

Review of procedures for handling broadcasting complaints, investigations and sanctions

Please accept this response as comments I wish Ofcom to consider as part of the above stated consultation procedure.

My comments are laid out as per your consultation document and equal weight should be given to all parts.

Move to an “issues based” model for ensuring compliance with relevant requirement

I am somewhat surprised that you do not already operate such a compliance model with regard to complaints. It has been the model that many enforcement organisations operate and have operated for many years, except the Police who deal with far more serious crime, and is modelled by the Better Regulation Commission.

If the complaint is not ‘In remit’, does not quote what part of the appropriate code they feel is ‘in breach’ or state why they are offended or what harm they have suffered then the complaint should be dismissed.

If the complaint does address any of the above references then it should be investigated but only that part of the broadcast complained of.

It should not be for Ofcom to scrutinise the whole broadcast searching for breach, this is not only against Better Regulation principals but is not cost effective and places additional burdens,

both time and financial, on both Ofcom and the broadcaster. It is also against your stated principles for enforcement.

- operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required.
- strive to ensure our interventions will be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome.
- always seek the least intrusive regulatory mechanisms to achieve our policy objectives.

So by your own admission that you now want to move to an 'issue based' model for complaint investigation indicates that Ofcom themselves were 'In Breach' of their own enforcement principles.

By dealing only with the issue raised by the complainant this will make the investigation more focused, align with Better Regulation principles and assist in reducing the overall burden on Ofcom and the broadcasters.

All complaints need to be acknowledged with a reference so that they are traceable and the complainant should be advised of the outcome, not all complainants have access to the internet to view your Broadcast Bulletins.

If the nature of the complaint has been addressed against a specific part of the Broadcasting Code or BCAP Code then the complainant should be advised fully of this reason and not just a bland 'In Breach' or 'Not in Breach' response. Again this is Better Regulation principle and failure could lead to a complaint to the **Parliamentary and Health Service Ombudsman** who is the appropriate body to investigate complaints against your administrative actions.

What you should consider is to reduce the time complainants have to record a complaint with Ofcom. It seems preposterous that if a broadcast has allegedly caused offense or harm then a

complainant has 20 working days to record that, just how offended were they.

This should be reduced to 7 working days which would give the complaint more credibility. This would also minimise complainants jumping onto the frenzy caused by newspapers and other media over shows which they do not agree with when the complainant hasn't actually seen the broadcast.

A perfect example would be the recent burlesque dance arrangement on the X Factor highlighted in the press that resulted in over 1500 complaints to Ofcom.

Technology has advanced in leaps and bounds to enable this action to be completed in 7 days without prejudicing people's right to complain.

Anonymous complaints should not be investigated at all and complainant's details **must** always be available to a broadcaster so that they can respond direct to the complainant. This will also minimise complaints that could be regarded as vexatious.

This should also be the case when Ofcom receives just a single complaint about a programme that was likely viewed by thousands if not millions of people. It should never be the case that the minority should decide on the taste and decency or harm and offence of the majority.

Introduce a Preliminary View

Whilst this approach is welcomed as it would be a start to reducing the overall time that Ofcom take to reach a decision, Ofcom contradicts itself in the explanation for this approach.

A preliminary view finding indicates that you have already got concerns over the broadcast and that an 'In Breach' decision has already been made by the investigating officer, otherwise this stage of the investigation is never reached.

To respond to such an accusation the full details of the complaint (s) must be provided to the broadcaster to enable them to know the full extent of the complainants concerns.

By summarising such complaints, detail of the complaint may be taken out of context which may prevent the broadcaster from correctly addressing the complainants concerns and Ofcom's findings.

Ofcom need to ensure that sufficient detail is provided to broadcasters when summarising complaints and that this procedure is consistent throughout the Ofcom to minimise broadcasters being prejudiced.

Breach of a licence condition is objective due to the wording of the conditions but breach of the Broadcasting Code and guidance is very much subjective and open to wide interpretation. This can lead to poor decision making which ultimately impacts on the response a broadcaster provides back to Ofcom in defence of that particular broadcast.

Ofcom's interpretation of harm and offence goes beyond that laid down in stated case law and under the Human Rights Act which is very tight on what is regarded as offensive material likely to cause harm.

This has already been decided upon by Mr Justice Hooper in May 2000 when the BBFC accepted the High Court ruling that the risk of harm to minors when viewing nudity and consensual sex '**was insignificant**'.

It is not for Ofcom to introduce a stricter standard than that already decided upon by due process and through a formal judicial process.

Remove the Internal Review Mechanism

By removing this element of internal review of a decision will be to the detriment of the broadcaster and the complainant alike.

Decisions are to be taken by the Ofcom Executive, an employee; this can be without reference to any additional advice or guidance provided by another employee who may have a different opinion on the decision reached. Like I have said previously Ofcom's Broadcasting Code and the BCAP code along with the guidance issued are very subjective and open to a wide interpretation.

This can lead to confusion on behalf of the broadcaster with regard to interpretation and can also lead to decisions being made by Ofcom that are disparate.

Whilst I believe that the current internal review mechanism of the Broadcasting Review Committee is unwieldy especially with regard to the timescales permitted, 50 working days is excessive, an internal review process is essential.

This should be done by a manager who has access to all documents, including the reason for the initial decision, and should be concluded within 10 working days.

This will ensure that some balance and checks have been made against the initial decision. Without this how can Ofcom demonstrate that the process is transparent and fair.

The internal review mechanism is not just for broadcasters as you have stated in the consultation, it is also for complainants if they believe a wrong decision has been made by Ofcom. Therefore by removing this process complainants will also be prejudiced.

Remove the Broadcasting Sanctions Committee

Any sanction imposed by Ofcom must be proportionate to the offence.

By removing the committee from the process will lead to more extreme penalties being delivered. By extreme I do not mean excessive, but disproportional over a range of breaches and against different broadcasters.

I believe that Ofcom currently target smaller broadcasters for undue and excessive enforcement due to their inability to afford proper recourse through the process of judicial review. Larger and more mainstream broadcasters who have ready access to legal opinion and the resource to challenge Ofcom tend to be left alone even though these broadcasters generate the majority of complaints.

The current process is not complex it's just that Ofcom have allowed the process to become unwieldy with regard to timescales which is to the detriment of broadcasters.

It cannot be seen as balanced enforcement when the person making the 'In Breach' decision, is also the person who decides upon the penalty to be imposed. Without recourse to any independent tribunal.

This is clearly outside the recommendations of the Better Regulation Commission and the Macrory Review which was carried out on behalf of the Business, Innovation and Skills Department, a co-sponsor of Ofcom. Ofcom's procedures should align with these recommendations to ensure best practice.

Taken from the Macrory report that Ofcom was party to.

**I recommend that with regards to Monetary Administrative Penalties: Government should, consider introducing schemes for Fixed and Variable Monetary Administrative Penalties, for regulators and enforcers of regulations that are compliant with the Hampton and Macrory Principles and characteristics. This can include national regulators as well as local regulatory partners;
Appeals concerning the imposition of an administrative penalty be heard by a Regulatory Tribunal, rather than the criminal courts;**

The current timescales for Ofcom to reach a decision following a complaint are excessive in the extreme, over 90 working days, and detrimental to the business of a broadcaster.

Ofcom needs to reduce this period of time at all stages beginning with the time allowed to make a complaint.

It is well documented that Ofcom are under enormous pressure from central government to reduce its costs and improve the efficiency of its operation whilst reducing the burden of regulatory action on its stakeholders.

Any changes to the investigatory procedures must not only be advantageous to Ofcom but must also be fair and proportionate to stakeholders.

Whilst this consultation is clearly driven by monetary savings it must not water down the right of a licence holder to be given a fair and just hearing, that is both consistent in its finding and proportionate in its sanctions whilst complying with both English and European law.

Removal of internal procedures only benefits Ofcom.

Broadcasters, especially smaller broadcasters, who do not have the financial resources to challenge Ofcom will not benefit from these changes. Even broadcasters with the resource to challenge Ofcom should not be forced down this route.

The revocation of a licence is a very draconian step to take and Ofcom should look at the introduction of an additional enforcement step of licence suspension. This would be similar to the provisions within the Licensing Act 2003 where a licence can be suspended up to a maximum of three months.

Ofcom needs to ensure that any administrative penalties imposed are in a way transparent and proportionate.