

A response to Ofcom's Impact Assessment Consultation

Introduction

Ofwatch is an organisation that represents the viewers of 'adult' subscription television services in the UK. Having taken part in Ofcom's public Broadcasting Standards Consultation (referred to as BSC below) and reviewed the associated Regulatory Impact Assessment (RIA) we feel that there is a great deal of scope for improvement in the way that impact assessments are conducted by Ofcom. The BSC RIA has been used as a comparative example throughout this text as we have been most closely involved with this particular impact assessment.

The intention of this document is to help Ofcom to avoid the difficulties that we have experienced in dealing with the BSC RIA from being repeated in the future. We fully realise that the BSC RIA was drawn up before the proposed Impact Assessment guidelines were, but believe that most of the principles should still have been applied. We also realise that the BSC process is not complete at the time of writing (8th March 2005) and that the Associated RIA is in draft form, so we have high expectations that the final RIA will address many of the points that we have raised here.

We note in section 1.1 that "These guidelines explain how Impact Assessments can help us make these judgements in a transparent and justifiable way." If this can actually be achieved in practice then the process will have been improved greatly.

Section 1

1.8 In producing these guidelines, Ofcom has had regard to other relevant guidelines, including the Cabinet Office publication, "Better Policy Making: a Guide to Regulatory Impact Assessment" (January 2003). We have also taken into account the guidance issued by the Better Regulation Task Force, which has identified five principles of good regulation: proportionality, accountability, consistency, transparency and targeting.

Another vital principle that should be included in this list is 'evidence based'. This is clear from Ofcom's own regulatory principles "*Ofcom will strive to ensure its interventions will be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome*".

Section 2

2.4 Impact Assessments should enable our stakeholders to see more clearly the costs and benefits associated with different policy options. They will therefore be able to comment on and challenge our proposals more easily and as a result, consultations should be more effective.

We agree entirely but would suggest that it is also vitally important to ensure that stakeholders are made fully aware of the *reasoning* that Ofcom have used in moving from the facts to the conclusion and why the final option was chosen.

We would make the following observation concerning the BSC RIA. There is no clear line of logical reasoning to show why the selected option was chosen. All reasoning is implicit.

BSC RIA recommendation (point 62) states:

“The status quo will prevail regarding a prohibition on R18s, and R18 standard material and also on a 2200 start for 'adult' sex material plus the other protections currently in place regarding 'adult' sex material. It will only change if it can be established that there are sufficient safeguards (technical and otherwise) to protect persons under eighteen, and ensure that adults who do not wish to see such material are adequately protected from harm and offence.”

Based on this statement and other information provided in the RIA we might conclude that the following assumptions have been made a) protecting children has overriding importance, b) the evidence suggests that disproportionate harm would result from allowing R18 content, c) R18 content on specialist service would breach general accepted standards. It would also appear that Ofcom are uncertain what safe guards are available.

It is unclear which of these assumptions are considered to be true or if they are, to what extent. Implicit assumptions in a conclusion should be made explicit so that stakeholders can more fully understand the regulatory reasoning behind a decision. It also allows stakeholders to question the logic very closely and propose alternative lines of reasoning for consideration.

Based on this we would suggest that a test for transparency is included in the analysis and decision making process in the form of the following question:

If the conclusion were to be changed to the exact opposite viewpoint would any other text in the impact assessment document then need to be altered in any way to support this change?

If no change is necessary then it can be guaranteed that the line of reasoning is not transparent. The greater the degree of change required, the greater the degree of clarity in the reasoning. In the case of the BSC RIA no changes would be needed at all so the line of reasoning is not transparent.

It might be argued that the final version of the assessment will do this, but by then it is too late to challenge any of the assumptions that Ofcom have used in coming to the conclusions they have.

Note there is a missing 'as' in last line of 2.4.

Section 3

3.6 Following the consultation stage of a policy initiative, Ofcom will generally publish a decision or policy statement. This will:

- set out our response to the comments made about the Impact Assessment;*
- show how the comments have affected our assessment of the impact of the options considered; and*
- set out the option we have chosen and why.*

A far more considered line of reasoning could be developed at a much earlier stage in the process if Ofcom were to engage a limited number of selected key stake holders in open dialogue prior to the formal consultation process. Although the existing consultation process is an excellent tool for identifying issues and is very broad in extent it is very restrictive in some areas. It is especially restrictive when considering complex arguments where it may take several iterations of questions and answers to see the full picture. In one sense a consultation represents two monologues rather than a dialogue. As such it is vital that the very best approximation of the finished arguments possible is presented for full public comment.

It is a great pity that difficult and controversial topics are particularly susceptible to what can best be described as a tight lipped approach. It appears that a huge amount of work is carried out before Ofcom is prepared to even tentatively provide any information for public comment.

As an example of this in the BSC I would suggest that discussions with some key stake holders would have revealed very quickly that one of the most important aspects of this particular issue concerns the quality of the various protective mechanisms that might be put in place such as PIN security, and that consequently this aspect should have been covered in much greater detail in the consultation document than was apparent from the single paragraph (51) in the BSC RIA. This omission is extremely puzzling.

Section 4

No comments

Section 5

5.1 "This means that the more substantial and wide ranging the impact on stakeholders, the more comprehensive the Impact Assessment should be".

Great care is needed here. Firstly the impact assessment is itself the agent by which the quality of the impact will be determined. The implication being that a rapid and possibly informal preliminary impact assessment will be carried out to determine the scope of work for the full impact assessment.

The effort required should be proportionate to the complexity of the task at hand as well as the degree of public interest/concern in the issue.

5.3 Producing an Impact Assessment will normally involve five stages:

- *defining the issue we need to consider and identifying the citizen or consumer interest (stage 1);*
- *defining our policy objective (stage 2);*
- *selecting the options (stage 3);*
- *assessing the impact on different types of stakeholders (stage 4);*
- *choosing the best option (stage 5).*

We would suggest that a quality step is included at some stage to test how consistent the selected options are when compared to similar issues dealt with by Ofcom, by other related regulators and by the wider world. An example is included in the illustration below.

Another useful test that could be applied to improve the quality of impact assessments is to consider what conflicts of principles exist and to ensure that each and every one is explained.

As an example; the BSC states that Ofcom will apply the law and not the regulation of the legacy regulators (BSC section 2 point 5), that there is no legal restriction on broadcasting R18 content at least as far as the Video Recordings Act is concerned (BSC RIA paragraph 41), but that the ITC program code does prohibit the broadcast of R18 content (BSC RIA paragraph 43) yet the conclusion reached appears to be based on the policy of the ITC and not the law. Explanation is required.

5.7 The first stage is to define the issue we need to consider and to assess how the interests of citizens or consumers (or particular groups of citizens or consumers) are affected, including the scale of the problem. For example, when Ofcom was asked to consider the impact of TV advertising on the health of children, the citizen or consumer interest could have been described as an interest in children not suffering harm as a result of exposure to TV advertising. This interest is reflected in Ofcom's duty to have regard to, "the vulnerability of children and of others whose circumstances appear to Ofcom to put them in need of special protection" when exercising its functions.

The first stage of the process must also involve selection of the most appropriate person or people to conduct the impact assessment. Those conducting an assessment must have a deep understanding of the subject matter and be familiar with all aspects from the perspective of all stakeholders. If this is not possible then it is even more important to involve some key stake holders at an early stage as mentioned previously.

A clear example of this issue can be seen in the BSC RIA as far as DCMS proscription orders are concerned. In paragraph 44 it was pointed out that the government has proscribed 5 foreign services in the past for transmitting R18 standard material. Whilst true this is a misleadingly incomplete. In reality no R18 compliant services have been proscribed since major changes made current R18 strength content legally available in the UK in 2000 and that the ITC specifically asked the DCMS to proscribe a service then which was never been implemented (and which we are told the minister is still considering to this very day).

There are 3 possibilities here. 1 the person conducting the RIA missed this important point, if so this underlines the above point that a deep knowledge of the subject matter is needed. 2. The person conducting the RIA may have assumed that this was not a key point, if so this underlines the point about familiarity with the perspective of all stakeholders. Some stakeholders were very greatly surprised by this omission. 3 It may have been deliberately excluded, we very much hope that this was not the case, but if it was then there is probably little point in mentioning it.

5.8 Having identified the relevant issue and identified the citizen or consumer interest, we need to define clearly the policy objective we are seeking to achieve i.e. the outcome we are seeking.

It is not at all clear why it is necessary to consider the citizens / consumer interest and then separately consider the policy objective. The obvious assumption is that the policy objective is to promote the interests of citizen / consumers in every case. This may be an issue of semantics and understanding, perhaps a slightly more detailed example that clearly illustrates this difference would be useful.

5.16 The principles that Ofcom will follow in analyzing the costs and benefits of different options are set out below. It should be borne in mind, however, that Ofcom's bias against intervention means that a high standard of proof must be satisfied. In other words, there must be a clear case for regulation, and the prospective benefits must exceed the costs. If a case for regulation can be made, we will choose the least intrusive means of achieving our objective.

We agree with this statement but wish to point out that it is not being applied in practice.

In the BSC RIA the only discussion of evidence presented in favour of restriction of R18 content on harm grounds is contained in paragraph 48 where we are told that *"there is no known and substantiated health or other risk associated with watching a video which has been given an R18 classification"* this is then qualified by *"there is wide spread public concern about children viewing explicit material"* and that the Government takes a "common sense view" (i.e. not evidence based) that restrictions should be as stringent as possible.

This 'evidence' would appear to represent the "high standard of proof that is required" and presumably the conclusion that an absolute ban will continue is the "least intrusive means of achieving our objective". The stated principles have not been applied in this instance, this requires explanation.

Even more bizarre is the benefit described in BSC RIA paragraph 56 that is "based on the assumption that such material <R18> is so potentially offensive to society that its transmission would be a breach of generally accepted standards".

The only hard evidence that can be found in the BSC RIA concerning public attitudes (paragraph 47) states that 76% of the public agreed that particularly sexually explicit programmes should be available on subscription services. This requires explanation.

5.18 points 3 and 4, we agree but would simply add that even where it is difficult to assign costs and benefits some attempt should be made even if this is simply low, moderate or high.

An Illustration of a risk assessment

Here is an illustration of the type of reasoning that we believe would be more appropriate in an impact assessment. Although this example is again based on the BSC R18 context there is no reason why similar reasoning should not be used in any other context or if sufficient evidence were available for it to be used to reach the opposite conclusion. It will never be possible to remove subjective judgement entirely, but such judgement can be minimised and made transparent. This assessment should be compared to the one actually included as part of the BSC.

The key issue in the case below is the balance between potential harm to children and the rights of adults to free expression. Several other issues such as harm and offence to adults might be treated in a similar fashion.

Considering the harm to children 'cost'

A measure of the total harm to children must be dependant on the seriousness of that harm and the degree of exposure to it. Total harm = seriousness of harm x degree of exposure.

Seriousness of harm:

The seriousness of the harm is not clearly known, however the absence of evidence of harm given the research that has been conducted and the wide spread availability of explicit content in continental Europe would indicate that the level of harm is not high and might best be judged as moderate.

Degree of exposure:

There are three possible ways in which children might be exposed to explicit content, children might subscribe to adult services themselves, children might access adult services their parents had subscribed to or children might access content recorded by their parents. Total exposure will be the sum of exposure through each of these modes of access.

1) Children subscribing to adult services directly: this would involve access to parental credit cards or credit card fraud, children breaching the PIN security as well as viewing the services late at night without parental awareness. Each of these in isolation might well be considered unlikely so the possibility of all three occurring together make access via this mode extremely unlikely. In the case of access via parental credit cards there is the added disincentive that the parent will become aware when the bill arrived.

2) Children accessing adult services through parental subscriptions: this would involve parents subscribing in the first place, children breaching PIN security as well as viewing the services late at night without parental awareness. This is more likely than mode 1 although access via this mode is still likely to be very low indeed.

3) Children accessing content recorded by parents: this would involve parents subscribing and recording the content in the first place, not being vigilant over the storage of the video and children finding it and viewing it without parental knowledge. This is the most likely mode of access, however as has been made clear there is a wide

spread public concern over children accessing explicit content and parents are likely to act accordingly so access via this mode will still be low.

On balance

There is a low exposure to a moderate risk of harm. The overall balance of harm that might be expected is low or moderate.

Considering the Free expression 'benefit'

This could be evaluated as net gain for free expression = severity of the restriction on availability x value of the content as defined by those who wish to see it.

The severity of the restriction is very high as the ban is absolute.

The value of the restricted content to the viewers is also high (as would be clearly demonstrated by asking a selection of viewers).

On balance

As there is a high restriction on highly valued content this could be seen as a very high restriction on free expression.

Both harm and benefit are likely to be closely related to and equally dependant on the number of adult subscribers, so there is unlikely to be any significant change to this balance if the number of adult subscribers increases (or decreases).

Conclusion

A low or moderate risk to children can be taken for a high gain result in freedom of expression. Consequently R18 content should be permitted.

Transparency check

Following the logic described in answer to point 2.4 above, if we reverse the decision and conclude that R18 content should be banned it is clear that much of the reasoning would no longer make sense and would need to be revised. So it is reasonable to conclude that the reasoning is transparent.

Consistency check

The BBFC permit the sale of R18 content videos and DVD's from in sex shops. It might therefore be useful to compare this situation to the broadcasting situation. In this case there are only two modes of access for children, direct purchase by the child and access to material purchased by the child's parents:

1) Direct access from a shop: this would involve illegal sale of R18 content and or deception on the part of the child. Sex shop owners stand to lose their licenses if they sell R18 video to children so are unlikely to do so. There is a limited possibility of sale to 16 or 17 year olds although this is likely to be very low or negligible.

2) Children accessing content purchased by parents in a sex shop: this would involve parents making the purchase in the first place, not being vigilant over the storage of the video and children finding it and viewing it without parental knowledge. This is the most likely mode of access, however as has been made clear there is a wide spread public concern over children accessing explicit content and parents are likely to act accordingly so access via this mode will be low. Mode 2 clearly poses the greatest risk to children.

It is reasonable to assume that any harm that might be caused by R18 content would be the same regardless of the mode of access or the medium of distribution. Therefore it is also reasonable to assume that as with broadcast content, there is a low exposure to a moderate risk of harm so the balance of harm is low or moderate.

When considering the free expression benefit it is reasonable to assume that the value of the content is the same. Although the restriction is not absolute as with broadcasting the access barrier is still very high.

As the free expression benefit and the child exposure cost remain similar to the broadcasting case, purchase from sex shops is broadly comparable to R18 broadcast and is consistent with it.

Other possibilities

If a sufficiently high value is placed on the protection of children it becomes clear that the greatest 'gain' can be achieved by prohibiting R18 content. However if the value placed on the protection of children is very high this will have very serious implications for free expression on free to air services. This is because the proportion of children viewing late night free to air services will exceed the proportion viewing late night PIN protected adult only subscription services by several orders of magnitude. The harm from 18 rated sexual and violent content can hardly be considered to be several orders of magnitude less than R18 content to balance this. If protection of children is considered of exceptionally high value then it would be inconsistent to allow 18 rated content on free to air services.

Whilst this form of reasoning may appear uncomfortable to some, it is clear from Ofcom's own statements that a balance must be struck and if so, that balance should be based on logical considerations. It is not possible to escape this balancing act between harm and freedom unless of course inconsistent regulation is to be permitted in which case none of the above needs to be considered.

Conclusion

Ofcom's Impact assessments must be based on clear logical reasoning. Every effort must be made to ensure that this reasoning is made transparently clear to all stakeholders. Consistent, proportionate and transparent arguments must be used that are firmly based on evidence.

Key stake holders should be involved at an earlier stage in the process to ensure that the best possible case is presented for full public consultation. Much benefit could be gained from engaging this group in *open* dialogue. Ofcom should not be afraid to voice tentative arguments at an early stage to validate its initial reasoning.

Those involved in conducting Impact Assessments must have a deep understanding of the issues involved from the perspective of *all* stakeholders.

The complexity of an issue must be a key element in judging the amount of effort required to conduct an assessment as well as public interest issues.

Where important principles conflict and one principle is considered to override another it is vital that such conflicts are explicitly pointed out and not implicitly assumed. The explanation as to why one principle was chosen over another should also be clearly stated.

The assessment process should include quality checks for both consistency and transparency that offer some degree of quantification even if this is imprecise.

We believe that the importance of point 5.16 cannot be over stated and that there is a great need for detailed analysis, reliance on evidence and a bias against intervention. Unfortunately at least as far as the Broadcasting Standards Consultation Regulatory Impact Assessment was concerned, these elements have been sadly lacking. We hope that this may be corrected before a final decision is reached.

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On behalf of Ofwatch
7th March 2005