



# Consultation response form

Please complete this form in full and return to [Part5Guidance@ofcom.org.uk](mailto:Part5Guidance@ofcom.org.uk).

<b>Consultation title</b>	Guidance for service providers publishing pornographic content
<b>Organisation name</b>	The Christian Institute

## Your response

Question	Your response
<p><b>Question 1:</b> 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><b>No.</b></p> <p><b>The Part 5 guidance should be more explicit about the inclusion of content which would receive an 18 certificate.</b></p> <p>Throughout the passage of the Online Safety Act, The Christian Institute and others argued that the legislation’s definition of ‘pornographic content’ was not robust enough. The definition in the now repealed Part 3 of the Digital Economy Act 2017 made explicit reference to the BBFC age ratings. The Government argued that the definition (“that it was produced solely or principally for the purpose of sexual arousal”) was sufficient because it underpins the BBFC ratings themselves. However, the omission of reference to 18-rated material in the Part 5 guidance proves our point.</p> <p>The guidance makes explicit reference to the R18 category but only mentions that “other content of a strong sexual nature” not falling into that category may also be treated as pornographic. This could be a reference to unclassified and so more extreme material, rather than to 18-rated material. As 18-</p>

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	<p>rated sexual material would often be limited to simulated sexual activity, a platform could attempt to argue it is excluded from the regime.</p> <p><b>There also needs to be much greater clarity on the ‘significant number of UK users’ threshold.</b></p> <p>As the guidance itself points out, the Online Safety Act “does not define what is meant by a ‘significant number’ of UK users for the purposes of considering the ‘UK links’ condition”. But the guidance does not help with this problem. Paragraph 3.21 provides some clarity as to what constitutes a ‘user’, but paragraph 3.20 simply states: “Service providers should be able to explain their judgement, especially if they think they do not have a significant number of UK users”. At the very least, it needs to be clear whether ‘significant number’ relates to a figure in proportion to the UK population, or whether it relates to a proportion of users on their site.</p> <p>Lack of clarity on this point gives porn sites a green light to claim they are outside the scope of regulations. Some may seek to argue that because only 1% of their global user base comes from the UK they are not subject to regulation, even if this amounts to thousands of UK users.</p>
<p><b>Question 2:</b> 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><b>Question 3:</b> 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</p>	

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these with any supporting information or evidence.	
<p><b>Question 4:</b> 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>The criteria are a step in the right direction for establishing the 'highly effective' threshold. However, a significant degree of variation as to appropriate standards is left open. For example, the guidance refers to the Age Check Certification Scheme's (ACCS) research on the Measurement of Age Assurance technologies, which helpfully sets out an accuracy confidence scale of 'basic' to 'strict' in relation to age assurance systems. A 'basic' system would carry a 90%+ accuracy, whereas a 'strict' system would carry 99.99%+ accuracy.<sup>1</sup> But it is not clear in the Part 5 guidance which confidence level would relate to the 'highly effective' threshold. This is significant as a judgement based on technical accuracy is necessary to determine whether a secondary check might be necessary.</p>
<p><b>Question 5:</b> 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><b>The guidance contains a welcome explicit clarification that “providing a link to and recommending the use of a VPN to avoid” age assurance controls is an example of a non-compliant act. Nevertheless, the guidance should go further in addressing situations in which it is identified that users are accessing a site via a VPN.</b></p> <p>Research by Professor Neil Thurman and Fabian Obster found that 46% of 16 and 17-year-olds in the UK have used a VPN or Tor browser to circumvent age restrictions. Additionally, a further 23% of children knew what they were.<sup>2</sup></p> <p>This is not surprising, given that a Google search for 'how to get around age restrictions online', even with SafeSearch on, brings up a plethora of information on VPNs, deliberately marketed as a way to get</p>

<sup>1</sup> *Measurement of Age Assurance Technologies: Part 2 – Current and short-term capability of a range of Age Assurance measures*, Age Check Verification Scheme, August 2023, pages 10 and 55

<sup>2</sup> Thurman, N and Obster, F, 'The regulation of internet pornography: What a survey of under-18s tells us about the necessity for and potential efficacy of emerging legislative approaches', *Policy & Internet*, 2021, 13, pages 415-432

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	<p>around porn checks, including links to download free products. A WikiHow page on bypassing age restrictions on YouTube videos makes clear: “If you live in the USA or use a VPN server based there, you won't be asked to verify your age when you create a new account.”<sup>3</sup></p> <p>Given the huge numbers of children who bypass restrictions in this way – or know how to do so – platforms cannot fulfil their duty to “prevent” child access to porn without this problem being addressed.</p> <p>But if companies have the will, they can address the problem. For example, BBC iPlayer has mechanisms to prevent VPN traffic to its site through blacklisting the common VPN servers and potentially blocking when a device's GPS location and IP address location do not match.<sup>4</sup></p> <p>This problem requires an international and technological response, and Ofcom, as a respected international voice, has a role to play. During the Act's Commons stages, Labour MP Sarah Champion tabled an amendment to require the Secretary of State to publish a report on the effect of VPN use on Ofcom's ability to enforce the provisions in the Act.<sup>5</sup></p> <p><b>If the Secretary of State is not required to publish a report, Ofcom should conduct a review in this area and release its own findings in further guidance.</b></p>
<p><b>Question 6:</b> 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>	

<sup>3</sup> 'Bypass Age Restrictions on YouTube videos: 8 simple methods', *wikiHow*, 27 January 2023, see <https://www.wikihow.com/Bypass-Age-Restrictions-on-YouTube-Videos> as at 21 March 2023

<sup>4</sup> 'BBC iPlayer not working with VPN? Here's the fix!', *Comparitech*, 6 March 2023, see <https://www.comparitech.com/blog/vpn-privacy/bbc-iplayer-vpn-not-working/> as at 21 March 2023

<sup>5</sup> *Yorkshire Post online*, 7 December 2022, see <https://www.yorkshirepost.co.uk/news/opinion/columnists/online-safety-bill-must-do-more-to-protect-children-from-abusers-sarah-champion-3943313> as at 21 March 2023

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<p><b>Question 7:</b> 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><b>Question 8:</b> 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><b>Question 9:</b> 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>Robust enforcement is absolutely essential to an effective regime. Unfortunately, Ofcom’s track record in managing the Video Sharing Platforms regulations does not inspire confidence that it will enforce the Online Safety regime effectively.</p> <p>Paragraph 6.9 of the Part 5 guidance refers to “our prioritisation framework when considering: (a) the risk of harm or seriousness of the conduct; and (b) the strategic significance of addressing the alleged contravention”. Prioritisation is necessary, but it would be far too easy for the language of “strategic significance” or “resource implications” (para. 6.11) to justify inaction.</p> <p>The degree of harm to children from pornography has made the matter a political priority in other jurisdictions. With that mentality, the evidence shows that swift implementation is possible. French regulator Arcom gives non-compliant porn sites only 15 days to put age verification in place, before requesting blocking orders from the court.<sup>6</sup> Legislation going through the Canadian Parliament gives 20 days.<sup>7</sup> The Age Verification Providers Association has noted that when pushed, “major sites turned it</p>

<sup>6</sup> ‘No blocking for these porn sites in France, but a reprieve of a few months’, *Aroged*, 7 July 2023, see <https://www.aroged.com/2023/07/07/no-blocking-for-these-porn-sites-in-france-but-a-reprieve-of-a-few-months/> as at 13 October 2023

<sup>7</sup> Bill S-210, 18 April 2023, Clauses 8(2)(d) and 9(1), see <https://www.parl.ca/DocumentViewer/en/44-1/bill/S-210/third-reading> as at 13 October 2023

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	<p>on with ten days' notice in France".<sup>8</sup> This timeframe better reflects the technical timescale for a site to implement age verification. Yoti, the age verification provider used by OnlyFans, suggests it can "Add age verification to your website in minutes".<sup>9</sup></p> <p>Although in recent months Ofcom has opened further investigations for its Video Sharing Platform regime, action has been slow in coming. In its first-year review of the regime, in October 2022, Ofcom said that one of the "strategic priorities" for Year 2 (i.e. October 2022 to October 2023) was to "drive forward the implementation of robust age assurance, to protect children from the most harmful online content (including pornography)".<sup>10</sup> In January 2023, Ofcom launched a four-month enforcement programme, suggesting that at the end of this period of "assessment" it may open formal investigations.<sup>11</sup> But, over nine months later, Ofcom extended this period until at least the end of the year, and then again to at least April 2024.<sup>12</sup> At the end of Year 2, only two formal investigations had been opened, with only one relating to failure to "take appropriate measures to protect under-18s from videos containing pornographic content" (the other, opened prior to the enforcement programme, related to failure to comply with a formal information request and concluded with the only fine that has been issued thus far under the regime).<sup>13</sup></p> <p>In order to reassure stakeholders, Ofcom should admit in the Part 5 guidance its slow action in the VSP regime and how this will be rectified. At the euCon- sent conference last year, Ofcom stated it was "thinking" about "compliance windows" for providers,</p>

<sup>8</sup> Submission by Age Verification Providers Association, Ofcom, Ofcom's proposed plan of work 2023/24, page 3, see [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0026/255905/age-verification-providers-association.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0026/255905/age-verification-providers-association.pdf) as at 13 October 2023

<sup>9</sup> 'Age Verification', Yoti, see <https://www.yoti.com/business/age-verification/> as at 13 October 2023

<sup>10</sup> *Ofcom's first year of video-sharing platform regulation: What we found*, Ofcom, October 2022, page 21, para. 5.7

<sup>11</sup> 'Enforcement programme into age assurance measures on UK-established, adult video-sharing platforms', Ofcom, 29 September 2023, see [https://www.ofcom.org.uk/about-ofcom/bulletins/enforcement-bulletin/open-cases/cw\\_01266](https://www.ofcom.org.uk/about-ofcom/bulletins/enforcement-bulletin/open-cases/cw_01266) as at 13 October 2023

<sup>12</sup> *Loc cit*

<sup>13</sup> *Loc cit*; *Ofcom's first year of video-sharing platform regulation: What we found*, Ofcom, October 2022, page 11, para. 3.8; 'Investigation into Tapnet's compliance with a statutory information request', Ofcom, 27 March 2023, see [https://www.ofcom.org.uk/about-ofcom/bulletins/enforcement-bulletin/all-closed-cases/cw\\_01263](https://www.ofcom.org.uk/about-ofcom/bulletins/enforcement-bulletin/all-closed-cases/cw_01263) as at 13 October 2023

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	<p>but such windows do not appear in the Part 5 guidance.</p> <p>There are significant concerns that some of the same mistakes could be repeated. The enforcement process set out in the referenced 'Annex 11: Enforcement guidance' sets out opening an 'enforcement programme' as the precursor to taking further action. Such a programme will be opened on the basis of "consumer research, desk-based research, or analysis of complaints".<sup>14</sup> Each of these scenarios envisages a more drawn-out process than merely responding to a parental complaint of child access (only 'super-complaints' which are from designated groups and take a degree of time to gather wider evidence are currently provided for). Given the straightforward testing that can be carried out to verify a parental complaint, the guidance should set out that such parental complaints etc. are welcome, and Ofcom should approach the Government if this is not legally possible.</p>
<p><b>Question 10:</b> 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><b>Question 11:</b> 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>	

<sup>14</sup> *Protecting people from illegal harms online: Annex 11: Enforcement guidance*, Ofcom, November 2023, page 12

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