

Review of procedures for handling broadcasting complaints, investigations and sanctions A Response

Para 2.17 Move to an Issue Based approach.

This seems non controversial and in the interests of efficiency.

- Responding to each and every person among thousands who complains about Big Brother or East Enders is wasteful and pointless.
- A suitable alternative would be to publish a single group response on the Ofcom website. If this is done it must be at least as detailed as personal responses would have been - simply providing summary information as at the end of current Ofcom broadcast bulletins would be inadequate. Details of complaints and reasoning why complaints have not been pursued must be provided. This is not commercially sensitive information.
- However it must not be used as an excuse to put complains on one side until enough accumulate to create the impression of an Issue.
- Time must be explicitly recognised as a factor that dilutes complaints - 10 complaints over 2 months is less of an issue than 5 in one week.
- There must also be a point at which complaints are considered dead unless communicated to the broadcaster.
- If complaints are allowed to accumulate over too long a period broadcasters will be unable to respond as memories will have faded and recordings will have been wiped.

Para 2.17 Preliminary View

There should be a mechanism to prevent time being wasted on complaints that are unlikely to succeed. These include ones based on misconceptions, out of scope, that are frivolous, malicious, lack detail and so on.

- However complainants should be informed of this in sufficient time to submit further details or justification if they have this. (Notwithstanding this, late submission of complaints should not result in accelerated procedures - if the complaint is not submitted within 1 week of broadcast, responsibility for lack of time lays with the complainant).
- In some cases forming a Preliminary View will also avoid wasting broadcasters time. Broadcasters should not be approached for comment or recordings unless it appears there may be a case to answer (preliminary step 1a). If it appears there may be a case to answer, then the broadcaster should be approached for a response and/or recordings. Having reviewed this, Ofcom should then decide whether or not to proceed (preliminary step 1b). Only after these two half-steps should a full blown investigation be launched.
- If it is decided not to proceed, the broadcaster should be informed of the nature of the complaint. This feedback is valuable.

Para 2.17 Remove the Internal Review Mechanism

This should be retained. The Internal Review Mechanism exists to review the accuracy of decisions. Introducing a Preliminary Review will not prevent occasional mistakes, or the perception of them.

If eliminated this will result in full Judicial Review of decisions in the fullness of time. Ofcom might wish to consider if an internal review by more experienced and independent staff might be preferable.

Para 2.17 Remove the Broadcast Sanctions Committee

This step should not be taken and will result in minimal saving. Referrals to the Sanctions Committee are few and far between,

- It must be realised that the Sanctions Committee exercises Judicial powers, issuing fines, cancelling telecommunications operators licences, cancelling broadcast licences, and effectively labelling individuals "unfit" and thereby banning them from senior employment within the industry. It would not be right or proper for these Judicial powers to be exercised by junior staff members.
- If Ofcom were to go ahead with this proposal, the names of individuals taking decisions must be published, in line with established legal practice of not having anonymous judges.
- If Ofcom were to go ahead with this proposal, Sanctions decisions must be made by Panels of not less than 3 individuals none of whom report to one another to avoid risk of bias or error. This is standard practice when evaluating competitive tenders, and these are more serious matters.
- If Ofcom were to go ahead with this proposal, Sanctions decisions must be made by people with formal legal qualifications. These are legal decisions that affect people's livelihoods and care should be taken to ensure that proper legal grounds exist.
- If Ofcom were to go ahead with this proposal, Sanctions decisions must only be made by people on permanent contracts. Temporary contracts create the potential for actual or perceived undue influence.
- If Ofcom were to go ahead with this proposal, Sanctions decisions must not be made by officers who investigated the original complaint as they cannot be unbiased. Neither should the line managers of investigating officers take Sanctions decisions as they may have allocated or discussed the complaint, or endorsed the original decision, compromising their impartiality.

Ofcom are strongly recommended to ensure that all Sanctions decisions are made by people wholly independent of Ofcom. No-one who is an employee of Ofcom can be considered truly independent. If employed by Ofcom their career and continued employment depends on Ofcom, particularly in a climate of severe budget cuts. Decision makers may do what their employer expects of them rather than what the facts warrant. Furthermore anyone involved in drafting rules and regulations, or collating consultation responses will find it difficult to distinguish completely between the letter of the regulations as finally implemented, and intention at the drafting stage. Article 6.1 of the European Convention on Human Rights states that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". If Ofcom does not ensure that judgements are not independent and impartial it will be taken through the Courts sooner or later, will lose, and will have a swathe of historic decisions overturned.

One option would be for Sanctions decisions to be taken by a wholly independent Court or Tribunal at County Court level, with decisions taken by a Judge or panel of Judges. This need not be expensive as it need not meet often (Sanctions cases are rare). This could be brought into the remit of an appropriate Trade court. This would certainly be less expensive than referral to the High Court and above for breaching the ECHR and having to revisit old cases.

Likewise it is arguable that decisions below Sanctions should be taken by a wholly independent body. This would include determination of whether or not a broadcast was in breach of the Broadcasting Code. This could be determined by a lower level body, equivalent to a Magistrates Court, but operating as a Tribunal without all the pomp and ceremony of a full Court. It might be argued that Tribunal hearings would be more expensive than the current system, however their form need not differ (only the personnel), and they could be incorporated into existing legal structures, avoiding the need for a new hierarchy, HR

department, offices, etc.

This may require new primary legislation. If it does it is incumbent on Ofcom to approach Parliament (through the Dept of Media Culture and Sport), inform it that its current structure may not be compliant with the ECHR and suggest legislative change.

Para 2.17 Clarify Information Disclosure Approach

Clarification sounds innocuous but this must not be taken as authority to reduce or increase what information is disclosed. These are matters for the Information Commissioner and Parliament.

If time and effort is wasted arguing about whether confidential information, such as names and addresses or complainants, should be disclosed, this waste should be eliminated by stating policy, the basis for that policy, and adhering to it. There should also be a clear policy on the basis for revealing information that telecom operators and broadcasters consider commercially sensitive.

Notwithstanding this, subjects of complaints should be able to query the credentials of complainants, and require that steps be taken to identify and (if permitted) eliminate complaints that are vexatious, malicious, campaign driven (eg anti-religious channels), or from competitors.

RESTITUTION

If intending to streamline Ofcom procedures and improve efficiency, increased use should be made of Restitution. This has already been accepted in several cases. In one there was inadequate use of signage and/or sub-titling. The broadcaster offered to increase this for a period, more than offsetting the error. In another case a radio station broadcast too little spoken word and local news, and offered to increase this above the required level for a compensating period.

Use of Restitution could avoid cases being considered for Sanctions in all but the most intransigent cases.

Use of Restitution could substantially reduce the number of cases progressing from Preliminary to Full Investigation. Broadcasters could offer a compensating period with reduced advertising, more news, etc, at an early stage without formal admission of guilt, saving officer time and improving audience experience. To avoid accusations of favouritism or bias, this should be administered without bias across all complaint types except where a serious statutory breach has occurred.

If a broadcaster transmits the F word on live family morning television (eg the BBC) they could cancel another live broadcast and transmit an extra children's show. Advertisers could have periods with reduced advertising. Nudity on a premium rate telephone show could result in a period of increased modesty. Biting a live snake to death could result in suspension of a popular talent show. Rigged phone in votes or changed rules could result in a period without phone in content.

Paragraph 3.6, Making a Complaint

This section might benefit from examples of complaints that would not be considered, and ones that would be unlikely to succeed.

Paragraph 3.6 makes no mention of advertising minutage, an important and substantial area

of future workload.

Paragraph 3.7 Making A Complaint

Not all broadcasters contact details are on the Ofcom website and it is not clear that they are they as contact points for complaints. Ofcom's website could provide prominent links to this information on the Complaints page.

Complaints General

Where there is a delay of more than a few days between a broadcast and the complaints Ofcom should query the delay and be entitled to disregard it.

Ofcom should disregard all complaints from people who have not seen/heard an offending programme first hand, or who did so in response to a campaign, eg people who knowingly sought out material they expected would offend them.