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Rt Hon Caroline Nokes MP
Chair, Women and Equalities Committee
House of Commons
London
SW1A 0AA

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Dear Caroline,

Thank you for your letter regarding your inquiry into the impact of pornography on women and girls and the implications for the Online Safety Bill. I am responding as the Minister for Tech and the Digital Economy.

I would also like to thank you for your engagement on this extremely important legislation. The Bill will ensure robust protections for women and girls online. As you will be aware, the Bill is currently at report stage in the House of Commons. As the Bill continues its passage through Parliament, it is important that the government continues to hear from a wide range of stakeholders.

Thank you for your suggestions for the Bill, which I will respond to in turn. These responses reflect the evidence given to the Committee by my predecessor and the then Minister for Safeguarding.

Age and consent checks for video uploads

The government shares your concerns in relation to online pornography, specifically about the presence of child sexual exploitation and abuse (CSEA) material within pornography, the non-consensual sharing of intimate images, and the withdrawal of consent by professional performers. I shall address each of these three points in turn.

The Online Safety Bill will ensure that tech companies are doing much more to tackle the sharing of illegal CSEA material. CSEA offences are listed as priority offences in the Bill, meaning that services will need to be proactive in identifying and minimising the uploading and sharing of this content. Companies in scope of Part 3 of the Bill will also be required to report online CSEA content they detect to the National Crime Agency (NCA). Pornography providers that publish rather than host the content, in scope of Part 5 of the Bill, are already legally liable for the content they publish.

In addition to CSEA, content which is classed as revenge pornography is also a priority offence under the Bill, and services in scope of Part 3 will be subject to the same duties to identify and minimise the uploading and sharing of this content.



All services that are in scope will need to proactively remove and prevent women and girls from being exposed to additional priority illegal content including hate crime, harassment and cyberstalking. Beyond the priority offences, all services will need to ensure that they have effective systems and processes in place to quickly take down other illegal content directed at women and girls once it has been reported or they become aware of its presence.

A key feature of the regulatory framework will be the designation of priority harmful content for children and adults. For content to be designated as a priority harm, it will need to meet the Bill's robust definition of harm. It sets a threshold, which brings into scope content of a kind which presents a material risk of significant harm to an appreciable number of children or adults in the UK. The types of content covered by these categories will be designated in secondary legislation following consultation with Ofcom. As outlined in the Secretary of State's written ministerial statement to Parliament on 7 July 2022, the government is minded to designate online abuse and harassment and the sharing and distribution of real or manufactured intimate images without the subject's consent, as priority harmful content for both adults and children.

We have also taken steps to improve criminal law in these areas. The government asked the Law Commission to review the criminal law in respect of the non-consensual taking and sharing of intimate images, and to assess whether it can deal adequately with these behaviours. The Commission published its final recommendations on 7 July 2022. The Government will carefully consider the recommendations and the appropriate legislative vehicle should we decide to take them forward.

Turning to the issue of consent in published pornography, the Copyright, Designs and Patents Act 1988 already gives performing artists based in the UK the right to authorise the making of a recording of their performance; that is, the right to consent to their work being recorded or not. Consent before publication is usually dealt with through contractual agreements between the performer and the creator. If the performer sought to remove this consent, then it would depend on the contractual arrangements they signed at the time. If works were recorded and made available to the public without the performer's consent, it would constitute an infringement of the performer's rights. As a private right, it is for the performer to enforce this.

The UK's intellectual property framework, which includes strong protections for performers' rights, is consistently rated among the best in the world and the government intends for this to continue.

Cyberflashing offence

We welcome the Committee's continued support for the new cyberflashing offence. I know you separately wrote to the Law Commission on this matter and the Committee has received a response from Professor Penney Lewis, Commissioner for Criminal Law.

The offence we have taken forward is the model proposed by the Law Commission and is based on the sender's intention rather than a lack of consent. It is important to note that the conduct element of the cyberflashing offence in the Bill is very wide. In order to capture all types of behaviour involved, the act (that is, the sending or giving of a photograph or film of genitals) which meets the offence is broadly drafted, and encompasses a wide range of behaviour. It captures any sending or giving of photographs, or films of genitals. This includes "air-drop" scenarios, or harassment on social media or dating platforms, and other harmful behaviours which stakeholders are very rightly concerned to include.

The offence also includes two specific mental elements of a) an intention to cause alarm, distress and humiliation and b) a purpose of obtaining sexual gratification coupled with recklessness as to whether the recipient would be caused alarm, distress or humiliation. These important elements ensure that a wide range of conduct is not criminalised without the requisite criminal level of culpability.

The alternative model proposed is based on a lack of consent, or “non-consent”. This would change the two specific mental elements in the offence and encompass many scenarios which are not understood as “cyberflashing”. For example, this could include a doctor showing a photograph of a patient to a colleague to seek a medical opinion, or a mother sharing a photograph of a baby with its grandparents. It would also extend to incidents where there appeared to be a naked figure in the background, such as artwork in a museum. This model could result in potential over-criminalisation of non-culpable acts and may not have the desired effect that stakeholders intended. It further raises concerns around the nature of consent in instant messaging conversations, accidental images of genitalia and misjudged attempts at humour and intimacy which could impact young people especially. Our new offence is therefore closely based on the one proposed by the Law Commission.

I also appreciate the Committee’s concerns that cyberflashing should be added to the list of priority offences in Schedule 7. Companies will need to remove illegal content relating to cyberflashing, which we have included in the Bill under clause 157. Under clause 157 of the Bill, companies will need to swiftly remove this illegal content where it is flagged to them and where there is an individual victim. In addition, existing priority offences in Schedule 7 already tackle a range of content directed at women and girls, including fear or promotion of violence, harassment and cyberstalking, which all in-scope services must tackle.

Minimum standards for age assurance

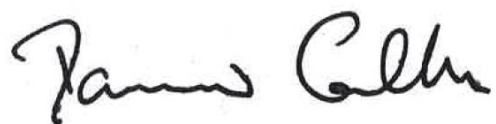
We appreciate the intention behind your recommendation that Ofcom should set minimum standards for age assurance technologies and develop a specific code of practice on their use. It is important that the use of these technologies is privacy preserving, proportionate and effective.

The Online Safety Bill already allows Ofcom to reference standards relating to age assurance in its Codes of Practice – including technical standards or high-level principles – where these have been judged as beneficial for supporting compliance with the safety duties. The child safety duties are mandatory for companies in scope of them. Companies will need to demonstrate that they have met them (whether by following the relevant measures recommended by Ofcom in Codes of Practice or by taking alternative but equally effective approaches) or face enforcement action. The steps set out by Ofcom, including on the use of age assurance, will be proportionate to the risk presented by the platform, as well as their size and capacity. Ofcom is expected to take a particularly robust approach to sites that pose the highest risk of harm to children.

For user privacy, the Bill already provides additional safeguards. Companies will be required to have regard to the importance of protecting users’ privacy when putting in place measures, including age assurance. Ofcom will also be required to incorporate safeguards for privacy within the measures set out in the Codes of Practice, and Ofcom will be required to consult with the Information Commissioner on its Codes. Furthermore, we have high standards of data protection legislation in this country. Companies and providers of age assurance solutions will be required to comply with the relevant data protection laws or face enforcement action from the ICO.

Once again, I would like to thank you for your engagement and for your suggestions for the Bill. I look forward to our further engagement as the Bill continues through its passage.

With best wishes,

A handwritten signature in black ink, appearing to read 'Damian Collins', written in a cursive style.

Damian Collins MP
Minister for Tech and the Digital Economy