

8 October 2019

COMMITTEE SECRETARY  
House of Representatives Standing Committee on Social Policy and Legal Affairs  
PO Box 6021  
Parliament House  
Canberra ACT 2600

Dear Committee Secretary

UNSW LAW SOCIETY SUBMISSION REGARDING THE INQUIRY INTO AGE  
VERIFICATION FOR ONLINE WAGERING AND ONLINE PORNOGRAPHY

The University of New South Wales Law Society welcomes the opportunity to provide a submission regarding the Inquiry into Age Verification for Online Wagering and Online Pornography.

The UNSW Law Society is the representative body for all students in the UNSW Faculty of Law. Nationally, we are one of the most respected student-run law organisations, attracting sponsorship from prominent national and international firms. Our primary objective is to advance the education of our student-members.

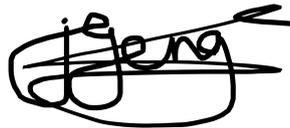
Our enclosed submission reflects the opinions of member-contributors of the UNSW Law Society.

We thank you for considering our submission. Please do not hesitate to contact us should you require any further assistance.

Yours sincerely



Katherine Cheng  
Policy Submissions Director



Joshua Geng  
Policy Submissions Director

## **Authors**

### **POLICY SUBMISSION DIRECTORS**

Katherine Cheng and Joshua Geng

### **STUDENT CONTRIBUTORS**

Angela Huang  
Jeremy Kuan  
Alice Lindsay  
Isobel Patmore  
Isabella Satz  
Bethany Rodgers  
Guy Suttner

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### **UNSW LAW SOCIETY CO-PRESIDENTS**

Fletcher O'Connor and Natasha Hartanto

### **UNSW LAW SOCIETY VICE-PRESIDENT (SOCIAL JUSTICE)**

Sophie Berton

# **THE INADEQUACY OF AGE VERIFICATION MODELS FOR MONITORING ONLINE PORNOGRAPHY**

“Pornography tends to generate social stigma. Privacy tends to alleviate it.”<sup>1</sup>

## I OVERVIEW

In Australia, 93 percent of males and 62 percent of females between the age of 13 and 16 have been exposed to pornographic material online.<sup>2</sup> In comparison, a 2013 study found that only 13 percent of youth had engaged in stimulated online gambling.<sup>3</sup> Traditionally, interactive gambling in the form of wagering (eg sports betting) is viewed as less addictive and periodic as its gaming counterpart (eg simulated poker) but changing patterns of technology use means that these differences are diminishing.<sup>4</sup> Age verification legislation means that users of gambling services must now verify their age within 14 days, although this process is not yet required for online pornography.<sup>5</sup> Proponents of the UK age verification system for pornography state that these measures are intended to mirror offline policies such as preventing an underage individual from entering the premises of a licensed sex shop.<sup>6</sup> However, unlike gambling – which is illegal for minors in both Australia and the UK – viewing pornography is not illegal in either regions. This raises the question of whether such restrictions are appropriate for online pornography so this submission will focus primarily on pornography.

## II POTENTIAL HARMS OF PORNOGRAPHY

The most concrete harm of exposing minors to pornography is the normalisation of unsafe sex. This is especially important since a child’s understanding of normative sex practices is derived primarily from online material such as pornography due to the underwhelming nature of sex education in school syllabuses which prioritises abstention and lack inclusivity for LGBTQ+ youth.<sup>7</sup> Adult film performers engage in prolonged and repeated sexual acts with multiple sexual partners over short periods of time, creating ideal conditions for the transmission of HIV and other sexually transmitted infections (STIs).<sup>8</sup> Since exposure to pornography often occurs before children have been educated about the prevention of STIs or how STIs are transferred, the practice of unsafe sex in pornography can cause a normalisation of unsafe practices in how children conceive of sex.

<sup>1</sup> Tom W Bell, ‘Pornography, Privacy and Digital Self Help’ (2000) 19(1) *Journal of Computer and Information Law* 133, 133.

<sup>2</sup> Courtney Bell, *An Overview of Research on the Impact that Viewing Pornography has on Children, Pre-Teens and Teenagers* (Research Report, September 2017) 9.

<sup>3</sup> Daniel King, *Online Gaming and Gambling in Children and Adolescents – Normalising Gambling in Cyber Places* (Literature Review, September 2018) 7.

<sup>4</sup> Allen Consulting Group, *Review of Current and Future Trends in Interactive Gambling Activity and Regulation* (Literature Review, June 2009) 3.

<sup>5</sup> *Interactive Gambling Act 2001* (Cth).

<sup>6</sup> British Board of Film Classification, *Frequently Asked Questions* (2019) Age Verification Regulator (Webpage) <<https://www.ageverificationregulator.com/faq/#20>>.

<sup>7</sup> Antonia Quadara, Alissar El-Murr and Joe Latham, *The Effects of Pornography on Children and Young People: An Evidence Scan* (Research Report, 2017) 11.

<sup>8</sup> Corita R Grudzen and Peter R Kerndt, ‘The Adult Film Industry: Time to Regulate?’ (2007) 4(6) *PLoS Medicine* 993, 995.

Furthermore, the lack of adequate education surrounding positive consent, pornography can normalise expectations of misogyny, sexual objectification and violence supportive attitudes. Physical aggression (eg slapping, choking, gagging, hair pulling) and verbal aggression such as name calling and slut-shaming are predominantly instigated by men to their female partners in pornographic content.<sup>9</sup> Arguable, pornography that depicts violence towards women condones inequality and destructive gendered power asymmetries.<sup>10</sup> Again, since school education tends to focus on quantitative statistics and abstention as opposed to patterns of behaviour and consent in sex, many minors may conceive of the behaviour in pornography as instructional or appropriate.

Although, not all pornography perpetuates the same harmful norms. This could result in the marginalisation and stifling of alternative sexual cultures that include queer and feminist pornography. Whilst conservatives often condemn pornography for encouraging non-normative sexual activity that promotes social deviancy, threatens family values and is ‘morally corrupting’,<sup>11</sup> alternative or non-normative sexual cultures and practices are important in encouraging sexual experimentation amongst LGBT+ youth. The reduction of access results in a stifling of diversity in sexuality and expression that is crucial in the formative period of identity formation for many LGBT+ youth.

### III AGE VERIFICATION MODELS

Internationally, most jurisdictions stipulate that 18 is the minimum allowable age for online wagering.<sup>12</sup> Internationally, there are three general approaches to age verification; none of them are considered foolproof but each have their respective benefits.<sup>13</sup> First, there are entirely online systems utilising government led e-ID schemes; an approach adopted in Spain, Italy and Denmark.<sup>14</sup> This is widely considered to be the fastest, most reliable and convenient method with a reduced likelihood of fraud and identity theft.<sup>15</sup> Second, there are online systems that avoid the need for a single centralised database by verifying a range of publicly accessible datasets. This method is currently used in the UK and is useful for nations such as Australia which have no e-ID schemes.<sup>16</sup> Third, offline submission systems (used in France) require physical copies of identity documents.<sup>17</sup> This approach is burdensome to customers

<sup>9</sup> Chyng Sun et al, ‘Pornography and the Male Sexual Script: An Analysis of Consumption and Sexual Relations’ (2014) 45 *Archives of Sexual Behaviour* 1.

<sup>10</sup> Michelle Evans, ‘Australia’s Failure to Address the Harms of Internet Pornography’ (2011) 2 *The Western Australian Jurist* 129, 140.

<sup>11</sup> Stanford University, *Stanford Encyclopedia of Philosophy* (online at 2 October 2019) Pornography and Censorship, ‘Conservative Arguments for Censorship’ [2.1].

<sup>12</sup> Anurag Bana ‘Online Gambling: An Appreciation of the Legal Issues’ (2011) 12 (3) *Business Law International* 335, 336.

<sup>13</sup> Victoria Nash, Rachel O’Connell, Bendert Zevenbergen and Allison Mishkin *Effective age verification techniques: Lessons to be Learnt from the Online Gambling Industry* (Report, December 2013) 32.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid* 32-33.

<sup>17</sup> *Ibid* 33.

but can be useful where there are no e-ID schemes or readily available datasets.<sup>18</sup> Regardless of approach, there is a consensus that requiring two independent verification – including a passport and potentially a driving license verified by a third party – is the most effective control for underage gambling.<sup>19</sup>

There is also the possibility of a voluntary and mandatory system. The consequences of a voluntary system is that; either the non-participation of providers or the half-hearted application of processes which avoid the collection of verified information to avoid privacy risks would fail to guarantee the obstruction of minors from pornography sites. A voluntary system would merely be a symbolic rather than substantial effort by the Parliament to provide false assurance to parents and the public.<sup>20</sup> A mandatory system would offer similar risks as well where consumers are faced with the choice of complying with age verification requirements and risking privacy breaches or pursuing non-compliant sites operating extraterritorially with no guarantee of safety given the lack of regulation.<sup>21</sup>

The *Digital Economy Act 2017* (UK) ('DEA') aims to protect children from online pornography by requiring commercial websites to verify users are over 18 before they can view any content.<sup>22</sup> Commercial websites include those with free content but paid advertising.<sup>23</sup> A designated regulator is empowered to impose a financial penalty on anyone who makes pornography material available on the Internet to anyone under the age of 18.<sup>24</sup> This law is ground-breaking since it is the first set of age-checks on pornography worldwide.<sup>25</sup> The British Board of Film Classification (BBFC) is designated as responsible for ensuring that adult websites have valid age verification mechanisms,<sup>26</sup> but the BBFC has essentially left the method to the discretion of individual websites where ancillary and payment service providers are requested to withdraw their services.<sup>27</sup> Whilst BBFC may have the framework to classify digital content as pornographic, it does not have the experience or expertise in the field of Internet regulation. These bodies are currently equipped to deal with minor complaints about Internet content but they lack the infrastructure to deal with privacy concerns and implementing a widespread age verification system. Consequently, despite

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<sup>18</sup> Ibid.

<sup>19</sup> Sangeeta Ranade, Stuart Bailey and Alexandra Harvey, *A Literature Review and Survey of Statistical Sources on Remote Gambling* (Report, October 2006) 19.

<sup>20</sup> Peter Chen, 'Pornography, Protection, Prevarication: The Politics of Internet Censorship' (2000) 23(1) *University of New South Wales Law Journal* 221, 222.

<sup>21</sup> Ronald J Rychlak, 'The Legal Answer to Cyber-Gambling' (2011) 80(4) *Mississippi Law Journal* 1229, 1244-1245.

<sup>22</sup> *Digital Economy Act 2017* (UK) ss 14 (1), 15 (1); United Kingdom, *Parliamentary Debates*, House of Commons, 13 September 2016, 776 (Karen Bradley).

<sup>23</sup> Matt Burgess, 'The UK Porn Block, Explained', *WIRED* (online, 11 July 2019) <<https://www.wired.co.uk/article/porn-block-uk-wired-explains>>; *The Online Pornography (Commercial Basis) Regulations 2019* (UK) s 2 (1), (2), (3).

<sup>24</sup> *Digital Economy Act 2017* (UK) ss 14, 19.

<sup>25</sup> Ibid.

<sup>26</sup> *Digital Economy Act 2017* (UK) s 16 (1); British Board of Film Classification, 'Frequently Asked Questions', *Age Verification Regulator* (web page) <<https://www.ageverificationregulator.com/faq#3>>

<sup>26</sup>.

<sup>27</sup> Burgess (n 23).

being passed in 2017, *DEA* is yet to be enforced due to the difficulties with developing a system of monitoring compliance for millions of websites.<sup>28</sup>

#### IV THE EFFECTIVENESS OF AGE VERIFICATION

Several factors suggest that when enforcement does occur, effectiveness is limited. First, enforcement will always be incredibly difficult since there are approximately four million adult domains.<sup>29</sup> Responsible sites could be at a commercial disadvantage as children may preferentially seek pornography from non-complaint sites that are less trustworthy.<sup>30</sup> Second, most pornography providers are hosted outside the United Kingdom.<sup>31</sup> *DEA* allows the BBFC to instruct Internet Service Providers (ISPs) to block non-compliant websites<sup>32</sup> but this could lead to the undue censorship of websites that contain legal content.<sup>33</sup> Third, likely effectiveness would be hampered by various circumvention techniques such as the use of VPN services – which would allow internet users to virtually relocate to a country without age verification – and the fact that youth below 18 years old can simply use the personal details of someone over the age of 18.<sup>34</sup> A report by FamilyZone has found that nearly 47 percent of teenagers between the age of 13 and 15 have used an internet filter to access pornography and nearly two thirds of them have attempted to use VPNs.<sup>35</sup> Fourth, the narrow focus of the law means that children will still be able to access pornography in other ways such as free sites, social media sites or shared via mobile phones.<sup>36</sup> Section 2(4) of *The Online Pornography (Commercial Basis) Regulations 2018* mandates that more than a third of the site or app's content must be pornographic to qualify.<sup>37</sup> This would leave major sites such as Twitter, Reddit and Imgur out of the scheme which all contain readily accessible. It is

<sup>28</sup> James Clark, 'The Digital Economy Act and What it Means for the Individual', *IT Pro Portal* (web page, 30 July 2018) <<https://www.itproportal.com/features/the-digital-economy-act-and-what-it-means-for-the-individual/>>

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> Andy Phippen 'Age Verification and Online Pornography – an Effective Safeguarding Approach?' (2016) 27(50) *Entertainment Law Review* 167, 171.

<sup>32</sup> *Digital Economy Act 2017* (UK) s 23 (1), (2).

<sup>33</sup> European Digital Rights 'The UK Digital Economy Bill: Threat to free speech and privacy', *European Digital Rights* (web page, 22 February 2017) <<https://edri.org/the-uk-digital-economy-bill-threat-to-free-speech-and-privacy/>>.

<sup>34</sup> Nicholas Rotherham 'Porn: all you need to know about the UK's porn block for under 18s' *BBC* (online, 27 April 2018) <<https://www.bbc.com/news/newsbeat-43795806>>; Jim Waterson, 'UK's Porn Age Verification Rules Can be Circumvented in Minutes', *The Guardian* (online, 19 April 2019) <<https://www.theguardian.com/society/2019/apr/19/uks-porn-age-verification-rules-can-be-circumvented-in-minutes>>.

<sup>35</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 20 June 2019, vol 662. <<https://hansard.parliament.uk/commons/2019-06-20/debates/FEB4CA3E-3F17-4E1C-803A-7194ECB996FF/OnlinePornographyAgeVerification>>.

<sup>36</sup> Andy Phippen 'Digital rights and pornography – a child protection catch-22 or lazy policy solutions?' *Open Democracy* (online, 14 July 2015) <<https://www.opendemocracy.net/en/opendemocracyuk/digital-rights-and-pornography-child-protection-catch22-or-lazy-policy-solutions/>>; Phippen 'Age Verification' (n 31) 172; Andy Phippen, Emma Bond 'Why is Placing the Child at the Centre of Online Safeguarding so Difficult?' (2019) 30 (3) *Entertainment Law Review* 80, 84.

<sup>37</sup> *The Online Pornography (Commercial Basis) Regulation 2018* (UK) s 2(4).

thus particularly easy for youth to bypass the restriction and incur all the policy harms of pornography.

Additionally, there are further concerns surrounding potential breaches in privacy. Since age verification requires the use personal material, any policy implemented must comply the Australian Privacy Principles (APPs) that require open and transparent management of personal information and an option of anonymity and pseudonymity.<sup>38</sup> The requirement for identification information such as credit cards or driver's licenses would deprive users, including adults, the option to access the content of these sites anonymously. Whilst companies claim that user information will be safely encrypted,<sup>39</sup> there is currently no mandatory privacy certification scheme in the UK to ensure that all companies fulfil a minimum standard of data privacy and security.<sup>40</sup> If Australia was to implement an age verification scheme, a standardised platform for age verification would be necessary. A public body would also likely be more trustworthy than a delegated private company.

Furthermore, the obscurity around the collection and management of personal information raises issues about which parties are responsible for the collection and storage of information.<sup>41</sup> The precariousness that stems from unclear information regarding management mechanisms give rise to the possibility of identity theft and fraud.<sup>42</sup> There are many questions that exist such as such as: whether users will be given notice around the storage of their information; to what extent can users consent to the manner in which their data is utilised; whether it is certain that unauthorised disclosure of personal information will not occur.<sup>43</sup> Given that leaks are common such as the 2014 Ashley Madison scandal which marketed itself as a dating site for married individuals and thus promised the highest standards of discretion, the impacts of a data breach was catastrophic.<sup>44</sup> Alongside other cases in popular memory from Facebook and Cambridge Analytica to Uber,<sup>45</sup> the effectiveness of age verification is thus contingent upon the ability to safeguard individual's security details.

In the UK, the lack of specific direction from BBFC meant that pornography websites have turned to several different private age verification technology companies resulting in inconsistent verification mechanisms and privacy concerns. A few of these companies that websites are planning to use include AgeID, AgeChecked, AgePass, 1Account and Yoti.<sup>46</sup> These companies collect information such as email addresses, SMS, credit card, passport, driving license, and even facial recognition to verify the user's age.<sup>47</sup> The lack of consistency

<sup>38</sup> *Privacy Act 1988* (Cth) sch 1 cl div 1.

<sup>39</sup> Burgess (n 23).

<sup>40</sup> Open Rights Group, *Analysis of BBFC Age Verification Certificate Standard* (Report, June 2019).

<sup>41</sup> Berin Szoka and Adam Thierer, 'The New Battle over Privacy, Age Verification, Online Safety & Free Speech' (2009) 16(11) *Progress on Point* 1, 5.

<sup>42</sup> John T Cross, 'Age Verification in the 21<sup>st</sup> Century: Swiping Away Your Privacy' (2005) 23(2) *The Jon Marshall Journal of Information Technology & Privacy Law* 363, 366.

<sup>43</sup> *Ibid* 399-402.

<sup>44</sup> Daniel Victor, 'The Ashley Madison Data Dump, Explained', *The New York Times* (online at 1 October 2019) <<https://www.nytimes.com/2015/08/20/technology/the-ashley-madison-data-dump-explained.html>>.

<sup>45</sup> Matthew Rosenberg, Nicholas Confessore and Carole Cadwalladr, 'How Trump Consultants Exploited the Facebook Data of Millions', *The New York Times* (online 1 October 2019) <<https://www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-trump-campaign.html>>.

<sup>46</sup> Burgess (n 23).

<sup>47</sup> *Ibid*.

means that individuals will likely face the prospect of having to use multiple age-verification systems.

The implication of these constraints is thus twofold: either users will bypass age verification mechanisms with the use of VPNs or users are driven to more nefarious sites to protect their privacy. Not only are data breaches a devastating event, but because these data breaches are associated with pornography, they are particularly embarrassing due to the stigma attached to the industry.<sup>48</sup> Providers are commercial entities and are aware that their appeal to consumers is dependent on their ability to guarantee content, privacy and safety. As such, if any of those elements are potentially put at risk by proposed laws, there is no reason to assume that individual will comply with legislation as opposed to opting into worse alternatives.<sup>49</sup> Whether it is using VPNs or accessing the dark web through Tor or simply finding non-compliant sites, each of these avenues are far less regulated than the current system. This means individuals may end up watching a more harmful product that goes from simply problematic to illegal such as unethical pornography or child pornography.

Finally, there is a significant risk in restricting verification requirements in absence of any incentives for providers to do so. The implementation of adequate technology is costly and timely with no clear financial reward.<sup>50</sup> Once a site collects private information, it both attracts a legal obligation to secure that information<sup>51</sup> and becomes a target to cybercriminals commonly engaging in identity theft, fraud and ransom.<sup>52</sup> More demanding verification requirements can therefore be financially and reputationally disastrous for providers and consumers in absence of greater security measures which are themselves an unwelcome burden on a business' finances and personnel.

## V RECOMMENDATIONS

If parliament was to introduce a mandatory age verification scheme, it must be able to assure providers that there is a simple and commercially viable way to implement restrictions which guarantee both accuracy and security against privacy breaches. It must be prepared to create verification and information retention standards suitable for the privacy demands of consumers and account for the time needed for providers to implement technology into their sites. The UK's recent foray has attracted abundant criticism, most notably surrounding its voluntary certification scheme and its inability to guarantee anonymity.<sup>53</sup> Recommendations for improvement have included providing recourse for non-compliant providers through financial penalties, comprehensive statutory requirements for data minimisations,

<sup>48</sup> Georgina Shaw, *Stigma and the Shaping of the Pornography Industry* (Routledge, 2015).

<sup>49</sup> Cross (n 42) 403-404.

<sup>50</sup> Australian Law Reform Commission, 'Should All Adult Content Be Classified?' (ALRC Report 118, February 2012) < <https://www.alrc.gov.au/publication/classification-content-regulation-and-convergent-media-alrc-report-118/10-restricting-access-to-adult-content/should-all-adult-content-be-classified/> > 10.43.

<sup>51</sup> *Privacy Act 1988* (Cth) div 2 s 15.

<sup>52</sup> Cross (n 42) 392-396.

<sup>53</sup> Open Rights Group (n 40) 2-4.

deidentification and destruction and specified regular testing standards.<sup>54</sup> A comparable scheme in Australia will only work in practice if it can effectively address the foreseeable operation and privacy risks already noted in the UK's scheme. Consequently, Parliament should consider self-help alternatives such as ISP based filtering focussing on personal devices rather than providers.<sup>55</sup>

While age verification may provide a short-term solution in limiting children's access to pornography, it is worth noting that there are structural problems with school's sex education programs that fail to educate children on safe sexual practices. It could be worth supplementing sex education syllabuses with information about how pornography can display unrealistic and harmful behaviours towards sex.<sup>56</sup> These solutions are often advocated for by youth themselves because it foregoes the paternalism of the state whilst raising awareness about safe sexual practices and providing a space for sexual exploration.<sup>57</sup> Ultimately, rather than stigmatising sex and pornography, an educative approach would fare better in mitigating the apparent harms inherent to pornography.

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<sup>54</sup> Ibid.

<sup>55</sup> Tom W Bell, 'Pornography, Privacy and Digital Self Help' (2000) 19(1) *Journal of Computer and Information Law* 133, 142-144.

<sup>56</sup> Andy Phippen and Henry Phippen 'The UK Government Internet Safety Strategy – Time to Listen to the Youth Voice?' (2018) 29 (8) *Entertainment Law Review* 237, 241; Phippen and Bond (n 36) 84; Andy Monaghan and DaYoung Yoo 'Age Verification for Online Pornography – no Silver Bullet, but a Good Start' *The London School of Economics and Political Science* (online, April 26<sup>th</sup> 2018) <<https://blogs.lse.ac.uk/mediapolicyproject/2018/04/26/age-verification-for-online-pornography-no-silver-bullet-but-a-good-start/>>.

<sup>57</sup> Phippen and Bond (n 36) 84.