

# Consultation: Guidance on age assurance and other Part 5 duties for service providers publishing pornographic content on online services

## About CARE

1. CARE (Christian Action Research and Education) is a well-established mainstream Christian charity providing resources and helping to bring Christian insight and experience to matters of public policy and practical caring initiatives. CARE advised MPs and Peers during the passage of the Online Safety Act through Parliament and played a similar role during the debates on Part 3 of the Digital Economy Act 2017. CARE is particularly concerned with the impacts of pornography on children and adults. We have campaigned on the need to protect children from accessing pornographic content as well as the impact on violence against women and children caused by addiction to extreme pornographic content.
2. The contents of this document are not confidential.

## Consultation 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.

3. CARE is concerned with how the guidance deals with Section 80(4) of the act and specifically the term 'links to the United Kingdom'. What is meant by this phrase was discussed in Parliament during the passage of the Act. In responding to the concerns of Peers, a government factsheet stated, "*The Bill's regulatory framework will cover all 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.*"<sup>1</sup>(emphasis added). During the Committee Stage of the Act in the House of Lords, the Government said, "*The Bill ensures that companies must prevent children accessing online pornography, regardless of whether it is regulated in Part 3 or Part 5. The Government are absolutely clear on this point; anything less would be unacceptable.*"<sup>2</sup> 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.
4. This was underscored by the Minister who, in commenting on the BBFC research highlighted in the consultation, stated "*The research we commissioned from the British Board of Film Classification assessed the functionality of and traffic to the UK's top 200 most visited pornographic websites. The findings indicated that 128 of the top 200 most visited pornographic websites—that is just under two-thirds, or 64%—would have been captured by the proposed scope of the Bill at the time of the Government's initial response to the online harms White Paper, and that represents 85% of the traffic to those 200 websites. Since then, the Bill's scope has been broadened to include search services and pornography publishers, **meaning that children will be protected from pornography wherever it appears online.***"<sup>3</sup>(emphasis added). In the same debate the Minister went on to say "*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.***"<sup>4</sup> (emphasis added).

<sup>1</sup> Online Safety Bill: Protecting Children from Accessing Pornography Online, page 1

<sup>2</sup> Hansard HL Debate 23<sup>rd</sup> May 2023, col 822 <https://hansard.parliament.uk/pdf/lords/2023-05-23>

<sup>3</sup> Hansard HL Debate 25<sup>th</sup> April 2023, col 1199 URL: <https://hansard.parliament.uk/Lords/2023-04-25/debates/8234D7A4-68A0-4598-98CA-F1F5F833B168/OnlineSafetyBill>

<sup>4</sup> Op Cit, col 1200

5. The clear expectation of Government in passing the legislation, was for Section 80(4) of the Act to be interpreted in the widest possible terms. The only way the stated aim of the Government can be reconciled with the drafting of the Act is to interpret the phrase “has links with the United Kingdom” as meaning that, if a site carries pornographic content, and if that site is available to anyone on the UK, then it must have highly effective age verification or assurance. This is the only way the Government’s commitment during debate on the Act can be fulfilled. In this regard, Hansard is clearly an aid to statutory interpretation in drafting the guidance and this wide interpretation must be made explicit before the guidance is issued.
6. The guidance is correct to state that the Act does not define what is meant by ‘*United Kingdom users form one of the target markets for the service*’ (section 80(4)9(b)), however the Minister’s comments to the House certainly convey the Government’s expectation of what the Act will achieve, namely, that all content that carries pornographic content, wherever it appears online, will be subject to highly effective age verification. The only way to ensure that the will of Parliament is fulfilled in the guidance, is to interpret ‘target market’ as: being capable of being accessed in the UK. If a user based in the UK can access the content, then the UK is a target market for the purposes of the Act. This would ensure all pornographic content is covered. This must be made clear in the guidance, as currently the guidance seems to be at odds with the stated intention of Parliament where Lord Stevenson said, “*Whether [pornography] comes through a Part 3 or Part 5 service, or accidentally through a blog or some other piece of information, it has to be stopped. We do not want our children to receive it. That must be at the heart of what we are about, and not just something we think about as we go along.*”<sup>5</sup>
7. Identical provisions in respect of Part 3 services are enacted in section 4(5). It therefore cannot be the case that pornographic content falling out of scope of Part 5 will be covered in Part 3 as suggested at paragraph 6.4 of the consultation document. This is for two reasons: the nature of the provider of the pornographic content is different between the different parts of the Act (whilst recognising that a particular service could contain both Part 3 and Part 5 content) and secondly, the test for links to the UK is identical in both parts of the Act. Clearly, if the will of Parliament is to be followed and all pornographic content is to be covered by age assurance, the guidance for Part 5 should state that all pornographic content is covered by the Act, without exception, and this must also be explicitly stated in the codes of practice for part 3. Parliament intended for all pornographic content to be covered by the Act, Ofcom, as regulator, must ensure the will of Parliament is followed.
8. By virtue of section 79(5), content that is advertising falls outside of the scope of Part 5 (as underscored by paragraph 3.8 of the draft guidance). The guidance states at paragraph 3.13 that “*There may be instances where online services include some pornographic content which falls in scope of Part 3 and some pornographic content which falls in scope of Part 5. For example, while tube sites are often predominantly user-to-user services (i.e., predominantly comprised of user-generated pornographic content), a provider of a tube site may itself make some pornographic content available on that site. Where a provider of such a service (which otherwise predominantly comprises user-generated content) publishes or displays pornographic content on its site, or someone else does so on its behalf, that pornographic content will be within scope of the Part 5 duties, unless otherwise exempt.*” Much of the content that is made by the owner of a tube-site and published on that platform, thus falling under part 5 duties, is an extended advertisement. The tube-site owner is publishing clips of longer works and directing traffic to the paid-for site that hosts the longer work. It could therefore be argued that the clip is an advert for the longer, paid-for work, on another platform. This may be an issue in the legislation that some tube-sites may wish to exploit. Clearly, the tube-site clip is not just an advertisement, it is pornographic content in its own right. The guidance should be clear that this type of content will not be considered an advertisement and is regulated under Part 5.

<sup>5</sup> Hansard HL Debate 23<sup>rd</sup> May 2023, col 821 <https://hansard.parliament.uk/pdf/lords/2023-05-23>

**Consultation 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.**

9. We are supportive of paragraph 3.14 of the guidance that content created by generative-AI on platforms that fall within the scope of Part 5 should be subject to the duties under Part 5 of the Act.

**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.**

10. At paragraph 4.7 the draft guidance states “Throughout this guidance, we refer to age assurance methods and processes.” The paragraphs that follow set out what is understood by methods and processes. We are concerned by this approach as it fundamentally fails to grasp the intention of Parliament and more specifically it fails to understand how part 5 is actually drafted, and thereby to be implemented so that service providers meet the duty in section 81(2) to ensure that “children are not normally able to encounter content that is regulated provider pornographic content in relation to the service.”
11. During the Parliamentary process the words “highly effective” were added to section 81(3) of the Act to clarify how the requirement to use age verification/estimation was to be implemented and ensure the veracity of the technology. 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. 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 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.”<sup>6</sup> (emphasis added)
12. The guidance fails to set out a definition of what Ofcom 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 that is, ‘beyond reasonable doubt.’ Beyond reasonable doubt is an outcome focused test in criminal law – a jury must be satisfied, to a high degree of certainty, that the evidence in the case means that the accused is guilty, it is focused on the outcome of the trial, not how well the barrister presented the evidence. In terms of age verification, beyond reasonable doubt means, a high degree of certainty, that no children are accessing pornographic content online, it is not a measure of how well an online company has completed a process. Clearly it was Parliament’s intention that Ofcom would define what that particular outcome means, by defining what the test ‘highly effective’ means. The guidance fails to do what Parliament asked and expected the regulator to produce.

**Question 4: Do you agree that service providers should use the proposed criteria to determine whether the age assurance they implement 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**

13. Notwithstanding our answer to question 3 above, we agree that the kinds of methods and processes set out in the guidance are broadly acceptable. However, the lack of guidance on the meaning of ‘highly effective’ means that a standard for content providers to attain is not included in the guidance. For age assurance to meet the statutory test of ‘highly effective’ would mean that the process and the method used must be effective beyond reasonable doubt. This means that the guidance should state a standard that content providers must attain. This could be a 99% rate of effectiveness at blocking access to children, or some other standard set by

<sup>6</sup> Hansard HL Debate vol 831 no 189 col 1430 6<sup>th</sup> July 2023 URL <https://hansard.parliament.uk/lords/2023-07-06/debates/35CCCD184-5828-4C47-AA19-D19D8AF44938/OnlineSafetyBill>

Ofcom which the public and Parliament would consider to be 'highly effective'.

14. A method or a process of age assurance, as set out in the guidance, could be utilised by a content provider, but the content provider also has a statutory duty to ensure that the method or process used does indeed exclude almost all children from accessing the content. 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. The guidance, by applying the term 'highly effective' to the method/process of age assurance, has failed to meet the statutory obligation of the Act and ensure that the outcome of age assurance is 'highly effective,' and no children are indeed accessing the content.
15. An age assurance method utilised by a content provider, may be technically accurate, robust, reliable and fair and still not be 'highly effective.' The guidance does not set out criteria for a requirement to prove that the content provider is utilising their age assurance method effectively to achieve the outcome of preventing children from accessing the content and the content provider can prove this, beyond reasonable doubt. **The focus on the method and process places the burden of the guidance on simply having age assurance, but equally important is proving the veracity of the age assurance, i.e. that it actually works.** This was clearly Parliament's concern and needs to be addressed in the draft guidance.
16. **CARE 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.** CARE is concerned that unless the guidance includes an outcome-based measure, content providers will simply choose the cheapest method allowable by the guidance and there will be no encouragement or incentive 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 implement the minimum standards which will not achieve the outcome of preventing children and young people from accessing pornographic content.

**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?**

17. The issue of circumvention highlights why Parliament tasked Ofcom to issue guidance on outcomes rather than just methods and processes. If 'highly effective' is defined as a measure based on the outcome of the age assurance method, then circumvention risk is mitigated. If the method or process is circumvented and this allows a child to access the content, then the test of 'highly effective' has not been met and the content provider is in breach of the duties under part 5 of the Act.
18. To ensure that children are not using circumvention techniques, such as VPNs, content providers could block traffic from VPNs or require age assurance from a known VPN IP address even if that address is outside the UK, or require age verification on every occasion a VPN attempts to access the content. Any age assurance measures which are implemented need to be robust and reliable enough to ensure that AI technology or fraud (e.g. children using the documents of adults) are not able to be utilised to circumvent the age assurance process.

**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**

19. CARE agrees that content providers should consider accessibility and interoperability when implementing age assurance. It is important, for age assurance to work effectively, that process and systems are well understood and portable across platforms. This will lead to greater compliance.

**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?**

20. The case study sets out clearly how the processes and methods established in the consultation work and is reflective of good practice in following the draft guidance. We remain concerned that the focus is simply on the process and method of age assurance and the case study (as is reflective of the guidance) does not establish good practice for outcomes. This remains a weakness of the guidance as a whole and does not reflect the intention of Parliament.

**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**

21. The record-keeping duty is focused on compliance with the guidance and does not establish if the method or process used by the content provider is actually working. This is reflective of the focus of the guidance on method and process rather than outcomes, as set out above.

22. Section 81(5) of the Act requires that the written record ensures compliance with the duty set out in section 81(2) of Act, which states “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.” The guidance states (paragraph 5.27) “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.” Clearly the only way to tell if children are not normally able to encounter a service is by showing the outcome of the age assurance method used. Namely, providing a written statement, with evidence, showing that the age assurance method chosen has indeed been highly effective at fulfilling the duty of section 81(2) of the Act. This further highlights the deficiency in the draft guidance and the need for the focus to be placed on outcomes not just method and process. The Act clearly requires providers of regulated content to consider the question of how it has kept children from accessing content and proving that it has been successful in doing so, to a standard which could reasonably be considered highly effective.

**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**

23. CARE is concerned with the approach set out in the draft guidance. Paragraph 6.3 states “When assessing compliance, we will act in accordance with our general duties, including our duty to have regard to our regulatory principles of transparency, accountability, proportionality, consistency and ensuring that regulatory action is targeted only at cases which require it.” While this is a worthy statement, what will it mean in practice? CARE is concerned that Ofcom has failed to take enforcement action in other areas for which it has the role of regulator and for which age assurance is required.

24. Since 2009, Video-on-demand services (VoDs) have been regulated under the Communications Act 2003. In 2014 and 2020 further amendments were made enacting sections 368E (4) and (4a) which require VoDs to restrict access to “specially restricted material” which is content that has been or would be classified as R18 by the British Board of Film Classification (BBFC), or material which might seriously impair the physical, mental or moral development of under-18s. The law stipulates that this material can only be made available by VoDs in a way which ensures that under-18s will not normally see or hear it. These are clearly age verification provisions.

25. CARE is concerned that while guidance for VoDs has been in place since 2021, Ofcom has so far 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.<sup>7</sup> Many VoD services are adult only. Currently there are 276 VoD operators registered in the UK. While it is hard to tell which services are adult only and which services contain adult content as part of their service, on a review of names only, it is clear that at least 35 VoDs are adult only services.<sup>8</sup>

26. Since, the law on age verification for VoDs has been in place for almost 3 years and guidance published for almost 2 years, it is alarming that, to date, Ofcom have taken a 'light touch' approach to enforcement. Ofcom have merely notified providers of their obligations; while stating they will 'consider' enforcement if platforms continue to ignore the law. It is clear that, to date, Ofcom's regulatory action is not so much targeted (as the draft Part 5 guidance states), as non-existent.
27. CARE is concerned that this 'light touch' approach, if adopted in respect of provisions in the Online Safety Act, will simply lead to an overwhelming majority of pornography sites and social media platforms simply ignoring the law. Age verification can only work if it is enforced. The draft guidance needs to be more robust in its wording on enforcement and action must be taken swiftly against non-complying content providers once the duties come into force.
28. VoDs represent a small number of adult platforms. By contrast the age verification requirements in the Online Safety Act will cover an estimated 25,100 platforms in the UK<sup>9</sup> and 4-5 million pornographic websites worldwide. This raises the question of Ofcom's capacity and desire to take the necessary enforcement action at the scale which will be required.
29. Public expectation is that age verification for pornography websites and social media will be implemented and enforced and that all pornographic providers will be forced to comply. The draft guidance does not provide comfort that enforcement will be meaningful or effective and gives rise to concern that many content providers will simply ignore the law, leaving children unprotected from harmful content.

**Question 10: Do you have any comments on the impact assessment set out in Annex I? Please provide any information or evidence in support of your views**

**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?**

30. We have no comments on either question 10 or 11.

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<sup>7</sup> 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](#)

<sup>8</sup> [Service Provider Contact list \(ofcom.org.uk\)](#)

<sup>9</sup> [Impact Assessment](#), March 2022, Table 5, pages 28-29