14), the victims are often known to the men, evidenced by them searching for and exchanging images relating to specific women, often school/university acquaintances, work colleagues and similar. Non-consensual distribution for sexual gratification can also include those known to the offender, but not as part of a domestic abuse context.
46. **Include discussion of websites dedicated to deepfake pornography:** There is an entire eco-system of platforms, discussion groups, youtube videos and other fora for the creation, dissemination and valorisation of deepfake pornography. This is where much of this material may be first accessed before further distribution. Links to these websites, videos and discussion fora will be found on user-to-user systems and social media platforms more generally. Reducing the accessibility of these platforms/fora and links thereto would help reduce the prevalence and harms of non-consensual distribution of deepfake pornography.

Risk of Harm to individuals

47. **Expand to include wider harms to women and girls, including 'silencing' effect of online abuse**

48. The discussion of harms must be expanded beyond individual harms to encompass the full range of harms experienced by women and girls in particular, including breach of their fundamental human rights to protection from degrading treatment (Article 3 ECHR), freedom of speech (Article 10) and right to privacy (Article 8).
49. For example, women's human right to freedom of speech is being breached by the prevalence of online abuse, including intimate image abuse and especially deepfake pornography. It is widely acknowledged that online abuse, including intimate image abuse and deepfake abuse, have the effect of 'silencing' and 'chilling' women's speech. This has been established in numerous studies of women politicians, women journalists, women human rights defenders and women more generally in the public eye.[2]
50. It also impacts on all women, as they constrain their online and social media engagement either as a result of intimate image abuse, or due to a fear of it, such as being deepfaked. Young women are more and more aware that they face an ever-present threat of being deepfaked and having their lives transformed by the viral distribution of non-consensual pornography.[3]
51. In addition, women's rights to privacy are systematically breached by intimate image abuse which is not recognised sufficiently in the discussion of harms and impacts. For more discussion of how the human rights of victims must be considered in more detail in Ofcom's guidance on harms, including case law on intimate image abuse, see Lorna Woods, Ofcom's approach to human rights.[4]
52. We note that in relation to hate crimes, the draft guidance does recognise that people experiencing this form of abuse often then constrain and limit their online interactions (6F.17).
53. **Revise text to describe deep psychological trauma from intimate image abuse:**
54. The text describing the psychological harms of intimate image abuse should be revised to emphasise the severity of impacts which can be life-shattering and life-threatening. The reference to mental health 'issues', to 'distress' and 'anxiety' does not do justice to the experiences of victims and risks minimising their harms.[5]
55. **Clarify reference to 'social rupture' experienced by victims**
56. It is welcome to see the reference to victims experiencing 'social rupture' following intimate image abuse: a marked and overwhelming breach – or rupture – that radically disrupted their lives, altering their sense of self, their identity and their relationships with their bodies, others and technology. The original study identifying this finding is given in this footnote which is preferable to the one used at 1077.[6]
57. **Broader understanding of what 'intimate' means in some communities**

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2 https://www.icfj.org/our-work/chilling-global-study-online-violence-against-women-journalists

3 See for example a discussion by Edinburgh University students regarding their fears of being deepfaked and the adverse impact of this on their emerging professional lives here and my comments on this here.

4 https://www.onlinesafetyact.net/analysis/ofcom-s-approach-to-human-rights-in-the-illegal-harms-consultation/

5 McGlynn et al, *Shattering Lives and Myths – a report of image-based sexual abuse* (Durham University 2019) and McGlynn et al, 'It's torture for the soul': the harms of image-based sexual abuse' (2021) *Social and Legal Studies*

6 McGlynn et al, 'It's torture for the soul': the harms of image-based sexual abuse' (2021) *Social and Legal Studies* 30(4), 541-562.

58. It is welcomed that some recognition is given of the understanding of 'intimate images' as being a broader concept in some religious communities and amongst some minority ethnic communities (6M.26). An authority for this can be found in some of the academic literature on law reform and in the Law Commission consultation on intimate image abuse.[7]

59. Understanding harms and impacts as varying between different groups and communities

60. The recognition that the nature of the abuse and its impact vary across different communities and groups is welcome but could also be strengthened, and that this may intensify with deepfake porn abuse. For example, it is likely that deepfake porn involving black women is likely to be more violent and abusive, as the mainstream online pornography involving black women is more violent and abusive.[8]

6S. Cyberflashing

Summary on cyberflashing

61. Mismatch between discussion of harms and implications for service providers
62. There is some detailed discussion and understanding of the harms of cyberflashing, its prevalence and its gendered impacts. Care has been taken in the preparation of those sections of the guidance.
63. However, this is not followed through in terms of the implications for service providers (see illegal content judgments guidance) or in the broader context and discussion of the significance of this conduct.
64. It is not clear why cyberflashing appears to be being treated differently to other criminal offences, such as weapons offences and foreign interference, in relation to harms and obligations on platforms,.
65. Cyberflashing that does not fall within the specific new offence may still be criminalised under section 127 of the Communications Act as it constitutes the sending of grossly offensive, indecent or obscene materials and is also within the Malicious Communications Act. See the updated CPS guidance here which confirms that: 'Where the legal elements of section 66A SOA 2003 offence are not established, prosecutors may also consider the offences relating to indecent messages under section 127(1)(a) CA 2003, and section 1(1)(a)(i) MCA 1988.'
66. Therefore, the full range of cyberflashing experiences and acts should be considered by the draft guidance.

Summary of guidance

67. Amend reference to harms to include potentially significant psychological harms, violation and humiliation

68. The summary refers to 'psychological impacts'. This could be strengthened by reference to the deep, significant psychological trauma that can result from cyberflashing. Many victims express a sense of violation, and humiliation, from cyberflashing which are harms

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7 See, for example, the discussion of a broader idea of 'intimate image' in Rackley, E., McGlynn, C., Johnson, K. *et al.* Seeking Justice and Redress for Victim-Survivors of Image-Based Sexual Abuse. *Feminist Legal Studies* 29, 293–322 (2021).

8 See Clare McGlynn comment on LinkedIn.

of a higher-level (and relate to breaches of their fundamental rights to privacy, sexual autonomy and may constitute degrading treatment).[9]

Introduction

69. Recognise the extensive research on harms of cyberflashing:

70. amend reference to 'limited research and evidence' to include broader context of why offence introduced (as set out in relation to other offences include foreign interference)

71. The approach taken relating to the harms of cyberflashing and reference to 'limited research and evidence' (6S.5) is surprising when compared with Ofcom's approach in relation to other offences, such as foreign interference. In relation to other offences, including drugs, firearms, terrorism and foreign interference, the discussion of the harms and evidence is understood and applied more widely, rather than being tied to the very specifics of English criminal law offences. In relation to epilepsy trolling, for example, Ofcom refer to evidence of 'broadly similar' behaviours (6R.7).

72. It is not clear, therefore, why this approach is taken in relation to cyberflashing. It is true that the English legislation is more limited in scope that comparable provisions in Northern Ireland, Scotland and in many other jurisdictions both in relation to the motivation requirements and scope of images covered. However, there is extensive evidence on the impacts of cyberflashing on women and girls, the prevalence of sending unsolicited genital images and some information on the motives of offenders.

73. Indeed, it is such evidence that first persuaded the Law Commission that a criminal offence was required and then persuaded the Government to enact a new offence.

74. Also, when Ofcom considers some other criminal offences where there might be more limited research evidence about impacts, it instead identifies the broader context within which the offences were adopted, thereby identifying the nature of the harms and the policy reasons why action is being taken to reduce the offending behaviours.

75. For example, in relation to the 'harms' of the new foreign interference offence, Ofcom state the following:

    a. *6P.29 Overall, the evidence available does not allow us to draw robust conclusions about the impact and harm associated with foreign influence operations. However, such operations are a significant source of concern for the population, policymakers and security services. Research that identifies how operations have influenced people and societies by "altering beliefs, changing voting behaviour, or inspiring political violence – is limited and scattered".* ***Despite the lack of direct insight, there is clear potential that there is a risk of harm to individuals which underpins the desire by government to introduce this offence in the online safety regime.***

76. As well as identifying the extensive evidence of harm of cyberflashing, in addition, Ofcom should take a similar approach to that in relation to the foreign interference offence, noting that there is significant concern among the population and policy-makers that led to the introduction of the offence, and that even if there was considered to be a 'lack of direct insight', then there is certainly the *potential risk of harm* which led to the offence being adopted and which requires a robust response.

[9] Discussion of victims' expressions of their harms as violation and humiliation is included in McGlynn and Johnson, *Cyberflashing: recognising harms, reforming laws* (pp 40-46).

77. In relation to Government aims, when announcing it's intention to introduce a new offence, the Minister stated that it was important to 'effectively criminalise this behaviour', that the recipients of unwanted genital images experience 'significant humiliation, alarm, or distress' and that the aim was to 'address increasing public concern expressed about behaviour of non-consensual sending of images of genitals, especially over electronic networks, and the harms associated' (Hansard, 14 March 2022). There are many other similar Government statements emphasising the need to criminalise this activity due to the significant harms and public concern.

Relevant offences

78. Contextualise 'some may view it positively', and take same approach of challenging and not over-emphasising such views as is taken in relation to other criminal offences such as weapons offences where there is also evidence of 'positive' perceptions

79. The draft guidance refers to one research study which found that a small proportion of individuals being sent unsolicited sexual images may view that positively, in terms of being 'entertained' or 'curious' (6S.10). It is important to contextualise this study, rather than giving it particular prominence. This is the finding of one survey of *single* people in the US who opted into being paid to undertake an online survey about their sexual experiences. Further, the study itself is clear that this is a form of sexual harassment and all sending of unwanted images is non-consensual (therefore wrongful) conduct:
    a. *'When men send unsolicited images of their genitals, the receivers are inherently not consenting to the receipt of images nor are they in control of if/ when to receive them. At its core, this form of sexual harassment reminds women that they have no right to privacy nor authority over their own exposure as they do not control the sending and receiving of these images. Regardless of sender intent, whether unsolicited "dick pics" are to be understood as harassment is, of course, the decision of the recipient; however, the act of sending unsolicited genital images is undoubtedly an exertion of power.' (p 8).*
80. Dating websites and apps are also clear that sending unsolicited genital images, even if positively received, are a violation of their T&C, challenging the assumption that this is an accepted practice, particularly on websites and apps where men are seeking sex/relationships with other men.
81. It is further noted that this concept of 'some may view it positively' is not applied to all the criminal offences considered in the draft guidance. For example, many of the behaviours being considered, as criminal and harmful conduct, will be perceived as positive by individuals involved whether that be drug offences, some 'hate crimes' (being considered 'funny'), immigration offences, and offences relating to prostitution and sex work. But such 'positive' experiences are not central to how the offending conduct is to be treated by platforms.
82. Indeed, in relation to **weapons offences**, the draft guidance itself refers to research that found that young people were showing concerningly positive attitudes towards the accessibility and 'coolness' of knives when shown a selection of knife images (6I.19). Yet this finding is not used to reduce the discussion of harms or protections offered to children or society generally.
83. That a few do not perceive or experience the harm of a criminal offence should not reduce the protection and harms experienced by those most commonly affected,

particularly when we are considering what internet service providers should be doing to design a system to reduce the prevalence and extent of harms online.

6L: Extreme Pornography

Summary

84. No rationale for restricting scope of assessment of harms to 'direct effects' research
85. Examine wider impacts of extreme pornography through research on sexual scripts, harmful attitudes and behaviours, and the cultural harm of extreme pornography
86. Include evidence of Government justifications for introducing the offence ('normalises sexual violence') and popular public support for the offence as evidence of harms and need for regulation, as per many other criminal offences in the draft guidance

<u>Risks of harm presented by online extreme pornography offence</u>

87. **Expand evidence of harm beyond narrow 'causal effects' research which is limited and no longer represents the field**
88. In considering the harms of extreme pornography, the draft guidance takes an unnecessarily limited approach, focusing only on what is referred to as 'direct effects' or 'causal links' research which examines whether it is possible to say there is a direct effect from viewing specific pornography to conducting acts of sexual violence (6L.16). The draft guidance states that there is 'no conclusive evidence' of such a direct link.
89. There is no consideration of the wider impacts of extreme pornography on society or the more up-to-date research on the impact of pornography being through it's 'sexual scripts'. This is research on pornography broader than 'extreme pornography'. However, as noted above, and in relation to other criminal offences, the discussion of harm goes beyond the specifics of the very particular English law offence.
90. In relation to 'direct effects' research, as the guidance notes, there are insurmountable ethical obstacles to ever carrying out such research. Therefore, when regulation is dismissed on the basis that there is 'no conclusive evidence', this is actually making an argument for there to never be regulation as there will never be such evidence.
91. The focus on this type of evidence also fails to recognise that the drivers of sexual offending are multifarious and far beyond one particular stimulus (pornography or something else). Therefore, it will never be possible to directly predict sexual offending from studying pornography use.
92. The draft guidance refers to studies and Government statements about the broader impacts of sexually violent pornography, suggesting that these materials argue that 'representations of this behaviour could incite those viewing the content to act it out themselves' (6L.17). The reference to 'incite' is unfortunate and does not accurately represent the arguments being made (including in my own research which is acknowledged in footnote 1017). We were definitely not making an argument of incitement (which would be a cause and effect argument). As the footnote explains, our argument is that the availability of extreme pornographic content risks creating a culture normalising sexual violence. This means, for example, that individuals – victims and offenders – are less likely to recognise acts as unlawful and sexual violence is less likely to be taken seriously with implications for reporting, prosecutions and convictions (footnote 1017, p 194).
93. However, rejecting a causal relationship is not the same as rejecting *any* relationship. It simply does not make 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.

94. Sexual scripts of pornography

95. Due to the problems of 'direct effects' research, the field has shifted to focusing on how pornography influences 'sexual scripts', ie the broader societal messages that pornography conveys such as what is sex, what is normal, what is expected, how to act and similar.[10] This research field produces evidence such as *'pornography use, while not directly related to sexually coercive behaviors, had a significant indirect effect on sexual coercion through sexual scripts. These results further support the use of the sexual scripts theory to help explain the relationship between pornography use and sexual coercion'*.[11]

Impact of pornography on attitudes and harmful sexual practices

96. As well as research on how pornography shapes sexual scripts, and therefore how the prevalence of sexually violent and sometimes extreme pornography will influence behaviours, there is also extensive research on the impact of pornography on attitudes and harmful sexual practices.

97. For example, Government's own commissioned research found that 'there is substantial evidence of an association between the use of pornography and harmful sexual attitudes and behaviours towards women'.[12]

Extreme Pornography offence being treated differently from approach to other criminal offences

98. Further, the focus on 'no conclusive evidence' is in direct contrast to the approach of the draft guidance in relation to other harms where there is reference to harms despite there being a 'lack of direct insight' and similar, as discussed above in relation to cyberflashing.

99. In relation to other offences, the broader context of why an offence was introduced is taken into account in establishing the nature of the harms, need to take such harms seriously and therefore the need for action from internet service providers. For example, in relation to weapons offences, the draft guidance states that there is particular concern over the 'glamourisation of firearms and weapons by young people' (6I.19). In relation to the supply of weapons and firearms, there is reference to the fact that the supply 'may' influence crime levels and the 'potential harm' and therefore emphasises the significance and seriousness of the offences, harms and need to act.

100. Similar statements could and should be made in relation to extreme pornography. It is of great concern that forms of extreme pornography such as rape are glamourised and glorified on pornography websites. It is exactly such concerns that led to the extreme pornography offence. There is a real risk of harm.

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[10] Marshall, E. A., Miller, H. A., & Bouffard, J. A. (2021). Bridging the Theoretical Gap: Using Sexual Script Theory to Explain the Relationship Between Pornography Use and Sexual Coercion. *Journal of Interpersonal Violence*, *36*(9-10), NP5215-NP5238. https://doi.org/10.1177/0886260518795170; Fiona Vera-Gray, Clare McGlynn, Ibad Kureshi, Kate Butterby, Sexual violence as a sexual script in mainstream online pornography, *The British Journal of Criminology*, Volume 61, Issue 5, September 2021, Pages 1243–1260, https://doi.org/10.1093/bjc/azab035

[11] Marshall, E. A., & Miller, H. A. (2023). The Role of Sexual Scripts in the Relationship Between Pornography Use and Sexual Coercion. *Journal of Interpersonal Violence*, *38*(7-8), 5519-5541.https://journals.sagepub.com/doi/10.1177/08862605221123291

[12] https://assets.publishing.service.gov.uk/media/606dc23be90e074e54965bda/The_Relationship_between_Pornography_use_and_Harmful_Sexual_Attitudes_and_Behaviours-_literature_review_v1.pdf

Government rationale and public support for extreme pornography offence

101. It is therefore important to draw attention this offence being introduced due to the Government determining that there was harm being perpetrated and this was of considerable public concern. This is also why this offence was included as a priority offence in the Act.

102. In particular, the extreme pornography provisions on pornographic images of rape and non-consensual penetration were introduced due to the harmful nature *to society* of its widespread impacts. Prime Minister David Cameron, when announcing the Government's decision to introduce the new law, stated that pornographic images of rape 'normalise sexual violence against women'.[13] That is the harm. Wider societal harm.

Where is the evidence that extreme pornography is not having an effect?

103. When considering a civil regime which is requiring service providers to design systems to reduce harms, instead of trying to prove the unprovable (with 'direct effects'), **the onus should be on those objecting to regulation to demonstrate there is *no* effect of extreme pornography**. Our attitudes and behaviour are shaped by our social environment which includes pornography. 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 and extreme pornography was not one such contributing factor. This is an argument about the 'cultural harm' of rape and extreme pornography.[14]

Amend reference to 'sexually violent acts can be consensual between adults' (6L.19)

104. I suspect that this sentence is aiming to refer to some forms of sexual activity which may include acts of violence as part of consensual practices, such as in some forms of BDSM. However, the terminology used is unfortunate and should be changed. Those within the BDSM community would not refer to their practices as constituting 'sexual violence'. Those concerned with working to end sexual violence would reject the juxtaposition of 'sexual violence' and 'consent'. It must also be noted that it is only possible to consent to violence/harms below the standard of assault occasioning actual bodily harm.

105. Therefore, in terms of public discourse and behaviours, and what is accordingly discussed and shared online, many 'common' practices are in fact unlawful.

ii) Do you think we have missed anything important in our analysis? Please provide evidence to support your answer.

Response:

[13] https://www.theguardian.com/technology/2013/jul/22/david-cameron-crackdown-internet-pornography; The internet and pornography: Prime Minister calls for action - GOV.UK (www.gov.uk)

[14] The cultural harm of rape pornography | Free Speech Debate

Absence of obscenity and communications offences from guidance

Summary:

1. Expand guidance to include the criminal offence obscenity
2. Expand guidance to include section 127 Communications Act and Malicious Communications Act 1988

Obscene Publications Act 1959

3. It is an offence under section 2(1) of the OPA to publish or possess for gain an 'obscene' article which is interpreted in section 1 as being material 'if its effect … if taken as a whole, [is] such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.'
4. This provision directs attention to the harm caused to individual viewers and therefore satisfies section the requirement in section 59(5) of the Online Safety Act 2023 that 'illegal content' includes offences where there is an individual victim.
5. In developing guidance in this area, Ofcom will want to consider the research on the broader impacts of pornography discussed above in relation to extreme pornography, beyond the sterile 'cause and effects' debates. It will also want to draw on the guidance and research of the BBFC which precludes the award of an R18 certificate to some pornographic works due to the harm to individuals and audiences of material that includes extreme pornography but is also far wider.
6. The category of materials that may be obscene, but not extreme, is likely to include depictions of strangulation, masturbation of an animal and many forms of 'incest porn' where representing family sexual relationships that are prohibited under the criminal law. For a fuller discussion see my briefing with Lorna Woods on Pornography and the Online Safety Bill and our forthcoming academic article on this issue.[15]

Section 127 Communications Act 2003 and Malicious Communications Act

7. Guidance should be developed relating to s 127(1) of the Communications Act 2003 which unlike s 127(2) has not been repealed. This legislation covers many abusive communications which fall within its scope of prohibiting a 'message or other matter that is grossly offensive or of an indecent, obscene or menacing character'.[16] It provides a catch-all for abuse and harms that may not fall within the specifics of a very particular offence.
8. The Malicious Communications Act 1988 also remains in place and applies to a wide range of materials and their distribution that might constitute a criminal offence.
9. These offences can include[17]:
    a. Cyberflashing (that falls outside the scope of the new criminal offence)
    b. Stalking and harassment that is not (yet) a 'course of conduct'
    c. Threats as part of domestic abuse

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15 https://www.claremcglynn.com/_files/ugd/e87dab_aeec0ca86ce04f07bf0a14253574b393.pdf

16 The CPS guidance notes offensive is more than bad taste and suggests that offensive could include "posting photoshopped images of a person" or "communications that contain images or videos of women with very serious injuries, or of women being raped, or of women being subjected to sadistic acts of violence, accompanied by text that suggests that such assaults / rape / acts are acceptable or desirable may well, depending on the context and circumstances, be considered grossly offensive." https://www.cps.gov.uk/legal-guidance/social-media-and-other-electronic-communications

17 Law Commission, Harmful Online Communications: The Criminal Offences A Consultation paper (2020).

10. It is therefore vital that guidance is given on these offences and then related actions that must be taken by service providers.

iii) Is this response confidential? (if yes, please specify which part(s) are confidential)

Response: no

Volume 5: How to judge whether content is illegal or not?

The Illegal Content Judgements Guidance (ICJG)

Question 49:

i) Do you agree with our proposals, including the detail of the drafting?

Response:

Cyberflashing

Summary:

1. Full scope of criminal law not considered
2. Unduly restrictive approach to 'reasonable grounds to infer' for a civil, regulatory regime
3. Little evidence that most/all cyberflashing is for benign reasons, yet extensive evidence of the harmful nature of cyberflashing practices.
4. Therefore, as identified in the Online Safety Act Network submission, where there is evidence about widespread negative impact of a behaviour such as cyberflashing, with little in the way of countervailing interests (contrast for example the difficulties around the suicide offences), the mental element of the offences could be inferred. This is especially so when it is understood that section 127 of the Communications Act also applies to these behaviours.
5. Reliance on victims blocking and deleting images is a wholly inadequate response to serious harms and prevalence of this criminal activity. There is an insufficient understanding of the harms of cyberflashing by referring to 'the recipient can, after all, delete' the image (26.263). The violation has already occurred by the receipt.
6. Mitigation acts by platforms, such as blurring and blocking, are not preventing the consensual sharing of genital images, just requiring approval or consent first, and therefore not significantly infringe on any rights of senders

Expand guidance to include communications offences extending the scope of cyberflashing criminal offending

7. The draft guidance only refers to the new specific cyberflashing offence. It should be extended to clarify that acts of cyberflashing that do not meet the motivation requirements of the specific cyberflashing offence are highly likely to be criminal acts

under the communications offence (section 127 of the Communications Act).[18] The fault element of section 127 CA is that the sender must be shown to have an intention to send the message/genital images and an intention 'to insult those to whom the message relates **or** giving rise to the inference that a risk of doing so must have been recognised by the sender'.[19] The fault is similarly described as the perpetrator being proven to 'have been aware of *or to have recognised the risk* at the time of sending the message that it may create fear or apprehension in any reasonable member of the public who reads or sees it'.[20]

8. In other words, all that must be demonstrated for there to be a criminal offence is the perpetrator was aware of a risk of harm. This is not a high threshold and should be able to be established in almost every situation.
9. This means that almost all cases of sending unsolicited genital images are criminalised.
10. The Malicious Communications Act 1988 also still applies.

Alterative approach to understanding 'reasonable grounds to infer'

11. The guidance states that it will 'often be difficult to infer whether the state of mind element of this offence is present', in light of the specific cyberflashing offence requiring proof of specific motives of intention to cause distress etc or sexual gratification and being reckless to causing distress etc (26.262).
12. The draft guidance continues that, therefore 'the existence of an image of genitalia taken on its own and with no further context is unlikely to provide a sufficient indication of the user's intent for a service to have reasonable grounds to infer that an offence has been committed (26.262).
13. This approach is problematic for a number of reasons:
    (a) it applies too high a threshold for 'reasonable grounds' in view of this being a civil, regulatory regime. See further the evidence submission of the Online Safety Act Network and open letter;
    (b) it fails to take into account that sending unsolicited images of genitalia also comes within section 127 Communications Act 2003 and therefore the scope of the criminal law is wider than the specific, new offence;
    (c) it does not take into account that the duties in the Act are to *design* systems and processes to reduce harms, rather than primarily be focussed on take-down obligations. See further evidence submission of the Online Safety Act Network and open letter.
    (d) there is no evidence that most/all/majority of individuals are sending genital images without consent for benign reasons. The guidance just assumes this is the case without any significant evidence demonstrating this.

Reasonable grounds and evidence of harmful intent in sending genital images without consent

14. The Act requires 'reasonable grounds' to infer a criminal offence. The draft guidance assumes that there will not be reasonable grounds to infer malign intent, unless there is some specific additional materials or text (presumably examples such as an image

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[18] See McGlynn and Johnson, *Cyberflashing: recognising harms, reforming laws* (2021) pp 82-85) and Law Commission, Harmful Online Communications: The Criminal Offences A Consultation paper (2020).

[19] Law Commission, *Abusive and Offensive Online Communications: a scoping report* (2018), para 4.97.

[20] Law Commission, *Abusive and Offensive Online Communications: a scoping report* (2018), para 4.98.

including a penis and knife or threatening words). The assumption, therefore, is that the most men sharing penis images without consent are doing so for benign (not harmful) reasons.

15. ***However, there is not sufficient evidence on which to base this assumption***. There are a small number of studies examining the motivations of men sending genital images each with significant limitations:
    a. Mandau (2020) involved interviews in 2018 of only 9 men[21];
    b. Oswald et al (2020) self-report survey of 1000 men, only half of whom had sent unsolicited genital images.[22]
    c. Karasavva et al (2023) limited study of 800 students, only appx 200 men, and focus was on sending nudes and genital images, misunderstands the nature and harms of cyberflashing, and with no disaggregated for the specific behaviours of cyberflashing.[23]
    d. YouGov (2018) survey of 1700 men provides data on how men 'describe dick pics' which may be linked to motivations but is not clearly so.[24]
16. While Oswald et al provide the most data, and this is a valuable study with important indicative analysis, the limitations of self-report studies must be appropriately recognised before an entire approach to cyberflashing under the Act is instituted. In self-report studies, individuals are far less likely to identify themselves as committing anti-social, harmful or criminal activities. They wish to identify themselves as good people and so either do not report such behaviours (even when anonymous) or have not accepted the conduct themselves as harmful. This manifests itself in relation to cyberflashing with self-reporters often stating they are sending images for fun, in the hope of receiving nudes in return and similar.
17. It is common in work with sexual offenders to identify 'techniques of neutralisation' where offenders seek to justify, explain and thereby minimise their behaviours. Relatedly, Waling and Pym (2017) identified that the evidence suggest men simultaneously understand sending unsolicited dick pics as problematic, but also normative, hence they are frequently sending them.[25]

Evidence of malign reasons for cyberflashing:

18. **YouGov found that:**
    a. 55% of men thought women would find the dick pics 'gross' and
    b. 45% 'stupid'
    c. 29% understood the dick pic may be distressing,
    d. and 24% threatening.

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21 'Directly in Your Face': A Qualitative Study on the Sending and Receiving of Unsolicited 'Dick Pics' Among Young Adults (springer.com)

22 I'll Show You Mine so You'll Show Me Yours: Motivations and Personality Variables in Photographic Exhibitionism - PubMed (nih.gov)

23 V. Karasavva, L. Brunet, A. Smodis, J. Swanek, A. Forth, Putting the Y in cyberflashing: Exploring the prevalence and predictors of the reasons for sending unsolicited nude or sexual images, Computers in Human Behavior, Volume 140, 2023, 107593, ISSN 0747-5632, https://doi.org/10.1016/j.chb.2022.107593

24 https://yougov.co.uk/politics/articles/20179-four-ten-female-millennials-been-sent-dick-pic?redirect_from=%2Ftopics%2Fpolitics%2Farticles-reports%2F2018%2F02%2F16%2Ffour-ten-female-millennials-been-sent-dick-pic

25 https://www.tandfonline.com/doi/abs/10.1080/09589236.2017.1394821

19. suggesting that they had awareness that they would not be well-received.

20. Oswald et al

    a. Motivations included 17% aiming to shock, 15% induce fear, 11% disgust, 18% their own sexual gratification

    b. Also identified that dark personality traits, such as narcissism, hostile and benevolent sexism were predictors of those who cyberflashed.

21. Overall, therefore, from *self-report* studies we find a significant minority actively undertake to cyberflash to cause distress or other form of harm, while over half are aware that sending the dick pic will not be well-received (gross/stupid).

22. So, for example, where we have evidence about widespread negative impact of a behaviour (e.g. cyber-flashing), with little in the way of countervailing interests (contrast for example the difficulties around the suicide offences), we could infer that the mental element was met. Evidence, albeit limited, indicates that a proportion of men know that the images cause distress. Moreover, Ofcom's own evidence gathering, set out in Volume 2, says that "Cyberflashing is not a product of technology and online behaviour alone; it is a manifestation of existing patterns of sexual violence and abuse. McGlynn argues that cyberflashing should be understood as part of a continuum of sexual violence. As with all forms of sexual violence, perpetrators of this abuse are motived by a desire to exert power, and victims and survivors experience feelings of fright and vulnerability." (Vol 2, 6S.19).

Requiring victims to block and delete is not an adequate response – receipt must be prevented

23. The draft guidance appears to misunderstand that the significant harm of cyberflashing arises on being sent the unsolicited genital images in the first place. That act induces the fear, violation, threat, and other harms. This appears to be more understood in part 2 of the draft guidance, but in Part 5, reference it is stated that 'the important thing is not so much that services must remove the content (the recipient can, after all, delete it) but that victims have the opportunity to prevent further messages being sent to them' (26.263).

24. This completely misunderstands the concerns of victims of cyberflashing who want to not be sent images in the first place. The labour of constant deletion and blocking is part of the negative experience and harms. Many senders simply send under another name, requiring the same cycle to continue.

25. Requiring victims to act after the harm has been inflicted is not consistent with a duty to design a system to reduce harms. Blocking is an inadequate response.

Intimate Image Abuse

Unduly restrictive obligations relating to reposting and resharing

26. At para 26.45, it states that when content has been 'shared, forwarded or reposted by a new user' that a service should treat this as a 'new piece of content for the purpose of an illegal content judgment'.

27. It may be possible to infer the intention to share an intimate image non-consensually from some of the first and early posts/reposts. This will get more difficult after many subsequent posts. However, the harm of the abuse is compounded and exacerbated the more times an image is reposted and shared.

28. The approach in this draft guidance has significant adverse consequences in relation to intimate image abuse that need to be addressed. It suggests that there is no obligation on

service providers to remove an image, even when they have been alerted to it being non-consensual. It is not sufficient to hope that platforms might act and do the right thing, as experience suggests this does not always happen and even when images are taken down, it is often after considerable delay.

29. It is vital, therefore, that platforms are obligated to remove all images that are known to be non-consensual.
30. It is noted that Appendix 10 on illegal judgments does suggest (A10.34) that if content is known to be posted without consent 'it should be taken down'. This is not sufficient. The obligation should be that it *must* be taken down, and only reinstated if there is some clear evidence as to this being appropriate.

Annex A10 Image-Based Adult Sexual offences

Extreme Pornography

Summary:

31. Unjustified introduction of new, high threshold for acts of strangulation and choking to be considered 'life-threatening' and therefore constituting extreme pornography
32. Medical consensus is that any act of strangulation can be life-threatening and there is no 'safe' way to undertake it. It is not possible to predict what reaction individuals will have or what type of act will be 'safe'.
33. Revise guidance to align with medical opinion
34. Draft guidance on basis of this being a civil regime, aimed at designing a *system* to reduce and prevent harm. Therefore, on the balance of probabilities, it would be reasonable to infer that depictions of strangulation (not needing to be 'extreme') may constitute extreme pornography and therefore steps should be taken to reduce their prevalence.

Definition of 'pornographic' (p 120)

35. *A10.11 Whether content can be assumed to have been produced either solely or principally for the purpose of sexual arousal is dependent on the nature of the image itself, not the intent of the uploading user or any viewer of it.'* (page 120)
36. This explanation is inaccurate. In terms of determining whether an image is 'pornographic' according to the definition in the legislation, it is based on the intention of the producer. Section 63(3) states that an image is "pornographic" 'if it is of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal'.
37. Whether or not the image is pornographic, therefore, is not based on 'the nature of the image itself'. An image can be pornographic if produced for the purposes of sexual arousal, even if the nature of the image itself might, at face value, suggest otherwise to some people.
38. Nonetheless, for the purposes of a civil, regulatory regime, aiming to reduce the harms of extreme pornography, it would be appropriate to base systems, policies and practices on the basis of the nature of the image.

'Explicit and realistic' portrayal - A10.13 (p 121)

39. It would be valuable to add additional clarification to this explanation that the legislation specifically covers depictions, that is scenes that are acted. There has been some confusion in the past, and suggestions in prosecutorial practice, that the law is only concerned with depictions of real events (particularly in relation to rape and sexual

assault). This is not the case and clarification of this would be helpful. For more discussion of this issue, see McGlynn and Bows.[26]

Limited interpretation of risks of strangulation which is not based on medical opinion: 'Acts which threaten a person's life'

40. *A10.14 Content which depicts hanging, suffocation or sexual assault involving a threat with a weapon are likely to portray an act which threatens life. Acts of choking or strangulation do so only where the act is extreme, persistent and appears to represent a credible threat to life. Consensual acts of bondage, domination and sadomasochism are unlikely to threaten life except where they involve any of the aspects mentioned above.*
41. It is not clear why Ofcom have interpreted what may constitute 'life-threatening' injury as being limited to strangulation and choking only where it is 'extreme, persistent and appears to represent a credible threat to life'. This is a new standard and high threshold not found in case law or prosecutorial guidance.
42. Moreover, it is an inaccurate representation of medical opinion on the risks of choking and strangulation.[27] The medical consensus is that choking/strangulation can be life-ending, and determining in advance which forms of behaviour will necessarily lead to serious risk to life is not easy or obvious. In other words, it is not the case that 'only … extreme, persistent' acts of choking or strangulation are life-threatening. In some cases, it can take very little pressure, for very little time, to result in serious injury and threat to life. Risks also depend on the medical status of the person being strangled/choked.
43. For example, the recent American Academy of Neurology Position Statement (2021) states as follows:
    a. *"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*."[28]
44. Further, the BBFC cuts from R18s 'depictions of throat-grabbing, choking, gagging and other plays on breath restriction, as well as verbal references encouraging such practices' as these are deemed harmful to viewers.
45. Accordingly, in designing a system to reduce harm, especially when considering significant threats to life, and on a balance of probabilities, it would be more appropriate to err on the side of caution and not introduce new, high thresholds before action is taken by platforms.

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[26] As discussed further in Possessing Extreme Pornography: Policing, Prosecutions and the Need for Reform Clare McGlynn and Hannah Bows, *Journal of Criminal Law* 2019 83:6, 473-488 at 478.

[27] Huibregtse ME, Alexander IL, Klemsz LM, Fu T-c, Fortenberry JD, Herbenick D and Kawata K (2022) Frequent and Recent Non-fatal Strangulation/Choking During Sex and Its Association With fMRI Activation During Working Memory Tasks. Front. Behav. Neurosci. 16:881678. doi: 10.3389/fnbeh.2022.881678; Institute for Addressing Strangulation, *Non-fatal strangulation: in physical and sexual assault* (January 2023) Non-fatal-strangulation-in-physical-and-sexual-assault-Dr-C-White-Jan-2023.pdf (ifas.org.uk); Schori, A., Jackowski, C. & Schön, C.A. How safe is BDSM? A literature review on fatal outcome in BDSM play. *Int J Legal Med* 136, 287–295 (2022). https://doi.org/10.1007/s00414-021-02674-0); Stapczynski JS, Dietrich AM. Strangulation Injuries (2010) Strangulation Injuries | 2010-08-02 | AHC Media: Continuing Medical… (reliasmedia.com)

[28] https://www.aan.com/advocacy/use-of-neck-restraints-position-statement#:~:text=The%20medical%20literature%20and%20the,cognitive%20impairment%2C%20and%20even%20death

46. Further, there is also no evidence to support the claim in relation to BDSM activity and none is given. This statement asserts any harm is 'unlikely', perhaps due to the supposed commonality of the behaviour. On the contrary, there is actual evidence of life-ending and life-threatening acts of choking etc in the BDSM community.

Cyberflashing

47. **A10.42: the interpretation of the law is limited to the new, specific criminal offence.** The guidance must be expanded to include that cyberflashing can constitute an offence under section 127 of the Communications Act 2003 and this is a lower mental threshold.
48. **A10.43: Expand guidance as outlined above:** This paragraph states that the state of mind for cyberflashing is 'unlikely to be reasonable inferred in most cases'. See above in relation to this being an inappropriate starting point for a civil, regulatory regime where there is a duty to design a system to reduce harm, as well as obligations regarding take-down of harmful imagery.
49. **Usage examples (p 126):** the first example refers to an image or GIF from a 'pornographic film' sent to another. It would be more accurate to refer to genital images as that is the scope of the English legislation (though laws in Northern Ireland and Scotland are wider).
50. **Usage examples refer to 'causing alarm or distress':** There is no requirement in the legislation to establish that the victim has been caused alarm or distress.

ii) What are the underlying arguments and evidence that inform your view?

Response:

See above

iii) Is this response confidential? (if yes, please specify which part(s) are confidential)

Response: no