

The Children's Commissioner's Office's response to: Ofcom's consultation on Online Safety Information Guidance

Full list of recommendations:

1. When determining whether or not it is appropriate or proportionate to exercise an information gathering power, the CCo recommends that the regulator does not give undue weight to the costs to corporations of providing information for a regulatory purpose.
2. The CCo recommends that the regulator removes reassurances made regarding the burdensomeness of regulatory regimes which are given at the expense of the intention of their regulatory purpose under the Act.
3. The CCo recommends the regulator reports on how decisions are made regarding how much information is enough information when issuing Coroner's Information Notices.
4. The CCo recommends that paragraphs (c) to (f) specifies that both providers and persons are in scope to be issued section 100 notices, as opposed to only "persons".
5. The CCo recommends the information stored on this Information Registry is used to create a Register of Online Services which exist within the UK.
6. When issuing a Remote Viewing Information Notice, CCo recommends that in addition to the remote viewer from Ofcom, the regulator appoints an independent viewer from each location at which the test is taking place.
7. Regarding the guidance on information notices requiring a test, the CCo recommends that the regulator stipulates that the regulator can require these tests to be carried out continuously over a period of time as well as in real time.

8. Regarding the guidance on Coroner's Information Notices, the CCo strongly recommends that the regulator also specifies that they may request information regarding matters isolated from the content type on the face of the guidance.
9. The CCo strongly recommends that a senior manager is required to be named in the event of an information notice of any type being issued and responded to. This must apply to all services in scope of the Act – of all risk profiles and sizes.
10. The CCo recommends the scope of the provision for skilled persons' reports to include information to understand if any additional risks (beyond that which prompted the investigation) related to the subject of the report require prevention, limitation or reduction.
11. The CCo recommends that the regulator puts resource into recruiting independent skilled persons with the subject knowledge and independence that a skills person report warrants.

Consultation question 1: Ofcom's general approach to information gathering (Section 3 of the draft guidance)

Do you have any comments on Ofcom's proposed general approach to information gathering, as outlined in Section 3 of the draft guidance?

- The CCo views the information gathering powers as an opportunity to strengthen the knowledge base of the online world. They should be viewed as a method of taking proactive steps to prevent harms, as opposed to being used as mere retrospective checks. Using the powers in this way is but one way the regulator could take up the CCo's recommendations made in its response to the Children's Code consultation.
- The CCo repeats its strong recommendation made in its response to the Children's Code consultation, and in its response to the transparency consultation, that **when determining whether or not it is appropriate or proportionate to exercise an information gathering power, the regulator does not give undue weight to the costs to corporations of providing information for a regulatory purpose.**

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- The CCo encourages the regulator to use their information gathering powers to ensure compliance with the Act *and* to also support Ofcom's regulatory functions. The CCo welcomes the regulator's indication that they will do so, but urges the

decision whether or not to engage their information gathering powers to be made based on a judgement of necessity, not necessity weighed against any potential inconvenience to private companies which fall in scope of an Act of Parliament.

- The CCo notes that the regulator is seeking to use the least intrusive methods of achieving their objectives in order to reassure the companies in scope of the Act that compliance with the Act and Ofcom's powers will not inhibit business as usual to a large degree. The CCo does not recognize inconvenience to businesses to be a valid factor in deciding whether or not to use information gathering powers in order to ensure compliance with an Act of Parliament. Ensuring such compliance necessitates the ability to use information gathering powers to scope the necessity for investigations and to prepare for any future issues that might arise in the regulatory landscape. Therefore, **the CCo recommends the regulator removes reassurances which are given at the expense of the intention of their regulatory purpose under the Act.**
- The CCo supports the use of information gathering powers to gather personal data when issuing a Coroner Information Notice and notes their intention to pursue data minimisation in that respect. However, **the CCo recommends the regulator reports on how the decision was made regarding how much information was enough information.**

Consultation question 2: Information notices (Section 4 of the draft guidance)

a) Information notices

Do you have any comments on Ofcom's proposed approach to the process for issuing and responding to information notices.

- **The CCo recommends that paragraphs (c) to (f) specifies that both providers and persons are in scope to be issued section 100 notices, as opposed to only "persons".** This is to ensure that – where appropriate - responsibility for corporations which provide, for example, the ancillary services specified in

paragraph (c) take responsibility for the services their company provides rather than naming individuals.

- The CCo refers to its response to question 1 of this consultation response regarding the recommendation made that the regulator revises its approach to proportionality when determining when it is appropriate to issue a section 100 notice.
- The CCo welcomes the regulator's decision to hold information gathered through section 100 notices on their Information Registry. To facilitate greater oversight over the online world and therefore a stronger regulatory regime that will have positive impact on children's safety, **the CCo recommends the information stored on this Information Registry is used to create a Register of Online Services which exist within the UK.**

b) Requiring a test

Do you have any comments on our proposed approach to information notices that require recipients to perform a test?

- The CCo refers to its response to question 1 of this consultation response regarding the recommendation made that the regulation revises its approach to proportionality when determining when it is appropriate to issue a notice requiring the performance of a test.

c) Remote viewing

Do you have any comments on our proposed approach to Remote Viewing Information Notices? For example, to the factors that we may take into account when considering whether to issue a Remote Viewing Information Notice.

- The CCo supports the regulator's decision to have a representative from Ofcom present – albeit remotely – during the performance of a test. However, the CCo expresses concern that remote viewing will provide an unreliable view of the test being carried out. This is both with respect of the limitation of information that

comes with remote viewing – which is two-dimensional and time limited – but also with respect of the fact that remote viewing itself relies on software that is not subject to any checks for accuracy or vulnerabilities to corruption. **The CCo therefore recommends that, in addition to the remote viewer from Ofcom,**

the regulator appoints an independent viewer from the respective location the test is taking place. This might be, for example, an individual from the government bodies which oversee communications. Given that these notices will be required only for the most serious or complex cases, the CCo anticipates such a use of resource will be justified.

- The CCo supports the regulator's proposal to test algorithms in real time. However, to ensure a thorough check takes place, **the CCo recommends that the regulator stipulates that these tests can be carried out continuously over a period of time**, to produce data that illustrates if a specific feature of a platform, for example an algorithm, functions in a way that produces results that cumulatively create a harm over time. This data cannot be captured by a single snapshot test.

d) Coroner Information Notices

Do you have any comments on our proposed approach to issuing Coroner Information Notices for the purpose of responding to requests for information by investigating authorities in connection with an investigation or inquest into the death of a child?

- The CCo welcomes the provision for Coroners Information Notices made in the regulator's information gathering regime. The CCo also notes that these provisions will be supplemented or usurped by provisions made in the Digital Information and Smart Data Bill, to be debated in this parliamentary term.
- The CCo welcomes the non-exhaustive list of information subjects that might be required in a Coroner Information Notice. In addition to those listed in the Annex to the guidance, **the CCo recommends that the regulator also includes information on the face of the guidance on other matters that are not content-specific.** For example specific algorithms or corporate behaviours – these should be included on the face of the guidance.

e) Naming a senior manager

Do you have any comments on the section relating to naming a senior manager who is in a position to ensure compliance with an information notice?

- **The CCo strongly recommends that a senior manager is required to be named in the event of an information notice of any type being issued and responded to. This must apply to all services in scope of the Act – of all risk profiles and sizes.** This is to instill a culture of responsibility across the industry, aside from communicating to in-scope services that compliance with the Act must be a priority at a senior level. The CCo made similar remarks in its response to the Children's Code consultation.

Consultation question 3: Skilled persons' reports (Section 5 of the draft guidance)

Do you have any comments on our approach to skilled persons' reports? This might include when we might decide to require a skilled person's report, and the typical process that we propose to follow.

- The CCo largely supports the measure to appoint a skilled person to assist Ofcom in its regulatory function.
- The CCo particularly welcomes the indication in the guidance that a skilled person's report might be requested in order to understand how to prevent, limit, or reduce identified risks. **The CCo recommends the scope of this provision is strengthened to include information to understand if any additional risks related to the subject of the report require prevention, limitation or reduction.** This is a method for Ofcom to take a proactive approach to online risks to children, which was a recommendation made by the CCo in its response to the Children's Codes consultation.
- **The CCo recommends that the regulator puts resource into recruiting independent skilled persons with the subject knowledge and independence that a skills person report warrants.**

Consultation question 4: Interviews (Section 6 of the draft guidance)

Do you have any comments on the section of guidance dealing with the power to require an individual to attend an interview?

- The CCo supports the use of interviews as an information gathering process.

Consultation question 5: Entry with or without a warrant (Section 7 of the draft guidance)

Do you have any comments on our proposed approach to entry either with or without a warrant? This might include the typical process and our interpretation of the requirement to have regard to the Home Office's code of practice on powers of entry.

- The CCo supports the procedure set out in the guidance regarding the regulator's powers to enter a premises with or without a warrant.

Consultation question 6: Audit (Section 7 of the draft guidance)

Do you have any comments on our proposed approach to the power for Ofcom to carry out an audit to assess compliance?

- The CCo supports the procedure set out in the guidance regarding the regulator's auditing powers.

Consultation question 7: Consequences of failure to comply with an information power (Section 8 of the draft guidance)

Do you have any comments on the potential consequences of a failure to comply with any of the information gathering powers covered in the draft guidance? This might be either on breaches that may be subject to enforcement action by Ofcom, or those that may constitute criminal offences.

- The CCo supports the provision for consequences for the failure to comply with an information power as provided for under the Act.

Consultation question 8: Additional comments Do you have any other comments on the draft guidance?

N/A