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?
Response: We refer Ofcom to our previous response to the illegal harms consultation, which is available for reference here: https://www.onlinesafetyact.net/analysis/ofcom-illegal-harms-consultation/ As with the previous consultation, we think that Ofcom's work to analyse and evidence the causes and impacts of online harms relating to animal cruelty offences is commendable and comprehensive. There is a fundamental disconnect, however, between the evidence Ofcom presents on how those harms manifest on social media and the measures it recommends to mitigate the risk of those harms occurring. We have updated the analysis – provided at annex A of this and our "free-form" submission – to show the gap between the identified functions that give rise to the risk of harm and the mitigation measures proposed in the codes of practice to address them: http://www.onlinesafetyact.net/uploads/ANNEX-A_-MEASURES-TABLE---animal-cruelty-update.pdf
ii) Do you think we have missed anything important in our analysis? Please provide evidence to support your answer.
The consultation documents refer multiple times to how the use or viewing of livestreams of animal cruelty amounts to a priority offence: for example, para 3.9 (c): "a user could use a service to … plan with others to commit the offence (conspiracy). In our view, a livestream of animal cruelty being carried out, which users chose to watch knowing what they will see, can be characterised as a conspiracy to commit the animal offence and therefore amount to priority illegal content (and should be taken down)". This is fine in so far as it broadens the applicability of the criminal offence and triggers the illegal content duty but highlights one of the recurring problems with Ofcom's approach to all its OSA consultations so far: the reliance on the criminal law as a basis on which services are required to take action on harm without looking at the wider design and operation of the services on which these offences are taking place. Here, Ofcom is saying that the use of livestreaming in relation to acts of animal cruelty is an offence but that the response can only be to wait for that livestreaming to happen and then take the resulting content down, not to impose requirements on service providers to ensure that they adequately risk assess their services, should they provide a livestreaming function, and introduce mitigating measures to prevent the use of that particular functionality for the commission of the offence in the first instance: this would arguably help protect the animals being harmed as well as the users who - deliberately or inadvertently - see the livestream content during or after its creation. The absence of a mitigating measure relating to livestreaming also highlights the disconnect - which we have written about frequently - between the assessment and evidence of risk of harms and the corresponding mitigation measures proposed by Ofcom for inclusion in its codes of practice. In these most recent consultation documents, Ofcom include updated material relating to the evidence of livestreaming as one of the causes and impacts of harm (paras 5.50-5.52) and include livestreaming in its updated content for the risk profiles (section 5a, user

communication factors).

Yet, there is no update to the illegal harms codes of practice to include mitigating measures on livestreaming, just as there are none in the draft children's codes. This means that there is no requirement on regulated services - whether or not they have a livestreaming function which facilitates harm or, in the case of animal cruelty offences, is a component of an identified criminal offence (conspiracy) - to take any measures relating to that functionality.

We noted in our response to the children's consultation that there was "no justification for measures on livestreaming to be omitted in relation to children given the number of types of harm it is linked to." We continued:

> "Rather weakly, Ofcom argues (in volume 3 para 7.17) that 'while livestreaming can be a risk factor for several kinds of harm to children, as it can allow the real-time sharing of content such as suicide and self-harm, it also allows for real-time updates in news, and can provide children with up-to-date tutorial videos and advice or encourage creativity in streaming content. These considerations are a key part of the analysis underpinning our Code measure.'
>
> "A small amount of benefit is used to make the case against a measure to mitigate a large amount of harm. Ofcom might understandably not want to "ban livestreaming" for children, but there would be interventions (aligned with the precautionary approach we advocated at Carnegie UK, see section 2) that could introduce friction into its use.
>
> Friction would not prevent the positive use cases continuing (eg, educational broadcasts - though there is no evidence that educational content has to be live-streamed or that there is inherent value to be gained from doing that by contrast to other forms of audiovisual dissemination) while the negatives (children livestreaming themselves doing dangerous stunts, self-harming, or engaged in violent activities) could be minimised.
>
> "Notably, a number of such practical measures were set out by DCMS, back in 2021, when it included guidance for companies on livestreaming in its "Principles of Safer Online Platform Design". Ofcom makes no reference to this in its proposals, nor does it consider the distinction between the issues around children having the ability to livestream versus the ability to receive content that is livestreamed; arguably these raise different issues in relation to harm."

Given this response and the fact that Ofcom has identified livestreaming as a means by which criminal offences (not just "harm") can be committed, it remains unfathomable to us why the mitigating measures in the illegal harms codes have not been updated to include this functionality. We urge Ofcom to address this gap in its final versions of both the illegal harms codes and the children's codes.

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.
Response: We agree with the concerns of many of the animal protection charities, and the SMACC coalition, that more could be done to focus on the links between animal cruelty and domestic abuse, child abuse, extreme pornography and other violent crimes which are widely evidenced.	
ii)	Is this response confidential? (if yes, please specify which part(s) are confidential)
Response: 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?
Response: We would refer Ofcom to the submissions of organisations with expertise in animal rights and protection.	
ii)	Please provide the underlying arguments and evidence that support your views.
Response:	
iii)	Is this response confidential? (if yes, please specify which part(s) are confidential)
Response: 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?
Response: We would refer Ofcom to the submissions of organisations with expertise in animal rights and protection.	
ii)	Please provide the underlying arguments and evidence that support your views.
Response:	
iii)	Is this response confidential? (if yes, please specify which part(s) are confidential)
Response: 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?
Response: We would refer Ofcom to the submissions of organisations with expertise in animal rights and protection.	

ii)	Please provide the underlying arguments and evidence that support your views.
Response:	
iii)	Is this response confidential? (if yes, please specify which part(s) are confidential)
Response: 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.

Response: One notable new approach in this consultation is the inclusion as a non-priority offence of Section 127(1) of the Communications Act, which makes it "an offence to send, or cause to be sent, online a message (or other matter) that is grossly offensive or of an indecent, obscene or menacing character where the sender intended, or recognised, at the time of sending ,that it may be taken to be grossly offensive, indecent, obscene, or menacing by a reasonable member of the public". This extends the reach of the duties on regulated services with regard to animal cruelty or human torture content. Ofcom have provided additional material on this new offence in an updated section to be included in its Illegal Content Judgements Guidance.

This is welcome. In our analysis of Ofcom's draft Illegal Content Judgements Guidance, we observed that Ofcom was right to assert that "identifying the most serious or most specific priority offence is not the most effective way to think about how the regime works … So, when an offence (and the consultation gives the example of racial hatred) is committed, for the purposes of applicability of the illegal content duties and enforcement it does not matter whether it is the aggravated offence or the base offence". But we noted in this regard that it was therefore "unfortunate that Ofcom had not considered any of the existing non-priority offences", specifically s 127(1) Communications or the Obscene Publications Act 1959.

> "Much content falling out of more specific offences will be caught by the Obscene Publications Act or by s 127(1), and therefore some safety duties would apply, notably the base level of mitigation (s 10(2)(c)) and having a system to take content down (s 10(3)(b)). The existence of these offences should be flagged so that they are not forgotten or overlooked, especially as Ofcom has suggested it is not proportionate for providers to anticipate all non-priority offences (Vol 5, para 26.70) and that (in relation to terrorism offences) the giving of guidance in relation to some offences and not others is to suggest to providers where they should focus their attention (Vol 5, para 26.64). This approach makes sense where an offence is unlikely to occur; much less so where there are offences which are quite likely to be relevant, as is the case with the two offences here. Moreover, the selection of the non-priority offences in respect of which guidance is given is not based on the likelihood of them being relevant, but on their newness (Vol 5, para 26.72)."

The decision to include section 127(1) here now in relation to animal cruelty and human torture poses significant questions as to whether and how this offence should apply to other offences or types of obscenity that may be caught by the regulatory duties, unless Ofcom proposes to update the Illegal Content Judgements Guidance to include section 127(1) in the main part of the

judgement. As it stands, the regulator is expecting companies to focus on what is in the guidance and not on other offences. Section 127(1) might therefore be useful for gore and violent material that would otherwise be dealt with as harmful to children (but not adults) as well as hateful misogyny, beyond harassment and domestic violence, which is not a crime.

We remain concerned that our previous feedback - both formally via the consultation and in subsequent discussions with Ofcom - has not been taken on board with regard to the application of the ICJG. The section of the consultation that looks at the new offences through this lens continues to apply an unjustifiably high criminal threshold, focussing on individual items of content and ex post measures and - worryingly - continues, erroneously, to refer to Ofcom's "takedown duty". Ofcom DO NOT have a takedown duty but have a duty to "operate a service using proportionate systems and processes designed to minimise the length of time for which any priority illegal content is present" and "where the provider is alerted by a person to the presence of any illegal content or becomes aware of it in any other way, swiftly take down such content".

This particular paragraph seems to highlight the problems that we have previously identified that Ofcom have caused for themselves in their narrow approach to the interpretation of the Act which, in our view, is entirely at odds with the intention of Parliament when it legislated to include this offence.

> "We recognise that it may protect animals better from harm if services chose to take action against all content in which a user's conduct may mean animals are caused unnecessary suffering, even where the person causing it is unaware of that. However, Ofcom only has the powers given to us under the Act. There must be reasonable grounds to make this inference, and we do not consider that it is reasonable to expect that users generally can recognise signs of distress in all types of animal which may be 'protected animals' for the purposes of the offence. Service providers are however entitled to choose to protect animals from harm further than the Act requires, in an exercise of their own right to freedom of expression" (para 9.39)

There is one further point to make here in relation to s127(1) which has been raised with us by charities with expertise in animal cruelty and animal protection. While we welcome the fact that Ofcom has looked beyond the criminal offences - as we had recommended previously - to look at how s127(1) might capture content that is not otherwise covered by the priority offences listed in the Act, its application here - in lieu of existing offences in the Animal Welfare Act – potentially weakens the scope for effective enforcement and goes against the intention of Parliament. From the perspective of those charities, Ofcom's conclusion that "the publication online of content relating to or depicting these offline acts does not in itself cause the animal unnecessary suffering (or further suffering) and therefore cannot constitute an offence under the Animal Welfare Act" (5.4) amounts to another example of a narrow interpretation by Ofcom of what constitutes an offence. Namely, that animal cruelty content would constitute an animal cruelty offence under Section 4(1) of the Animal Welfare Act 2006 given that animals are often only subjected to cruelty or abuse in order for the perpetrator to film it - whether as a livestream or as a recording for later uploading online. The content is therefore inextricably part of the offence. Moreover, the content itself can encourage other creators to create and publish animal cruelty content when they see it garners attention and generates revenue.

We would refer Ofcom to the submissions from the Social Media Animal Cruelty Coalition (SMACC) and Born Free for further analysis and evidence, including additional legal advice, on this point.

We would urge Ofcom to review whether - taken in the round - their approach is unnecessarily limiting the scope of their regulatory options in a way that is not required by the Act and which runs counter to the intention of Parliament when it voted to include animal cruelty within the scope of the priority offences.

We hope that this submission is helpful to Ofcom as they make their final amendments to the illegal harms codes, not just in relating to these particular offences but more broadly in light of the concerns we have raised.

ii)	Please provide the underlying arguments and evidence that support your views.
Response: Please see the submissions from SMACC and Born Free for further analysis with specific relevance to the animal cruelty offences. Our blog on the Illegal Content Judgements Guidance remains relevant to Ofcom's approach here too. https://www.onlinesafetyact.net/uploads/analysis-ofcom-s-illegal-content-judgements-guidance.pdf	
iii)	Is this response confidential? (if yes, please specify which part(s) are confidential)
Response: No	

Question 7:	
i)	Do you consider the guidance to be sufficiently accessible, particularly for providers with limited access to legal expertise?
Response: N/a	
ii)	Please provide the underlying arguments and evidence that support your views.
Response:	
iii)	Is this response confidential? (if yes, please specify which part(s) are confidential)
Response:	

Question 8:	
i)	What do you think of our assessment of what information is reasonably available and relevant to illegal content judgements?
Response: N/A	
ii)	Is this response confidential? (if yes, please specify which part(s) are confidential)
Response:	