

Written evidence submitted by Christian Action Research and Education (CARE) (DEB 01)

Evidence to the Public Bill Committee for the Digital Economy Bill: Part 3 and Online Pornography

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 across the UK.

Executive Summary

2. CARE welcomes the intention of Part 3 of the Digital Economy Bill (clauses 15-25)¹ to introduce age verification for commercial pornography websites and apps.
3. However, it is completely unclear how the age-verification regulator will be able to ensure that compliance is enforced for websites when the vast majority of sites containing pornographic content accessed in the UK are not UK-based. Part 3 must be amended to include the following solutions:
 - Financial transaction blocking – *requiring* payment and ancillary services to block payments/services to pornography websites that do not provide age-verification.
 - IP Blocking – *requiring* internet service providers to block access to pornography sites that fail to verify the age of users.
4. CARE also argues that the Communications Act 2003 should be amended through the Digital Economy Bill so that UK based video-on-demand services operate on a level playing field with other online media and are required to ensure that children are not able to view content online that they would not be permitted to view offline.
5. This briefing also highlights additional concerns in relation to the silence of the Bill on the commitment to introduce legislation to ensure the continuation of the adult content filtering agreement between the big four ISPs, following the EU net neutrality vote. The Appendix to this briefing sets out suggested amendments.

Defining the problem

6. A significant number of children are accessing the internet through both mobile and household devices. 86% of children aged 5-15 live in a household with access to the internet through a PC, laptop or netbook.² The internet can be a powerful force for good, but it can also be a dangerous

¹ http://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0045/cbill_2016-20170045_en_3.htm#pt3-l1g15

² *Children and Parents: Media Use and Attitudes Report*, OFCOM, November 2015, page 33

place without proper online protections where some children and young people find exposure to pornography disturbing and harmful.^{3 4}

- A March 2014 study reported the vast majority of pornography sites were not UK-based and 23 of the top 25 adult websites provided “**instant, free and unrestricted access to hard core pornographic videos**”.⁵ “**Only one of the 1,266 adult websites identified...as having been visited from the UK in December 2013 was a service regulated in the UK.**” This is, therefore, largely an international challenge.
- In May 2015, government research revealed that 1.4 million unique visitors under the age of 18 accessed sites containing pornographic content from their desktop: **this equates to 20% of all under-18s who access the internet and 13% of children aged 6-14.**⁶ As these statistics relate to desktop access, the true figures are likely to be far higher due to the ubiquity of smartphone and tablet technology.⁷

The Proposed Solutions

7. Part 3 of the Digital Economy Bill proposes that all overseas and UK commercial websites and apps⁸ that make pornography available in the UK should have an age-verification procedure that prevents children and young people from accessing this material (clause 15). CARE **welcomes this proposal in principle.**

CARE’s Concerns

8. CARE has two main concerns **related to enforcement and scope. We are also concerned about a serious omission, although possibly the Government may be planning on addressing this through regulation.**

I. Enforcement

This challenge is critical given that the vast majority of pornography sites accessed in the UK are based in other jurisdictions. The Bill’s attempt at engaging with enforcement is inadequate:

i) Fining Foreign Sites?

9. The regulator can impose large fines (clause 21(2)) up to £250,000 or 5% of the person’s qualifying turnover (clause 21).⁹ However, it is not at all clear how the Government proposes that the

http://stakeholders.ofcom.org.uk/binaries/research/media-literacy/children-parents-nov-15/childrens_parents_nov2015.pdf

³ “I wasn’t sure if it was normal to watch it...” Elena Martellozzo, Andy Monaghan, Joanna R. Adler, Julia Davidson, Rodolfo Leyva and Miranda A.H. Horvath, (June 2016)

<https://www.nspcc.org.uk/globalassets/documents/research-reports/mdx-nspcc-occ-pornography-report-final.pdf>

⁴ *Boy aged 10 ‘raped male classmate in the school toilets, as he acted out online porn’, court told*, Mail Online, 22 April 2014

<http://www.dailymail.co.uk/news/article-2610371/Schoolboy-10-raped-boy-school-toilets-seeing-internet-pornography-deciding-act-out.html#ixzz3K5J4B2S1>; *Blackburn boy, 13 rapes his sister, after watching porn on Xbox*, Lancashire Telegraph, 7 February 2014

⁵ *For Adults Only? Underage access to online porn*, The Authority for Television on Demand, March 2014, pages 4 & 19 (no longer online)

⁶ Child Safety Online: Age-Verification for Pornography, February 2016, page 7

<https://www.gov.uk/government/consultations/child-safety-online-age-verification-for-pornography>

⁷ See pornhub statistics that in 2014, 65% of access from the UK was via a smartphone or tablet. *For Adults Only?*, Op Cit, page 14

⁸ Child Safety Online: Age Verification Consultation Response, July 2016

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/534965/20160705_AVConsultationResponseFINAL_2_.pdf, page 7 – but excluding services regulated under on-demand programme services

⁹ Consultation Response, *Op Cit*, page 10

regulator will compel a Russian site, for instance, that has already ignored its previous direction, to pay such a fine. If it is the case that fines can only really be enforced in the UK then it would be better for the Bill to be amended to acknowledge this fact since this would:

- a) be more honest; and
- b) highlight the need for alternative enforcement mechanisms when dealing with sites outside the UK which are the source for the vast majority of online porn accessed in the UK.

ii) The Lack of Credible Statutory Financial Transaction Blocking Mechanism and a Credible Statutory Mechanism for ensuring the suspension of ancillary services

10. If one is to gain leverage over sites based overseas but making pornographic material available in the UK countries then the provision of a clear statutory financial transaction blocking mechanism, and an equally clear statutory mechanism for suspending ancillary services, is vital.
11. As the Authority for Television on Demand, the previous regulator for on-demand programming services, stated vis-à-vis financial transaction blocking in its seminal report 'For Adults Only': *"as the provision of free unrestricted hardcore porn is designed to generate revenue through associated pay services, the obvious effective policy in relation to non-EU based providers would be to 'follow the money'. It is clear that significant sums are flowing from UK customers to foreign websites which allow children to access hardcore porn. Cutting off that flow of funds to services which fail effectively to protect children would provide a powerful incentive for porn websites to put in place effective age verification and access control mechanisms in order to restart the flow of funds from the UK."*
12. While the Bill allows for the regulator to inform payment providers or ancillary services of non-compliance (clause 22), it contains **no requirement for payment and ancillary providers to act to block payments or withdraw services**. It is as if the government is proposing one half of the legislative solution but not the other half. The Government says, *"we do not think it would be appropriate or necessary to place a specific legal requirement on these payment providers to remove services,"*¹⁰ basing this on their stated belief that they can rely on these companies to block transactions because their terms and conditions require merchants to be operating legally in the country they serve. On the basis of this logic, however, there would be no need for clause 22 and, in acknowledging that it is not sufficient to simply leave financial transaction and ancillary service providers and their existing codes of practice to get on with it, the provision of half of an additional legislative solution does more to call the proposed arrangement into question than it does to suggest that all is as it should be. Of special interest, Nash V and others from the University of Oxford examined age-verification mechanisms in a variety of different European countries with respect to gambling websites. They found that *"where enforcement is patchy and uncertain, the incentives to invest in expensive authentication systems are less clear."* It was also noted that this is *"especially true for smaller or less well-known companies who are also less likely to receive reputational damage if any illegal selling is revealed."*¹¹
13. Providing the missing half of the enforcement mechanism will make it clear to the relevant websites that, if they do not introduce robust age-verification protections to interface with the UK market, then - regardless of where in the world they are located - they will find that their transactions with UK customers are blocked and that any UK services on which they depend will be suspended. This will create a clear incentive for the sites in question to proactively put robust age

¹⁰ *Ibid*, page 11

¹¹ Nash V et al, University of Oxford, Effective age verification techniques: Lessons to be learnt from the online gambling industry, Final Report, December 2012-December 2013, page 27
<https://www.oii.ox.ac.uk/archive/downloads/publications/Effective-Age-Verification-Techniques.pdf>

verification checks in place. **CARE believes there should be a new clause in the Bill requiring payment and ancillary services to act if the regulator informs them of non-compliance under clause 22.**

iii) No IP Blocking

14. Equally important is giving the regulator the power to block **sites that are non-compliant**. The Government, however, has declined to equip the regulator this critical tool, arguing that it is disproportionate and not in line with other policy areas like child sex abuse images.¹² This argument, however, is completely unconvincing:
15. First, **in the absence of IP blocking the regulator would have zero leverage over the increasing numbers of foreign sites that provide free access and do not depend on UK based ancillary services. If we are to have a regulator, investing it with appropriate powers so it can have the necessary leverage to do its job is not disproportionate.**
16. Second, the fact that the law does not make provision for statutory IP blocking in relation to child sex abuse images is irrelevant. There is a strong global consensus that child sex abuse images should not be tolerated such that there is no need to provide for statutory compulsion. The pornographic sites that we are talking about, by contrast, are quite different because they are providing a product that is, generally, entirely legal for adults to access and in relation to which there is not the same sense of unanimous international censure.
17. Third, UK law does make provision for statutory IP blocking in relation to copyright. Does Parliament want to signal that the copyright interests of business are more important than child protection?
18. In response to the Government's age-verification consultation, a number of organisations noted the importance of IP Blocking to strengthen enforcement of the age-verification provisions. The NSPCC, the Digital Policy Alliance, the BBFC and others all stressed the importance of IP blocking, particularly as a last resort for the Regulator.¹³ **CARE believes there should be a new clause in the Bill allowing the Regulator to require IP blocking.**

Conclusions on Enforcement

19. In concluding this section on the failures of the Bill in relation to enforcement, **it is important to remember that the Conservative Party Election Manifesto set out a commitment to "stop children's exposure to harmful sexualised content online"**¹⁴ and the consultation on age-verification said **"The principle of protecting the young and vulnerable reflects our society's most fundamental and deeply-held values."**¹⁵ **As currently drafted the serious enforcement failings of this Bill mean that the Bill will be unable to deliver on this important commitment. The Bill requires urgent amendment in order to put this right.** The attempt of

¹² Consultation Response, *Op Cit*, page 6

¹³ *Ibid*, pages 22, 24, 26 and 28

¹⁴ Strong Leadership, A Clear Economic Plan, A Brighter, More Secure Future, *The Conservative Party Manifesto 2015*, <https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf>

¹⁵ Age Verification Consultation, *Op Cit*, page 5

the Government in the Bill's Impact Assessment to try to completely change the nature of the commitment from stopping children's access to harmful sexualised content online' to "*nudging the online pornography providers to comply and introduce age-verification*"¹⁶ is completely unacceptable.

II. Scope of the Bill

i) Video on Demand Pornography

20. CARE is concerned about the exclusion of UK based video-on-demand services from this Bill. Clause 15(5)(a) states that "*For the purposes of this Part— (a) making material available on the internet does not include making the content of an on-demand programme service available on the internet in the course of providing such a service.*" An on-demand programme service is defined in clause 15(6) as having the same meaning as section 368A of the Communications Act 2003 and on the basis of that definition applies only to material within the jurisdiction of the UK (section 368A(1)(e)).
21. **The exclusion on UK based video-on-demand from these provisions would mean that it would continue to be regulated by the Communications Act 2003 which in section 365E limits the access of children under 18 to R18 material – but not 18 rated content. Foreign Video on Demand by contrast would, very properly, be required to provide age-verification for 18 rated video on demand, courtesy of clause 15(1), while not being subject to clauses 15(5)(a) and (6).**
22. This arrangement is unsustainable and indefensible. If a determination is made that content is 18 rated then it must not be made available in a way that can be accessed by under 18s online any more than is the case offline. This must engage all online content, including video on demand, and must engage all providers, including those in the UK.
23. The need to address this inconsistency is compounded by the findings of Ofcom's recent Communications Market Report which showed that paid for video-on-demand material accounted for 20% of the age group 16-24's total viewing time in 2016.¹⁷ Similarly, a small scale longitudinal study by Ofcom of eighteen 8 to 15 year olds highlighted the significance of video-on-demand to young children: "*One of the most important types of content, for the majority of the children, was catch-up and VoD services, available online and through their TV sets. The children had become accustomed to watching the programmes they wanted, when they wanted. The most popular platforms among the sample were Netflix, Amazon Prime, iPlayer, 4OD, ITV Player and YouTube (in no particular order).*"¹⁸
24. The Bill must be amended so that children are protected from accessing both 18 and R18 rated video on demand pornography supplied by UK providers so that children are afforded the same levels of protection online as offline with respect to UK based video on demand just as they will be with respect to foreign video on demand. **CARE believes that a new clause should be tabled to**

¹⁶ Digital Economy Bill - Overarching Impact Assessment, *Op Cit*, page 6

¹⁷ Ofcom: The Communications Market Report, August 2016, page 57
http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr16/uk/CMR_UK_2016.pdf

¹⁸ Ofcom: Children's Media Lives – Year 2 findings, 27 January 2016, page 24
http://stakeholders.ofcom.org.uk/binaries/research/media-literacy/childrens-media-lives-year-2/children_media_lives_year2.pdf

the Digital Economy Bill amending section 368E of the Communications Act 2003 so that there is a level playing field for media containing pornographic material that is rated 18.

III. The Bill should preserve adult content filters

25. CARE was expecting provisions in the Bill to clarify the law regarding the Government's adult content family-filtering scheme (**which crucially extends beyond pornography to cover adult content in the round**) further to the EU net neutrality vote last October. In the aftermath of the vote the then Prime Minister said "*we secured an opt-out yesterday so that we can keep our family-friendly filters to protect children. I can tell the House that **we will legislate** to put our agreement with internet companies on this issue into the law of the land so that our children will be protected*" (emphasis added).¹⁹ Similarly, during Committee stage of Baroness Howe's Online Safety Bill, the Minister Baroness Shields said "***we must legislate to make our filters regime legal according to the new net neutrality regulations. The date for that is by December 2016.***"²⁰ However, there are no provisions in the Digital Economy Bill to address this and the 1 December deadline is now barely two months away.
26. In putting this obligation into law it is important that the legal provision applies to all ISPs and not just the so-called "big four" (BT, Sky, TalkTalk and Virgin) since to apply the provision only to these ISPs would be discriminatory, creating two classes of children whereby those whose parents use one of the big four ISPs will benefit from a legal provision that will make it more likely that they are protected by adult content filters, while those children whose parents use the other ISPs will not benefit from the legal provision and will consequently have less chance of being afforded the protection of adult content filters. **CARE believes there should be a new clause in the Bill to uphold family friendly filters, and on a non-discriminatory basis, based on clause 1 of Baroness Howe's 2016 Online Safety Bill.**²¹

Conclusion

27. CARE warmly welcomes the intention of Part 3 but believes that as currently drafted it does not have the capacity to deliver the 2015 Conservative Party age verification manifesto commitment. **We believe that it is absolutely vital that the Bill is amended to:**
- a) Make provision for clear statutory mechanisms for financial transaction blocking and suspending ancillary services;
 - b) Make provision for a clear statutory IP Blocking power for the regulator;
 - c) Address the current anomaly that the Bill proposes age verification for 18 rated pornographic websites/apps etc but would not require this for UK based video on demand providers.
28. In addition the Bill should be used to hold the Government to their promise to make statutory provision for adult content filters in order to preserve the adult content filtering regime introduced by the big four ISPs at the Government's request, in the context of the new legal imperatives introduced by the EU net neutrality regulation. **It is vital that this change is made, although it is possible that the Government may be intending to make the change by another means.**

¹⁹ Question 9, Prime Minister's Questions, 28 Oct 2015 Column 344
<http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm151028/debtext/151028-0001.htm#15102833000668>

²⁰ Online Safety Bill, 11 December 2015, Column 1803
<http://www.publications.parliament.uk/pa/ld201516/ldhansrd/text/151211-0001.htm#15121154000396>

²¹ Online Safety Bill 2016, <http://www.publications.parliament.uk/pa/bills/lbill/2016-2017/0027/17027.pdf>

Appendix: Amendments to Part 3 of the Bill

In what follows we list amendments and New Clauses for the Bill.

New Clauses (Key to meeting the objectives set out in our Conclusion)

General Purpose	Detail	Comments
Strengthen enforcement	Requiring the financial transaction providers and ancillary services to block or remove services, as appropriate.	Similar to clause 12 of Baroness Howe's Bill.
Strengthen enforcement	Giving the Regulator a power for IP blocking.	Similar to clause 97A of the Copyright Act 1988 but without need to go to court.
Extending scope	To ensure consistency across video like material – make 18 video on demand containing pornographic material subject to age verification.	Amending section 368E of the Communications Act 2003, similar to clause 8 of Baroness Howe's Bill.
Extending scope	To maintain family friendly filters provided by ISPs	Similar to clause 1 of Baroness Howe's Bill.

Amendments to Current Clauses

General Purpose	Detail	Where in the Bill
Strengthening enforcement	To require the regulator to publish guidance on how the public and industry can report non-compliant websites to the regulator.	New sub-clause in Clause 15(3).
Clarifying scope	To clarify that clause 15(1) does not apply to ISPs.	Clause 15(5)
Strengthening enforcement	To require the regulator to impose a financial penalty.	Clause 20(1) “may” to “must”, except where compliance has been met.
Strengthening enforcement	To require the regulator to send an enforcement notice if no age verification.	Clause 20(2) “may” to “must”
Strengthening enforcement	To require the regulator to impose a financial penalty when an enforcement notice is not complied with.	Clause 20(10) “may” to “must”
Clarifying enforcement	To limit fines to UK providers only	Clause 20(1)
Clarifying enforcement	To limit enforcement notices to non-UK providers only	Clause 20(2)
Strengthening enforcement	To require the regulator to inform financial transaction providers and ancillary services about non-compliance.	Clause 22(1) “may” to “must”
Clarifying enforcement	To require an enforcement notice be issued and the person still be in non-compliance before a notice is given to financial transaction providers/ancillary providers.	New sub-clause in Clause 22(1)
Clarifying scope	To confirm whether an internet service provider is regarded as an ancillary service.	Clause 22(6)
Clarifying scope	To require the regulator to provide guidance about which services it will treat as enabling or facilitating the making of available of pornographic material of	Clause 22(7) “may” to “must”

General Purpose	Detail	Where in the Bill
	prohibited material.	
Clarifying scope	To require the regulator to consult about the option to restrict the use of its powers to the largest websites only.	New sub-clause in clause 23.
Ensuring implementation	To require that Part 3 of the Bill be brought into effect one year after passing of the Bill rather than by regulation.	New sub-clause in clause 82.

September 2016