

Annex 1

Procedures for the consideration and adjudication of Fairness & Privacy complaints



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Introduction

- 1.1 This document outlines the Procedures for Ofcom's consideration and adjudication of Fairness and Privacy complaints in relation to programmes¹ broadcast on television and radio and broadcasters'² compliance with Ofcom's "fairness code" under section 107 of the Broadcasting Act 1996 (as amended)³ ("the 1996 Act") see the "statutory framework" below. These Procedures are effective from 1 June 2011.⁴
- 1.2 If Ofcom considers that it is necessary to depart from these Procedures in any material respect in a particular case for reasons of fairness and/or in order for Ofcom properly to consider a complaint or carry out an investigation, it shall write to the parties concerned in advance setting out the nature/extent of its departure, its reasons for doing so and seeking the relevant parties' response. (Separate procedures apply for investigating breaches of content standards for television and radio, at <http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/standards/>).

Statutory framework

- 1.3 Ofcom has a general duty under section 3 of the Communications Act 2003 ("the 2003 Act") to (among other things) secure the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public (and all other persons) from both unfair treatment in programmes included in such services and unwarranted infringements of privacy resulting from activities carried on for the purposes of such services: section 3(2)(f) of the 2003 Act.⁵ Ofcom has a specific duty under section 107 of the 1996 Act to draw up a code giving guidance as to the principles to be observed and the practices to be followed by broadcasters in connection with the avoidance of unjust or unfair treatment⁶ in programmes and unwarranted infringement of privacy in programmes (or in connection with the obtaining of material included in them). For the purposes of that duty, Ofcom applies the provisions in Sections Seven ("Fairness") and Eight ("Privacy") of the Ofcom Broadcasting Code ("the Broadcasting Code")⁷, and

¹ References to "programmes" in these Procedures include advertisements, teletext, subtitles, and any item included in television and radio services.

² References to "broadcasters" in these Procedures are to any broadcaster licensed and/or regulated by Ofcom.

³ The Broadcasting Act 1996 was amended by the Communications Act 2003.

⁴ The Procedures set out in this document, and any related guidance, may be reviewed and amended at any time. Any major revision will be the subject of prior consultation.

⁵ By virtue of section 3(4)(g) of the 2003 Act, Ofcom must also have regard to the need to secure that the application of standards in relation to the inclusion of offensive and harmful material is in the manner which best guarantees an appropriate level of freedom of expression.

⁶ Unjust or unfair treatment is defined by section 130 of the 1996 Act as including treatment which is unjust or unfair because of the way in which material included in a programme has been selected or arranged.

⁷ <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/>

broadcasters are required by the terms of their licence conditions to observe the provisions of the Broadcasting Code in the provision of their services and in relation to programmes included in their services.

- 1.4 Under section 110 of the 1996 Act (and subject to the other provisions of Part 5 of the 1996 Act), Ofcom also has a specific duty to consider and adjudicate on complaints which relate to unjust or unfair treatment in programmes or to unwarranted infringements of privacy in programmes (or in connection with the obtaining of material included in them). (These are collectively referred to below as “Fairness and/or Privacy complaints”). Sections 111 to 130 of the 1996 Act provide for certain statutory criteria which must be satisfied before Ofcom is entitled to proceed to consider Fairness and/or Privacy complaints, in addition to certain procedures to be followed by Ofcom, complainants and broadcasters.
- 1.5 However, in exceptional circumstances, where Ofcom considers it necessary in order to fulfil its general duty (under section 3(2)(f) of the 2003 Act) to secure the application of standards that provide adequate protection to members of the public (and all other persons) from unfair treatment in programmes and unwarranted infringements of privacy, Ofcom may consider fairness or privacy issues in the absence of a complaint from “the person affected” (see paragraph 1.6 and the “Entertainment Decision” text box below). In those exceptional circumstances, Ofcom would set out in advance the procedures that it intends to follow and allow any relevant parties to respond accordingly.⁸ The procedures would be similar to these but adapted as appropriate to ensure that they are fair in the particular circumstances.

Procedures

Making a complaint: who may make a complaint

- 1.6 Fairness and/or Privacy complaints may be made by an individual or by a body of persons (whether incorporated or not). However, Ofcom is normally under a duty not to entertain such a complaint unless it is made by “the person affected” or by a person authorised by him/her to make the complaint on their behalf: for further details on who can make a complaint, see the “Entertainment Decisions” text box below.
- 1.7 In the interests of timely resolution, Ofcom considers that complainants should follow the broadcaster’s own complaints procedure before making a complaint to Ofcom. The contact details of all radio and television broadcasters can be found on Ofcom’s website at <http://licensing.ofcom.org.uk/tv-broadcast-licences/current-licensees/> and <http://licensing.ofcom.org.uk/radio-broadcast-licensing/>. If a complainant is not satisfied with the broadcaster’s response to their complaint, the complaint can be submitted to Ofcom. However, complaints can also be made directly to Ofcom in the first instance: see paragraphs 1.10 to 1.13 for the time limits on making a complaint.

Form of complaint & information to be provided

- 1.8 Fairness and/or Privacy complaints must be submitted to Ofcom in writing. Ofcom will normally only consider such complaints if they are submitted through the completion of Ofcom’s Fairness and Privacy Complaint form. (To access this complaint form, go to Ofcom’s website at

⁸ As Ofcom does, for example, in relation to complaints made to the Election Committee.

<http://www.ofcom.org.uk/complain/progs/specific/?itemid=353159> or contact: Ofcom, Riverside House, 2a Southwark Bridge Road, London SE1 9HA, Tel No. 0300 123 3333 or 020 7981 3040).

1.9 All complaints should include:

- the name/title of the programme complained about;
- the date and time of the programme;
- the channel on which it was broadcast;
- the standing of the complainant, (i.e. whether the complainant is “the person affected” or authorised by “the person affected” to make the complaint for them: see the “Entertainment Decision” text box below);
- the nature of the complaint and (where possible) the particular parts of the programme complained about;
- the complainant’s full contact details (including email address where appropriate);
- whether (and, if so, when) the complainant has submitted a complaint to the relevant broadcaster (and details of it); and
- any supporting material/evidence which the complainant considers relevant to the substance of the complaint and/or their standing to make it.

It is very important that the complainant provides as many of these details as possible when making a complaint. Failure to provide these details may prevent Ofcom from identifying the programme within a reasonable time and otherwise delay or prevent Ofcom being able to consider the complaint.

Time limits on making a complaint

- 1.10 Ofcom may refuse to entertain a Fairness and/or Privacy complaint if it appears not to have been made with a reasonable time after the last occasion when the relevant programme was broadcast: section 111(5) of the 1996 Act. Accordingly, complainants should submit their complaint to Ofcom within 20 working days after broadcast of the relevant programme. Ordinarily, Ofcom will not accept a complaint which is submitted after this deadline.
- 1.11 Where a complaint is submitted later than 20 working days after broadcast, complainants should explain why the complaint was not submitted earlier. Ofcom will then weigh up all relevant factors (including the complainant’s explanation for the delay in submitting the complaint) and decide whether or not it is appropriate for it to consider the complaint despite the delay in its submission.
- 1.12 Where a complainant has previously complained directly to the broadcaster, the complainant should wait to see if he/she is satisfied with the broadcaster’s response (in accordance with the broadcaster’s own complaints procedures) before referring it

to Ofcom.⁹ If not, the complainant should refer his/her complaint to Ofcom (with the broadcaster's response) as soon as possible, and in any event within 20 working days of the final response or determination by the relevant broadcaster under its procedures. If the complainant has not received a response to or determination of his/her complaint from the broadcaster, the complainant should submit it to Ofcom within 20 working days of the time by which he/she could reasonably have expected a response or determination by the broadcaster under its procedures.

- 1.13 Where a complainant submits a complaint simultaneously to the broadcaster and to Ofcom, Ofcom will not normally proceed to consider the complaint until the broadcaster has first had an opportunity to resolve the complaint itself under its procedures. In such a case, the complainant should inform Ofcom when he/she has received the broadcaster's response or determination, and confirm whether he/she wishes proceed with his/her complaint. (Time will start to run from the date of the broadcaster's response/determination as set out in paragraph 1.12 above).
- 1.14 In cases where a complaint is made under a broadcaster's own complaints procedures, Ofcom will expect the broadcaster to retain the relevant recordings, and any related material, for the periods of days that are required by statute¹⁰ but running from the date on which the broadcaster may reasonably expect the complainant to have received the broadcaster's final determination.

Assessing whether to entertain a complaint

- 1.15 On receiving a complaint Ofcom will forward a copy of the complaint to the broadcaster and ask it to provide a recording of the programme within five working days.¹¹ At this stage, it is not appropriate for broadcasters to provide written responses on the substance of the complaint.
- 1.16 If Ofcom considers that it requires further information from the complainant at this stage (for example, about their standing to make a complaint on their own or some other person's behalf, or about the substance of their complaint), it will write to the complainant requesting such information and will also provide it to the broadcaster.
- 1.17 Ofcom will then decide whether or not to entertain the complaint. This decision is called the "Entertainment Decision".

⁹ Broadcasters should be aware that they are required to ensure that Ofcom's functions in relation to Fairness and/or Privacy complaints are brought to the attention of the public. (These include functions which enable complainants to ask Ofcom to consider complaints where they are dissatisfied with the broadcaster's consideration of the complaint. Ofcom considers that, amongst other things, broadcasters should make clear to complainants the time limits that apply for pursuing complaints with Ofcom).

¹⁰ The statutory requirements, derived from section 117 of the 1996 Act, and section 334 of the 2003 Act, are as follows. Recordings of radio programmes must be kept by broadcasters for 42 days after the broadcast. Recordings of television programmes must be kept for 60 days except in the case of BBC1, BBC2, ITV1, Channel 4, Channel 5 and S4C in which case recordings must be kept for 90 days.

¹¹ It is a condition of all broadcast licences that a licensee must make and then retain a recording of all its programmes for a fixed period of days from broadcast (see time periods in footnote immediately above and paragraph 1.14 above), and at Ofcom's request must produce such recordings "forthwith".

- 1.18 Ofcom aims to assess and decide whether to entertain a complaint within 25 working days of receipt of the complaint and any further information requested from the complainant (as set out in paragraph 1.16).

Entertainment Decisions

As explained above, Fairness and/or Privacy complaints are complaints about unjust or unfair treatment in programmes, or about unwarranted infringements of privacy in programmes (or in connection with the obtaining of material included in them).

These complaints may be made by an individual or by a body of persons (whether incorporated or not). However, Ofcom shall not entertain such a complaint unless it is made by “the person affected” or by a person authorised by “the person affected” to make the complaint for him/her: section 111(1) of the 1996 Act.¹²

“The Person Affected” is a statutory term defined by section 130 of 1996 Act.

In relation to a Fairness complaint, i.e. a complaint of unjust or unfair treatment in a programme, “the person affected” means:

- a participant in the programme in question who was the subject of that treatment (“Participant” means a person who appeared, or whose voice was heard, in the programme); or
- a person who, whether such a participant or not, had a direct interest in the subject-matter of that treatment.

In relation to a Privacy complaint, i.e. a complaint of unwarranted infringement of privacy in a programme(s), or in connection with the obtaining of material included in a programme(s), “the person affected” means a person whose privacy was infringed.

The 1996 Act then sets out a number of other statutory criteria that must be satisfied before Ofcom may entertain or proceed to consider a Fairness and/or Privacy complaint. In particular, Ofcom is under a duty not to entertain a complaint where it appears to Ofcom that:

- the matter complained of is the subject of proceedings in a court of law in the UK; or
- the matter complained of is a matter in respect of which the

¹² This is subject to exceptions. Where “the person affected” is an individual who has died, a Fairness and/or Privacy complaint may be made by his personal representative or by a member of the family of the person affected, or by some other person or body closely connected with him (whether as his employer, or as a body of which he was at his death a member, or in any other way). Equally, where “the person affected” is an individual who is for any reason both unable to make a complaint him/herself and unable to authorise another person to do so for him/her, a fairness complaint may be made by a member of the family of “the person affected”, or by some other person or body closely connected with him (whether as his employer, or as a body of which he is a member, or in any other way): see section 111(2)&(3). (This will be appropriate if “the person affected” is unable to give his/her authority, because, for example, he/she is under the age of 16).

complainant or the person affected has a remedy by way of proceedings in a court of law in the UK, and that in the particular circumstances it is not appropriate for Ofcom to consider a complaint about it; or

- the complaint is frivolous; or
- for any other reason it is inappropriate for Ofcom to entertain or proceed with consideration of the complaint.

(If any of the above matters become apparent to Ofcom in the course of a considering a complaint, it may cease to proceed with consideration of the complaint).

- 1.19 The complainant and the broadcaster will be provided with a copy of Ofcom's Entertainment Decision indicating whether (and to what extent) Ofcom will be proceeding with consideration of the complaint¹³: see paragraph 1.21 below.
- 1.20 Not all complaints (or all parts of complaints) received will fall into Ofcom's Fairness and Privacy remit. If Ofcom considers that the complaint raises other (non Fairness and Privacy-related) matters which are within Ofcom's wider remit, the complaint will be passed to an appropriate section of Ofcom for assessment. (For example, if a complaint is made in relation to general content standards under section 319 of the 2003 Act, then Ofcom's "Procedures for investigating breaches of content standards for television and radio" will apply. These are available on Ofcom's website at: <http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/standards/>).

Representations

- 1.21 If a complaint is entertained by Ofcom, then at the same time that it provides the Entertainment Decision to the relevant broadcaster (under paragraph 1.19 above), Ofcom will also ask the broadcaster to provide a statement in response to the complaint within 20 working days. In doing so, Ofcom will set out the provisions of the Broadcasting Code which it considers are relevant and applicable to its subsequent consideration of the complaint, and seek representations from the broadcaster on that basis. Ofcom may also request a transcript of the relevant programme to be provided by the broadcaster, together with any other relevant material or documentation.
- 1.22 On receipt of the broadcaster's statement/representations, Ofcom will provide a copy of it to the complainant.

Preparation of Ofcom's preliminary view

- 1.23 Ofcom will then prepare its "preliminary view" on the substance of the complaint. This preliminary view is only provisional and may be subject to change in the light of subsequent representations/material provided by the complainant and the broadcaster.¹⁴ see paragraphs 1.24 and 1.25 below. Members of Ofcom's Content

¹³ Details of all programmes being investigated (i.e. if a Fairness and/or Privacy complaint has been entertained), will be published on Ofcom's website at

<http://stakeholders.ofcom.org.uk/enforcement/audience-complaints/>

¹⁴ including any relevant third party (see "Representations from third parties" text box below).

Board will be provided with all preliminary views before they are provided to the complainant and broadcaster.¹⁵ The preliminary view will contain:

- a summary of the entertained complaint (or the particular parts of the complaint which have been entertained) as set out in the relevant Entertainment Decision;
- a summary of the material parts of the programme(s) to which the complaint relates;
- the particular provisions of the Broadcasting Code which Ofcom considers are relevant and applicable to the entertained complaint;
- a summary of the broadcaster's statement of representations in response; and
- Ofcom's preliminary assessment of whether any breaches of those provisions have occurred and the reasons for that assessment.

1.24 Ofcom will then provide the preliminary view to the complainant and request representations within 10 working days. After receiving any representations from the complainant Ofcom will provide both the preliminary view and those representations to the broadcaster, requesting its representations within 10 working days. In some circumstances, Ofcom may decide that it is appropriate, fair and necessary to hold a hearing before reaching a decision (see "Hearings" box below). Where it does so, Ofcom will prepare its preliminary view after it has held the hearing.

1.25 Once Ofcom has received and considered the broadcaster's and complainant's representations (or any representations from relevant third parties (see relevant text below) on its preliminary view, it will then make its final Adjudication. If Ofcom considers that it is necessary to obtain further information from either party¹⁶ to ensure that it can fairly and properly adjudicate on the complaint (for example, if there is a significant dispute of fact between the complainant and the broadcaster), Ofcom may seek such further information.

1.26 Ofcom aims to complete the consideration and adjudication of Fairness and Privacy complaints within 90 working days of the complaint being entertained.

Hearings

Fairness and/or Privacy complaints made to Ofcom shall be considered either at a hearing, or if Ofcom thinks fit, without a hearing. Ofcom will normally hold an oral hearing if it considers that a one is necessary to ensure that it can fairly and properly adjudicate on the complaint. For example, if there is a significant dispute of fact between the complainant and the broadcaster. Ofcom will normally give at least 15 working days' notice of the hearing date to the parties. Hearings may take place in England, Northern Ireland, Scotland, or Wales, as appropriate.

¹⁵ The Content Board is a committee of the main Board established by the Communications Act 2003. It includes members with extensive broadcasting experience. See <http://www.ofcom.org.uk/about/how-ofcom-is-run/content-board/functions-and-role/>

¹⁶ or a relevant third party.

Hearings are held in private and each of the following persons shall be given an opportunity to attend and to make oral representations:

- (a) the complainant;
- (b) the relevant broadcaster;
- (c) the programme-maker responsible for the making of the programme complained about (if different from the relevant broadcaster); and
- (d) any other person who Ofcom considers might be able to assist at the hearing.

Each of the parties may bring to the hearing any other person (normally up to a maximum of three other people). Their names, connection to the case and a description of the role they intend to play at the hearing, should be given to Ofcom at least five working days before the hearing. Ofcom must also be informed if any person to attend a hearing is under the age of 16.

The procedure at the hearing will be at the discretion of Ofcom. Ofcom will write to the parties in advance of any hearing to set out what the procedure will be.¹⁷

Late submission of material/representations

- 1.27 Parties should only submit representations and relevant material/evidence to Ofcom when requested to do so at the appropriate stages of these Procedures. Ofcom will not normally accept submission of any additional representations or material once it has proceeded to draft its final Adjudication (see paragraph 1.29 below).
- 1.28 Whether such material is admitted will be at Ofcom's discretion. If unsolicited material is admitted it will be provided to the other party who will then be given an opportunity to comment on it.

Representations from third parties

Ofcom recognises that there may be persons/bodies who may be directly affected by the outcome of Ofcom's consideration and adjudication of a complaint and who may have interests independent of the relevant broadcaster of that programme (for example, presenters, producers and/or independent programme-makers). Wherever possible, broadcasters should seek to take account of and include the representations of such persons/bodies in their submissions in response to a complaint and confirm to Ofcom that they have done so.

However, such persons/bodies may make representations on their own behalf direct to Ofcom in respect of a complaint which Ofcom proceeds to investigate. In such a case, persons should seek to make representations to

¹⁷ Together with details of who from Ofcom, including any Non-Executive members of Ofcom's Content Board, will attend.

Ofcom as early in an investigation of a complaint as possible, setting out if/to what extent their representations differ from those of the broadcaster. Ofcom will as appropriate take those representations into account and include those persons/bodies in its decision-making process under these Procedures.

Publication of Adjudication

- 1.29 Once Ofcom has gathered and considered the relevant evidence and (written/oral) representations submitted by the parties, Ofcom will conclude its consideration of a complaint by drafting a final Adjudication setting out whether the complaint is upheld, not upheld, or upheld in part.¹⁸
- 1.30 Before publishing its final Adjudication, Ofcom will provide the broadcaster and complainant with a strictly embargoed draft copy of the Adjudication for the purposes of correcting factual inaccuracies only. The broadcaster and the complainant will then be given 48 hours in which to respond with such corrections, following which Ofcom will publish the Adjudication.
- 1.31 Adjudications will be published in Ofcom's Broadcast Bulletin on its website at <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/>
- 1.32 If a complaint is upheld or partly upheld, Ofcom may direct the broadcaster to broadcast a summary of its Adjudication. Ofcom will normally make such a direction where there has been a breach of the Fairness and/or Privacy sections of the Ofcom Broadcasting Code which has resulted in a complainant's legitimate interests being seriously damaged and requires publication over and above publication in the Ofcom Broadcast Bulletin.¹⁹ Any decision to direct will reflect Ofcom's duties to be proportionate, consistent and targeted only at cases on which, in Ofcom's view, action is merited.

Non Disclosure

- 1.33 Subject to any relevant obligations, it is an essential part of the integrity of Ofcom's processes and its ability to adjudicate fairly that the parties concerned, both complainant and broadcaster, abide by all Ofcom's published rules and procedures. These require, for example, that parties to a complaint should not disclose any correspondence, documents and other material concerning the complaint²⁰ during the course of the investigation (see text box below). This requirement of non disclosure does not limit what Ofcom can publish in its decision at the end of the investigation.

¹⁸ Members of Ofcom's Content Board will be provided with all Adjudications before they are provided to the complainant and broadcaster.

¹⁹ But Ofcom may also make such a direction in other cases in which it considers publication over and above publication in the Ofcom Broadcast Bulletin is appropriate.

²⁰ Ofcom is obliged to meet various statutory obligations relating to the disclosure of information (for example, under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004). Such obligations do not allow the use of exemptions by Ofcom in an arbitrary fashion. Information provided to Ofcom as part of a complaint may need to be disclosed by Ofcom in order to meet such obligations and nothing in these Procedures can prevent Ofcom from doing so.

Non Disclosure

Parties (complainants, broadcasters, Ofcom and any relevant third parties) may, unless otherwise indicated, make public the fact that a complaint has been made or that Ofcom is investigating a case. They may also use information which is already in the public domain.

However, all parties are subject to the requirement of non disclosure in relation to all other material submitted and communications/correspondence entered into in relation to that complaint or case.²¹ Prior to Ofcom's final decision, the identity of a complainant may only be disclosed by the broadcaster or a third party to those with a direct interest in the matter complained of. Moreover, once a complaint has been entertained, no party should take any steps which could – whether intentionally or not – compromise, or risk compromising, a fair decision on the matter by Ofcom or otherwise constitute, in Ofcom's opinion, an abuse of process.

Failure to follow these requirements may result in Ofcom ceasing to consider the party's representations.

Time limits

- 1.34 Complainants and broadcasters should keep to the time limits specified in these Procedures. However, Ofcom may consider it appropriate (in the interests of fairness and/or properly to consider a complaint) to amend or adapt the time limits set out in these Procedures in a particular case. Any complainant or broadcaster seeking an extension of a time limit should explain in writing to Ofcom why it believes it is appropriate. Ofcom will then decide if an extension is appropriate and inform the other party/parties accordingly.

Sanctions

- 1.35 In the light of its adjudication of a Fairness and/or Privacy complaint, Ofcom may consider that it justifies consideration of a statutory sanction against the broadcaster. If so, then Ofcom will make that clear in its Adjudication and the "Procedures for the consideration of statutory sanctions in breaches of broadcast licences" will then apply. These are available on Ofcom's website at <http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/procedures-statutory-sanctions/>

²¹ Ofcom may withhold material it believes to be confidential, market sensitive or legally privileged or that it is under some other legal obligation to protect from disclosure. In such cases, the broadcaster will be notified that relevant material has been withheld and the reasons why.