

Your response

Ofcom's Register of Risks

Question 1:

- i) Do you have any comments on Ofcom's assessment of the causes and impacts of online harms?

We broadly agree with Ofcom's assessment of the causes and impacts of online harms in relation to animal cruelty, and that animal cruelty content can pose a significant risk to people who use online services. However, as detailed below, we do not agree with Ofcom's assessment that most pre-recorded content depicting animal cruelty would not fall under the Schedule 7 priority offence, and urge Ofcom to review its Risk Profiles accordingly to reflect that illegal content risk assessments should be based on the premise that all animal cruelty content should be considered a priority offence.

- ii) Do you think we have missed anything important in our analysis? Please provide evidence to support your answer.

Par 5.15 refers to some animal content online that users may not recognise as cruelty and identifies 'fake rescue' videos as an example. We note that such content is frequently used to solicit payment from unwitting viewers who believe the content to be genuine, which should be identified as a Schedule 7 priority offence under the Section 2 of the Fraud Act 2006.

In terms of identifying fake rescues, the Social Media Animal Cruelty Coalition (SMACC) is publishing a report on 1st October 2024 which details the nature and extent of fake rescue content and will provide a set of criteria that could be used by content moderators to determine whether such content is likely to be fake.

We also note that in 2023 the UN Convention on Rights of the Child (CRC), to which the UK is a signatory, published General Comment 26 (see <https://digitallibrary.un.org/record/4019010>) Paragraph 35 of which states, *inter alia*, that '*children must be protected from all forms of physical and psychological violence and from exposure to violence, such as domestic violence or violence inflicted on animals*'. Failure of signatory States to protect children from such exposure may be a breach of the CRC. The Online Safety Act represents an opportunity to ensure the UK fulfils its obligations under the CRC in respect of online content involving violence inflicted on animals, and this should be reflected in Ofcom's considerations.

- iii) Is this response confidential? (if yes, please specify which part(s) are confidential)

No

Question 2:

- i) Do you have any views about our interpretation of the links between risk factors and different kinds of illegal harm? Please provide evidence to support your answer.

We agree with the interpretation of the links between risk factors and different kinds of illegal harms, and agree that acts of animal cruelty have demonstrable links to other harmful acts which

may manifest online, such as extreme pornography and child abuse, as identified by respondents to Ofcom's November 2023 consultations summarised in Par 4.7.

We note that there is strong evidence linking perpetrators of animal cruelty with other types of abusive behaviour, such as domestic abuse and child cruelty. This should be given greater emphasis in documentation and guidance.

ii) Is this response confidential? (if yes, please specify which part(s) are confidential)

No

Service's risk assessment

Question 3:

i) Do you have any comments on our approach to amending the draft Risk Profiles or our proposed risk factors for animal cruelty?

We agree with the proposal to amend all mentions of 15 kinds of illegal harms to 16 kinds of illegal harms, and to include animal cruelty in the table in the reference list of illegal offences covered by the Act. We welcome the fact that services will need to carry out Illegal Harms Risk Assessments which include Animal Cruelty.

We also agree to the proposal to add animal cruelty to the risk factors associated with U2U services. Given the recognition that animal cruelty content is likely to be findable via online search facilities, we urge Ofcom to consider including such content in relation to search service risk profiles. Animal cruelty content should also be explicitly included in risk assessments for discussion forums and chat rooms, file storage and file sharing services, services with live streaming, services with direct messaging, services with encrypted messaging, services which enable reposting or forwarding of content, services with hyperlinks, and services with recommender systems.

ii) Please provide the underlying arguments and evidence that support your views.

Direct messaging and encrypted messaging services are frequently used to share animal cruelty content, and recommender systems are used to point people towards such content, as exposed in SMACC's Fake Rescue report due to be published on 1st October 2024.

iii) Is this response confidential? (if yes, please specify which part(s) are confidential)

No

Question 4:

i) Are the draft Risk Profiles for illegal content sufficiently clear in presenting the relationships between the risk factors and the risk of harm posed by animal cruelty content?

Yes, although it should be emphasised that platforms should adopt a precautionary approach in cases of doubt.

ii) Please provide the underlying arguments and evidence that support your views.

iii)	Is this response confidential? (if yes, please specify which part(s) are confidential)
No	

Question 5:

i)	Do the draft Risk Profiles for illegal content include the risk factors that are most strongly linked to the risk of harm posed by animal cruelty content?
Broadly yes.	
ii)	Please provide the underlying arguments and evidence that support your views.
iii)	Is this response confidential? (if yes, please specify which part(s) are confidential)
No	

The Illegal Content Judgements Guidance (ICJG)

Question 6:

i)	Do you agree with our proposals? Please provide the underlying arguments and evidence that inform your view.
<p>No.</p> <p>We note that in Par 1.3, Ofcom confirms that all providers will need to act to protect users from encountering content which amounts to a priority offence, and that offences under section 4(1) of the Animal Welfare Act 2006 (unnecessary suffering of an animal) are identified as priority offences in Schedule 7. In Par 1.6, Ofcom states that animal cruelty content can pose a significant risk to people who use online services. It is therefore imperative that guidance by Ofcom requires platforms to address the distribution of content depicting such offences.</p> <p>Platforms should be required to take a precautionary approach in making an illegal content judgement, by assuming that animal cruelty content represents a priority offence, in cases where information available to the provider of the service is limited.</p> <p>We do not agree that pre-recorded animal cruelty content is likely to fall outside the Schedule 7 priority offence under s4(1) of the Animal Welfare Act. It is our view that the very act of recording acts of animal cruelty for online distribution, whether it is distributed 'live' or in the form of pre-recorded content, is likely to amount to an inchoate offence (ie encouraging, assisting or conspiring to commit an action that would cause, or be likely to cause, unnecessary suffering to an animal), and this should be reflected in Ofcom's register of risks and Illegal Content Judgements Guidance. Indeed, in Par 9.61, Ofcom confirms that <i>'For content to be considered illegal, the conduct only needs to be 'capable' of encouraging or assisting.'</i></p> <p>We note Par 5.18 which states that <i>'...animal cruelty content online may inherently create demand for more of the same'</i>, and that <i>'...its existence can therefore contribute to activities which do explicitly encourage, assist or conspire.'</i> In Par 5.45 Ofcom states that <i>'The ability for users to post content, in particular images and videos, is a known risk factor for animal cruelty content, including that which encourages, assists or conspires.'</i> Par 5.47 states that <i>'...even if it does not directly encourage, assist or conspire, the publishing of animal cruelty content may normalise harmful behaviours towards animals and desensitise users of online services to these acts. This</i></p>	

may then itself result in users encouraging increasingly extreme acts of animal cruelty to be carried out in order to be published online.’ Par 5.48 states *‘The ability to repost or forward content may be a risk factor for the animal cruelty offence in that bad actors may re-share content with others within their network, as a way to show approval for the acts and encourage further cruelty.’* Par 5.68 states that *‘...the existence of animal cruelty content online in itself could encourage or represent a conspiracy to commit animal cruelty’*. In Par 5.7, Ofcom identifies that *‘it may be that the ability to disseminate animal cruelty content online is part of the motivation for the animal cruelty offences being committed’*. And in Par 5.8 it states that online services *‘may also provide a medium on which these acts may be advertised or where content made about them may be subsequently sold and shared online’* and that *‘Content published for this purpose may then in itself potentially encourage further illegal acts.’*

These statements within the consultation document clearly demonstrate that most animal cruelty content, whether livestreamed or pre-recorded, would meet the threshold for priority offences. By suggesting that the priority animal cruelty offence does not deal with pre-recorded animal cruelty in a suitably robust way, and that a service provider *‘may conclude that a pre-recorded depiction of a real animal being tortured was not illegal content’*, Ofcom is setting too high a bar for what would constitute a priority offence, and creating a risk that only livestreamed content can be considered a priority offence (and presumably only at the point at which it is livestreamed), thereby undermining the effectiveness of the Act. Whether the act of cruelty itself is livestreamed or pre-recorded is irrelevant to the potential negative impacts on the content viewer, and the time when the cruelty was perpetrated is an irrelevant consideration which Ofcom should not be taking into account. We note that a perpetrator of unnecessary animal suffering can be held accountable under the Animal Welfare Act long after the suffering has occurred.

We strongly argue that the overwhelming majority of animal cruelty content, whether livestreamed or pre-recorded, should be considered to fall under the identified priority offence in Schedule 7 of the Act. We therefore urge Ofcom to delete paragraphs 9.52, 9.53 and 9.54 from the guidance.

While we agree that most, if not all, animal cruelty content could be described as ‘obscene content’ and therefore would be considered an offence under s127(1) of the Communications Act, we are concerned that, by identifying the distribution of certain categories of animal cruelty content as non-priority offences under the Communications Act, rather than as priority offences under s4(1) of the Animal Welfare Act, there is a significant risk that platforms will not prioritise such content for removal, since as stated in Par 2.3 of the consultation document, *‘under the Act, the duties of providers are more stringent for priority offences’*. Law firm Lewis Silkin’s analysis of the consultation identifies that *‘While user-to-user platforms must carry out risk assessments which separately assess the 15 kinds of illegal harm covered off by the list of priority offences, as well as confirm the level of risk that their service will be used to commit or facilitate the commission of the priority offences, this won’t be needed for non-priority offences. Instead, providers need only assess the risk of harm from non-priority offences where they have reason to believe that specific non-priority offences are likely to be carried out on their platform.’* They go on to say *‘In respect of priority offences, they must operate a service which proportionately minimises the risk of individuals encountering illegal content. This latter requirement will extend to non-priority offences only where the service has been made aware of the relevant illegal content.’* (<https://commercial.lewissilkin.com/post/102jfsc/lions-and-tigers-and-priority-offences-oh-my>).

Differences in interpretation of what constitutes ‘obscene’ material may also weaken the effectiveness of the Act in addressing animal cruelty content. In Par 6.4, Ofcom talks about

'...depictions of cruelty which are so serious as to be obscene', and in Par 6.9 it states that '...the most serious pre-recorded content depicting animal torture is also likely to constitute an s.127(1) offence, and pose a risk of harm to users of online services who see it', suggesting that those considered to be 'less serious' would not constitute an offence, when they may in fact involve acts of cruelty leading to significant (and avoidable) animal suffering, and harm to those who view them. Ofcom acknowledges in Par 6.4 that 'The offence [under the Communications Act] can be difficult to apply consistently with the right to freedom of expression...'

As stated in Par 3.2.2, offences under S127(1) of the Communications Act are 'difficult' for providers to understand, and as acknowledged in Par 9.79, 'obscene' is not defined in legislation. The Communications Act has not been identified in relation to other non-priority offences in the Online Safety Act, and we are not aware of cases where the Communications Act has been successfully used in relation to the depiction and distribution of acts of animal cruelty, while there are examples of successful prosecutions under the Animal Welfare Act in relation to acts of animal cruelty that were pre-recorded and subsequently broadcast online, that have relied on evidence of inchoate offences, including conspiracy, assistance and encouragement. Relying on non-priority offences under the Communications Act therefore significantly weakens the potential for the Online Safety Act to effectively tackle online animal cruelty content.

This was clearly not the intention of parliamentarians when they voted to include animal cruelty as a priority offence in the Act.

ii) Please provide the underlying arguments and evidence that support your views.

The clear intention of Parliamentarians when adding offences under section 4(1) of the Animal Welfare Act to Schedule 7 during the passage of the Online Safety Act was to ensure platforms have a legal obligation to identify and remove animal cruelty content, regardless of whether it is livestreamed or pre-recorded.

iii) Is this response confidential? (if yes, please specify which part(s) are confidential)

No

Question 7:

i) Do you consider the guidance to be sufficiently accessible, particularly for providers with limited access to legal expertise?

Regarding the definition of the kinds of animals caught by the animal cruelty offence, we consider that the definition in Section 2(b) of the Animal Welfare Act 2006 ('[an animal ... under the control of man whether on a permanent or temporary basis]') should provide an easily understandable definition. Paragraph 9.58 should include this definition in full (it currently only refers to animals under the control of a person on a permanent basis).

As regards paragraph 9.29, as indicated above we urge Ofcom to advise that in the case of uncertainty, services and their moderators should adopt a precautionary approach and regard animal cruelty content as a priority offence unless there are compelling reasons why they should not do so. Failure to follow this approach could result in significant animal cruelty content being deprioritised.

Regarding paragraphs 9.38(b) and 9.68(b), it should be noted that, in many cases, highly distressed animals (particularly those that have been subjected to repeated exploitation and

stress) may withdraw, rather than show aggression. This should be included in the advice to content providers and moderators.

With regard to paragraph 9.39, we refer to previous comments regarding the adoption of a precautionary approach, which should provide greater clarity to content providers and moderators.

Paragraph 9.65 states that: *'...for the purposes of this guidance, content should be considered illegal if either: a) the animal cruelty offence concerned is taking place in the UK, or b) the animal cruelty offence is to be committed by someone who is British, or c) the animal cruelty is taking place in any other country where animal cruelty is an offence.'* This appears to be at odds with statements made by government during the amendment stages of the Bill, specifically that *'...even if the activity takes place outside the UK but is seen by users in the UK, tech companies will be made to take it down as part of a zero-tolerance approach.'* (see <https://www.gov.uk/government/news/online-animal-cruelty-activity-to-be-removed-from-social-media-platforms>). We note that in many jurisdictions, certain acts of animal cruelty may not constitute an offence under national legislation. It is therefore vitally important that the guidance emphasises that the animal cruelty content only needs to meet the threshold of illegality under UK legislation and that the associated content is accessible to UK users, regardless of where the act of cruelty was committed and the content was created.

ii) Please provide the underlying arguments and evidence that support your views.

iii) Is this response confidential? (if yes, please specify which part(s) are confidential)

No

Question 8:

i) What do you think of our assessment of what information is reasonably available and relevant to illegal content judgements?

No comment

ii) Is this response confidential? (if yes, please specify which part(s) are confidential)

No