

Consultation response form

Consultation title	Guidance for service providers publishing pornographic content
Representing (delete as appropriate)	Organisation
Organisation name	CEASE (Centre to End All Sexual Exploitation)

Your response

Question	Your response
<p>Question 1: Do you agree with our proposed guidance on scope? If not, please provide any information or evidence in support of your views, including descriptions of services or content where you consider it is unclear whether they fall within the scope of Part 5.</p>	<p>Confidential? N</p> <p>CEASE is concerned that the Guidance does not meet the intentions of Parliament re scope. While the Guidance rightly states that the Act itself does not define what is meant by ‘a significant number’ of UK users for the purposes of considering the UK links condition, it is clear from discussions during the passage of the Bill and indeed the Government’s own Factsheet that <i>“The Bill’s regulatory framework will cover <u>all</u> online sites with pornographic content, including commercial pornography sites, social media, video-sharing platforms and fora. It will also cover search engines, which play a significant role in enabling children to access pornography”</i>¹ (emphasis added). Further, during debates in the House of Lords, the Minister assured the House, of the following: <i>“I assure noble Lords that the Bill already has robust, comprehensive protections in place to keep children safe from all pornographic content, wherever or however it appears online.”</i>² (emphasis added).</p>

¹ Online Safety Bill: Protecting Children from Accessing Pornography Online, page 1

² Hansard HL Debate vol 828 no 151 col 1199 25th April 2023 URL:

<https://hansard.parliament.uk/Lords/2023-04-25/debates/8234D7A4-68A0-4598-98CA-F1F5F833B168/OnlineSafetyBill>

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	<p>It is clear that the Government’s intention was for all pornographic content that could be accessed in the UK to be covered by the Act.</p> <p>The overarching aim of the Act is ‘to make the UK the safest place in the world to be online’.³ If not all provider pornographic websites (and the rest) are covered by highly effective age assurance, regardless of how many or how few UK users a site purports to have, then the purpose of the Act is not being met and the will of Parliament as outlined above, is being ignored.</p>
<p>Question 2: Do you have any comments on how our proposed guidance applies in respect of pornographic content created by generative-AI services within the scope of Part 5? Please provide any information or evidence in support of your views.</p>	<p>Confidential? N</p> <p>CEASE is pleased that content created by generative-AI will fall within scope of Part 5.</p>
<p>Question 3: Do you have any comments on our proposed guidance in respect of the kinds of age assurance which could be highly effective? If you consider there are other kinds of age assurance which have not been listed that you consider could fulfil the proposed criteria, please identify these with any supporting information or evidence.</p>	<p>Confidential? N</p> <p>CEASE’s primary concern with the Guidance is less the types of age assurance proposed but how age assurance methods will be assessed and evaluated. Our primary concern therefore is the lack of a definition of ‘highly effective’ age assurance.</p> <p>During the Parliamentary process the words “highly effective” were added to section 81(3) of the Act after much consultation and discussion between Honourable Members of the House of Lords and a coalition of civil society members and child protection experts. The purpose of introducing that wording in the Act was to ensure that age assurance was ‘outcome-focused’ rather than focused on simply the methods and processes of age assurance.</p> <p>The Minister, in introducing the new wording said “[content providers] will need to be highly effective at correctly determining whether a particular user is a child. This new</p>

³ Press Release: Department for Science, Innovation and Technology, Home Office, Ministry of Justice, The Rt Hon Michelle Donelan MP, The Rt Hon Alex Chalk KC MP, and The Rt Hon Suella Braverman KC MP <https://www.gov.uk/government/news/uk-children-and-adults-to-be-safer-online-as-world-leading-bill-becomes-law#:~:text=Online%20Safety%20Act%20receives%20Royal,to%20be%20online%20into%20law.&text=The%20Online%20Safety%20Act%20has,duties%20on%20social%20media%20platforms>.

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	<p><i>bar will achieve the intended outcome behind the amendments which we looked at in Committee, seeking to introduce a standard of “beyond reasonable doubt” for age assurance for pornography, while avoiding the risk of legal challenge or inadvertent loopholes.”⁴</i></p> <p>However, Ofcom’s guidance fails to set out a definition of what it determines ‘highly effective’ to be. The Minister clearly informed Parliament that the definition of ‘highly effective’ would meet the expectations of Parliamentarians, namely that age assurance should be set to a level of compliance akin to the criminal law standard of proof namely, ‘beyond reasonable doubt.’</p> <p>While it was accepted at the time that these exact words were not the correct language for inclusion in the final wording of the Online Safety Act, it was the principle that was crucial. Beyond reasonable doubt is an outcome focused test in criminal law - a jury must be satisfied, to a high degree of certainty, that the outcome of the case should result in the guilt of the accused. In terms of age verification, beyond reasonable doubt means, a high degree of certainty, that no children are accessing pornographic content online.</p> <p>Clearly it was Parliament’s intention that Ofcom would define what the standard is that age verification must achieve to satisfy the legislation. To do this Ofcom must define what the standard is by defining what ‘highly effective’ means. Disappointingly, the guidance fails to do what Parliament asked and expected.</p>
<p>Question 4: Do you agree that service providers should use the proposed criteria to determine whether the age assurance they implement which is highly effective at correctly determining whether or not a user is a child? Please provide any information or evidence in support of your views.</p>	<p>Confidential? N</p> <p>As stated above, the lack of guidance on the meaning of ‘highly effective’ means that there is no objective, measurable and agreed upon standard for content providers to attain. This leaves both content providers and Ofcom in a quandary. If no standard is set by the guidance as to what meets the statutory bar of ‘highly effective’ then there is nothing by which to judge if the content provider has met their obligations. Further, the guidance currently gives service providers the freedom to decide whether they meet the four criteria set. For example, Ofcom currently</p>

⁴ Hansard HL Debate vol 831 no 189 col 1430 6th July 2023 URL:

<https://hansard.parliament.uk/lords/2023-07-06/debates/35CCD184-5828-4C47-AA19-D19D8AF44938/OnlineSafetyBill>

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	<p>allows the provider to determine what metrics should be used to evidence technical accuracy. While a criteria for technical accuracy is crucial (as are the other three criteria), the regulator should determine the metric standard for technical accuracy, not the provider.</p> <p>Therefore, for age assurance to meet the statutory test of 'highly effective' means that the guidance should state a standard that content providers must attain. CEASE would suggest that the term 'highly effective' needs to be defined and a percentage applied (we would suggest 99%) to the age assurance method whereby a content provider can prove that the method and process employed prevents 99% of children accessing the content. Currently, age verification providers are confident that age assurance is accurate to 99% for identifying those under 16 years and 95% for 16-18 years.</p> <p>If Ofcom is not satisfied that the above is a true and accurate picture of age verification capabilities, then having a high outcome-based measure will result in content providers needing to innovate and develop, something the pornography industry is well adept at doing and something that both Ofcom and Parliament inform us they wish to encourage.</p> <p>But if the guidance fails to include an outcome-based measure, content providers will simply choose the cheapest method allowable by the guidance and there will be no encouragement for innovation and development within the industry. Indeed, without an outcome-based measure, as mandated by Parliament, there will simply be a 'race to the bottom' and content providers will simply implement the minimum standards, if even that.</p>
<p>Question 5: Do you have any information or evidence on the extent of circumvention risk affecting different age assurance methods and/or on any steps that providers might take to manage different circumvention risks for different methods?</p>	<p>Confidential? N</p> <p>Children, especially older children using VPNs to circumvent age assurance methods and access pornographic content is a very real risk. CEASE would suggest that content providers block traffic from VPNs or require age assurance from a known VPN IP even if that address is outside the UK, or require age verification on every occasion a VPN attempts to access the content.</p>

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<p>Question 6: Do you agree with our proposed guidance that providers should consider accessibility and interoperability when implementing age assurance? Please provide any information or evidence in support of your views.</p>	<p>Confidential? N</p> <p>CEASE agrees and welcomes Ofcom’s prioritisation of interoperability and accessibility. It is important that systems and different methods of age assurance can work in unison. CEASE is concerned with the speed at which AI for example, is developing and it is vital that the Guidance allows for age assurance technology to keep pace and incorporate new ways of assuring age gates are fit for purpose. Though again, without something to measure against, the how becomes a moot point.</p>
<p>Question 7: Do you have comments on the illustrative case study we have set out in the guidance? Do you have any supporting information or evidence relating to additional examples of how the criteria and principles might apply to different age assurance processes?</p>	<p>Confidential? N</p> <p>Overall, CEASE has no comments on the case study but we reiterate our points above re the need for a definition of highly effective assurance.</p>
<p>Question 8: Do you agree with our proposed guidance on the record-keeping duties? Please provide any information or evidence in support of your views.</p>	<p>Confidential? N</p> <p>The record-keeping duty while welcome, is again focused on compliance with the guidance and does not establish if the method or process used by the content provider is actually working.</p> <p>Section 81(5) of the Act requires that the written record ensures compliance with the duty set out in section 81(2) of the Act, which states “<i>A duty to ensure, by the use of age verification or age estimation (or both), that children are not normally able to encounter content that is regulated provider pornographic content in relation to the service.</i>” The guidance states (paragraph 5.27) “<i>the service provider should aim to provide the main details about the age assurance process which it uses. This will help to explain to users of the regulated service what the process is designed to do and how it works, so that users can understand why it is necessary and how to complete the process.</i>” Again, the focus is on the method and process of age assurance and not the outcome. As already stated, Parliament mandated an outcome-based standard of age assurance.</p> <p>Therefore, what should be required of service providers is a written statement, with evidence, showing that the age</p>

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	<p>assurance method chosen has been highly effective at fulfilling the duty of section 81(2) of the Act, namely that children are not normally able to access their content and to what percentage number this is accurate.</p>
<p>Question 9: Do you have any comments on our proposed approach to assessing compliance with the duties on service providers who publish or display pornographic content, including on the proposed examples of non-compliance? Please provide any information or evidence in support of your views.</p>	<p>Confidential? N</p> <p>CEASE believes that the approach taken in the Guidance is not strong enough in assessing a service providers compliance with its duties. As well as the issues noted above regarding the lack of a clear definition of highly effective age assurance, CEASE is concerned that Ofcom has not shown the level of enforcement necessary to curb harmful material available online.</p> <p>In the recently published House of Commons Committee of Public Accounts Preparedness for online safety regulation Thirteenth Report of Session 2023–24, Ofcom gave examples of how it currently deals with non-compliance, explaining that, ‘where non-compliance issues arise, it will approach services with an engagement-first attitude and would not normally move straight to enforcement.’⁵ This is deeply concerning. The pornography industry has repeatedly shown its disregard for laws requiring platforms to implement age verification.⁶ An engagement-first attitude is not sufficient when the service providers in question are actively avoiding and disregarding their duties. Further, Ofcom references its regulation of video sharing platforms as a high standard of enforcement. Yet it has taken Ofcom anywhere from 2 to 3 years to take enforcement action against pornographic sites who failed to comply with the duties set out for them. This is an unacceptable amount of time for enforcement action.</p> <p>The same is true for Video on Demand services. Ofcom has been the regulator for VODs since 2021, yet has so far</p>

⁵ House of Commons Committee of Public Accounts Preparedness for online safety regulation Thirteenth Report of Session 2023–24: <https://committees.parliament.uk/publications/43321/documents/215761/default/>

⁶ <https://www.numerama.com/tech/1230502-les-sites-porno-sont-impuissants-en-justice-pour-empêcher-le-contrôle-de-l'âge-en-france.html> ; <https://www.telegraph.co.uk/news/2019/04/18/porn-sites-offer-loopholes-get-around-web-ban-bbfc-admits-powerless/> ; <https://www.texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-sues-major-pornography-distributor-violating-texas-age-verification-laws#:~:text=Texas%20Attorney%20General%20Ken%20Paxton,being%20exposed%20to%20obscene%20materials> ; https://ca.news.yahoo.com/pornhub-blocking-users-2-more-105518665.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAKHJ0fntACNuG5DceVDEstfi0o6q5arMlpyqigeSCy0GQgdfC7tzAocvCNpbWqYEvicDBrCRC5VLEYP55aWNXanPr6yKxrl-Xq9CQu5in8RHdttleXEjcei3yiUWxW4b4thP6P8JeS6dOyVsvl14iEzwrJOqREQ9BvzY-BDpaZO#:~:text=Pornhub's%20decision%20to%20block%20access,Arkansas%2C%20Utah%2C%20and%20Mississippi

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	<p>not moved to enforce the age verification requirements. To date no VoD service has had enforcement action taken against it for failure to comply with the Communications Act, while only one service is under investigation.⁷</p> <p>CEASE is concerned that we will see the same lack of enforcement for service providers publishing pornographic content under the OSA.</p>
<p>Question 10: Do you have any comments on the impact assessment set out in Annex 1? Please provide any information or evidence in support of your views</p>	<p>Confidential? – Y / N</p> <p>No Comment</p>
<p>Question 11: Do you agree that our proposed guidance is likely to have positive effects on opportunities to use Welsh and treating Welsh no less favourably than English?</p> <p>If you disagree, please explain why, including how you consider the proposed guidance could be revised to have positive effects or more positive effects, or no adverse effects or fewer adverse effects on opportunities to use Welsh and treating Welsh no less favourably than English.</p>	<p>Confidential? N</p> <p>No Comment</p>

Please complete this form in full and return to Part5Guidance@ofcom.org.uk.

⁷ An investigation has been opened against one operator for failure to report service as well as failure to implement age verification, but no enforcement action has been proposed to date on foot of that investigation. See [Investigation into Secure Live Media Ltd - Ofcom](#)