



CHANNEL4 RESPONSE TO OFCOM CONSULTATION ON THE REVIEW OF PROCEDURES FOR HANDLING BROADCASTING COMPLAINTS, INVESTIGATIONS AND SANCTIONS - 2011

CHANNEL 4

Channel 4 is a public service broadcaster licensed by Ofcom to broadcast, currently, the main Channel 4 core service, three free-to-air digital channels (E4, primarily an entertainment channel, More4, primarily a factual and documentary channel) and Film4 a film channel. All four channels are regulated, post broadcast, by Ofcom under its Broadcasting Code ("the Ofcom Code").

The Channel 4 main service itself, E4, More4 and Film4 operate under broadly the same regulatory constraints. Channel 4 is obliged under its licence for all these services to ensure compliance with the Ofcom Code and severe sanctions may be imposed by Ofcom for a serious or persistent breach of the Code. In the case of the three digital channels, their licences could be shortened or revoked and in the case of Channel 4 and the other three channels fines of up to 5% of qualifying revenue (i.e. all advertising revenue and sponsorship revenue) can be imposed. All UK broadcasters, including the BBC (with some limited exceptions), ITV, Five and digital channels fall under Ofcom's jurisdiction.

The Channel 4 Television Corporation is a public service broadcaster and a statutory corporation with a special and unique statutory remit contained in Section 265(3) of the Communications Act 2003 which provides:

"The public service remit for Channel 4 is the provision of a broad range of high quality and diverse programming which, in particular-

- (a) demonstrates innovation, experiment and creativity in the form and content of programmes;*
- (b) appeals to the tastes and interests of a culturally diverse society;*
- (c) makes a significant contribution to meeting the need for the licensed public service channels to include programmes of an educational nature and other programmes of educative value; and*
- (d) exhibits a distinctive character."*

Section 22 of the Digital Economy Act 2010 extended Channel 4's public functions as follows:

"22 Functions of C4C in relation to media content

(1) Before section 199 of the Communications Act 2003 insert -

"198A C4C's functions in relation to media content

(1) C4C must participate in –

- (a) the making of a broad range of relevant media content of high quality that, taken as a whole, appeals to the tastes and interests of a culturally diverse society,*
- (b) the making of high quality films intended to be shown to the general public at the cinema in the United Kingdom, and*
- (c) the broadcasting and distribution of such content and films.*

(2) C4C must, in particular, participate in –

- (a) the making of relevant media content that consists of news and current affairs,*
- (b) the making of relevant media content that appeals to the tastes and interests of older children and young adults,*
- (c) the broadcasting or distribution by means of electronic communications networks of feature films that reflect cultural activity in the United Kingdom (including third party films), and*
- (d) the broadcasting or distribution of relevant media content by means of a range of different types of electronic communications networks.*

(3) In performing their duties under subsections (1) and (2) C4C must –

- (a) promote measures intended to secure that people are well informed and motivated to participate in society in a variety of ways, and*
- (b) contribute towards the fulfilment of the public service objectives (as defined in section 264A)*

(4) In performing their duties under subsections (1) to (3) C4C must -

- (a) support the development of people with creative talent, in particular –*
 - (i) people at the beginning of their careers in relevant media content or films, and*
 - (ii) people involved in the making of innovative content and films,*

(b) support and stimulate well-informed debate on a wide range of issues, including by providing access to information and views from around the world and by challenging established views,

(c) promote alternative views and new perspectives, and

(d) provide access to material that is intended to inspire people to make changes in their lives.

(5) In performing those duties C4C must have regard to the desirability of –

(a) working with cultural organisations,

(b) encouraging innovation in the means by which relevant media content is broadcast or distributed, and

(c) promoting access to and awareness of services provided in digital form.

(6) In this section -

“participate in” includes invest in or otherwise procure;

“relevant media content” means material, other than advertisements, which is included in any of the following services that are available to members of the public in all or part of the United Kingdom –

(a) television programme services, additional television services or digital additional television services,

(b) on-demand programme services, or

(c) other services provided by means of the internet where there is a person who exercises editorial control over the material included in the service;”

Channel 4 is a publisher broadcaster without an in-house production base, and our programmes are produced by a range of independent production companies. The independent production companies which make our programmes are obliged to comply with the law and with the Ofcom Code. However, Channel 4 cannot, and would not wish to, subrogate our responsibilities for compliance with the Ofcom Code under our licence from Ofcom and in the event that a controversial or contentious programme is commissioned, legal and editorial staff will work closely with the producers to ensure compliance with the law and with the Ofcom Code. In doing so we are mindful of our rights and duties arising out of the Human Rights Act and the European Convention on Human Rights.

AREAS OF PARTICULAR CONCERN

Ofcom consulted on these procedures in 2009. At that time Channel 4 provided a detailed response to the consultation alerting Ofcom to a number of problems with the proposed new procedures. Those concerns were, for the most part, not addressed

by Ofcom. In addition, Ofcom imposed a significant change to the fairness procedures, which was not included in the consultation document. After the publication of the new procedures a number of broadcasters including Channel 4 raised serious concern about the manner in which this change was made without any attempt to consult or notify licensees of this addition. We trust that on this occasion Ofcom will ensure that there is transparency and openness with all licensees. Channel 4 is willing to meet with Ofcom to discuss our concerns and to assist in the development of fair, just, effective and efficient procedures.

Channel 4 is sympathetic to Ofcom's desire to make these procedures as streamlined as possible and is mindful of the need to operate effectively with fewer resources. However, in the drive to create more efficient and effective procedures, Ofcom should not jettison basic requirements of natural justice. Channel 4 is concerned that the proposed changes to these procedures create substantial concerns that they will operate unjustly.

These areas are of particular concern to Channel 4:

- a. The reaching of preliminary views.
- b. The removal of any review stages in the procedures.
- c. The removal of the ability to offer "appropriate resolution" in fairness and privacy cases.
- d. The removal of the Broadcasting Sanctions Committee.
- e. The continued assertion by Ofcom that fairness and privacy cases can be instituted and considered by the regulator in the absence of any complainant.
- f. The continued assertion by Ofcom that the procedures can be departed from in any particular case or category of case.
- g. The removal of any clear time limits which apply to Ofcom's disposal of cases.
- h. The retention of the concept of "directly affected third parties".

With this background we turn to the Consultation. We will make observations and suggestions regarding each of the three sets of procedures for **investigating breaches of broadcast licences, investigating fairness and privacy complaints** and for **the consideration of statutory sanctions in breaches of broadcast licences**.

OFCOM PROCEDURES FOR INVESTIGATING BREACHES OF BROADCAST LICENCES

OVERVIEW AND GENERAL INFORMATION

Paragraph 3.1 - Ofcom asserts that if it considers that *“it would be more fair and appropriate to follow a different procedure in any particular case or category of cases, [they] will explain [their] reasons for departing from these procedures.”*

In order for procedures to be fair they must be clear and predictable. It is unreasonable for a regulator to tailor procedure for particular cases or categories of cases in an ad hoc manner. Both broadcasters and complainants are entitled to know in advance how alleged breaches of broadcast licences will be investigated and adjudicated upon. The creation of ad hoc procedures creates the risk of procedural incompetence and unfairness. The use of such procedures where the regulator has removed any internal review mechanisms could lead to a need for broadcasters and complainants to rely upon judicial review to ensure reasonableness and fairness.

As Ofcom are aware similar statements in the previous consultation in 2009 affording Ofcom an unfettered discretion to alter procedures were challenged by broadcasters during that consultation. If Ofcom wishes to provide for situations where it is not going to follow the notified procedures it should identify such situations now and provide clear criteria for determining when the publicised procedures would not be followed, in the interests of fairness to both licensees and complainants.

PROCEDURES

Making a complaint

Paragraph 3.10 - The previous procedures stated that *“ Ofcom will not usually consider anonymous complaints”*. We consider that this clear statement should be reinstated. It is a fundamental principle of justice that a person knows who their accuser is. As Ofcom are well aware powerful interests, such as foreign governments, have in the past tried to hide their complaints behind a veil of anonymity. In order that broadcasters can properly defend themselves and their rights to freedom of expression it will be necessary to know who alleges that a breach has occurred. In that way the credibility and motives for the allegation can be properly assessed.

In addition broadcasters are often the subject of litigation threats. The use of a complaint to Ofcom is a common tactic employed by claimant lawyers to try and obtain information regarding a production without court sanction or without compliance with the appropriate pre-action protocols. It is essential that broadcasters are aware of the source of a complaint in order to defend productions properly and in order to alert Ofcom to the existence of any litigation or threats of litigation.

Of course with many complaints it will be clear that the complaints come from what could be described as ordinary viewers. In those situations there would be no need for a broadcaster to know the details of each and every complainant. However where a vested interest, pressure group, foreign government, large corporation, programme

contributor or similar has initiated the complaint or requested Ofcom to investigate it is appropriate that the complainant is not permitted to be anonymous.

Paragraph 3.11 - It is not clear what time limit will run when a complainant complains to Ofcom and a broadcaster simultaneously.

Assessing and Investigating

Paragraph 3.14 - Channel 4 previously made detailed responses to Ofcom's previous consultation with regard to "directly affected third parties". Rather than repeating those comments again please consider them adopted and incorporated into this response. (Annexure 1 to this response contains our 2009 consultation response. Our comments on this point can be found at Paragraphs 6 to 14 inclusive.)

Paragraph 3.15 - Previously Ofcom carried out an "*initial assessment*" and where it considered that a complaint raised "*potential issues*" it proceeded to investigate and request a written response from the broadcaster. Details of the complaint and the relevant provisions under which Ofcom was considering the complaint were provided to the broadcaster.

Ofcom propose replacing this fair and transparent procedure with a procedure which only allows a broadcaster to make representations once the complaint has been pre-judged. This is neither fair nor just.

There is a substantial difference between the existing procedures where Ofcom assess that there may be a case to answer ("*that a complaint does raise potential issues*") and a system where the regulator has already formed a preliminary view before receiving any representations from the licensee.

In effect Ofcom will be making a decision which requires to be either challenged or accepted. It is not fairly investigating a complaint and adjudicating having heard both complaint and response. This "preliminary view" will be formed without context, without reference to the editorial choices that have been made and without any knowledge of the steps that have been taken by the broadcaster to comply with the Ofcom Code and relevant guidance. Such a procedure is unreasonable, unjust and unfair.

Separately it is noteworthy that in these proposed new procedures all reference to Ofcom carrying out its work within specified timescales are removed. Therefore the regulator may form a preliminary view over a length of time, issue it, and having done so may wish to finalise that view swiftly. However the broadcaster may have been handicapped by any delay in reaching that preliminary view. Memories may have faded and production staff may have moved on to other projects. Therefore it is desirable that Ofcom retains timescales for its own actions otherwise both the complainant and licensee are left in limbo, sometimes for several months, not knowing how the matter is progressing. In the case of programmes, where the licensee, believes they have a robust defence to a complaint and they wish to repeat the programme before it becomes out of date, such time limits are important and without them there is no onus on Ofcom to respond within reasonable time frames.

We also note that at **Paragraph 3.21** Ofcom advise that time limits for broadcasters and complainants may be "*shortened, in appropriate circumstances at Ofcom's*

discretion". As we have previously stated it is unreasonable for a regulator to tailor procedure for particular cases or categories of cases in an ad hoc manner. Both broadcasters and complainants are entitled to know in advance how alleged breaches of broadcast licences will be investigated and adjudicated upon. They are entitled to know in advance the time limits for their dealings with the regulator. It is neither fair nor reasonable for the regulator to retain the ability to shorten periods for response without defining in advance the criteria for such limitation.

Paragraphs 3.18 and 3.19 - we note that Ofcom propose to reach and publish a decision having received the broadcaster's representations on the preliminary view. Ofcom propose to remove the existing procedural provision which allows a broadcaster to review a Decision and comment on factual inaccuracies and typographical errors.

We consider the retention of this provision essential to ensure that such errors are corrected before the wider public and press are misinformed. A failure to correct such errors may have consequences for third parties especially members of the public and also professionals involved in the production of programmes. In addition the publication of inaccurate material could have consequences for Ofcom.

More importantly, Ofcom proposes removing any ability to request a review of the Decision. Previously reviews could be requested on the basis that the Decision was materially flawed, for example that it was obviously wrong in substance; contained a significant mistake in fact or was reached following a failure in process.

Ofcom therefore proposes a procedure where it forms a preliminary view, receives representations and then issues a final decision. It proposes no review of this procedure. In the event that any steps taken by the regulator are wrong in law or fact the only remedy open to broadcasters will be to seek a judicial review of the decision or decisions made by the regulator. That will include cases where even the most fundamental and easily corrected errors have been made. This seems to us a disproportionate and costly way to deal with matters that can often be straight forward.

Ofcom's proposal to remove all appellate procedures within these procedures is contrary to natural justice and a remarkable proposal for a regulator to make. For example, other regulators such as the Advertising Standards Authority, PhonePayPlus, the Information Commissioner, Financial Services Authority, and the Press Complaints Commission all have such procedures. A system without such appellate procedures would be an unreasonable departure from the previous system of regulation and separate Ofcom's procedures from other comparable regulators and standards of regulatory practice. Ofcom has not set out any clear basis for their decision to arbitrarily remove the appellate process and we are concerned that under pressure to save costs an unfair procedure is being proposed.

These proposals therefore will lead to a more time consuming, expensive, ineffective complaint resolution system for the regulator as Court procedure becomes an inevitability rather than rarity. We urge Ofcom to reconsider the proposed altering of the existing system in this unjust way.

Non Disclosure

Paragraph 3.20

Whilst there is a reference to the limitations of Ofcom's duty of confidentiality under this paragraph (by way of *Footnote 12*) to its perceived obligations under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004, the limited nature of Ofcom's duty of confidentiality compared to that of licensees should be made clearer in the procedures themselves. Furthermore, it is not accepted that the Environmental Information Regulations 2004 would limit Ofcom's duty of confidentiality in these circumstances. Those Regulations do not apply where Ofcom acts in a quasi-judicial capacity. In addition for both the Environmental Regulations 2004 and for the Freedom of Information Act 2000, relevant exemptions under that legislation and obligations under the Communications Act 2003 (S.393) oblige the regulator to consult with the licensee and apply relevant exemptions where appropriate before any disclosure

OFCOM PROCEDURES FOR THE INVESTIGATION OF FAIRNESS & PRIVACY COMPLAINTS

OVERVIEW AND GENERAL INFORMATION

Paragraph 4.1 – As with the proposed new procedures for investigating breaches of broadcast licences Ofcom asserts in these proposed new procedures that if it considers that if *“it would be more fair and appropriate to follow a different procedure in any particular case or category of cases, [they] will explain [their] reasons for departing from these procedures.”*

Again, in order for procedures to be fair they must be clear and predictable. It is unreasonable for a regulator to tailor procedure for particular cases or categories of cases in an ad hoc manner. Both broadcasters and complainants are entitled to know in advance how alleged breaches of broadcast licences will be investigated and adjudicated upon. The creation of ad hoc procedures creates the risk of procedural incompetence and unfairness. The use of such procedures where the regulator has removed any internal review mechanisms could lead to a need for broadcasters and complainants to rely upon judicial review to ensure reasonableness and fairness.

As Ofcom are aware similar statements in the previous consultation in 2009 affording Ofcom an unfettered discretion to alter procedures were challenged by broadcasters during that consultation. If Ofcom wishes to provide for situations where it is not going to follow the notified procedures it should identify such situations now and provide criteria for determining when the publicised procedures would not be followed.

In addition we note that in *footnote 15* to this paragraph Ofcom advise that *“these procedures and any relevant guidance, may be reviewed and amended at any time. Any major revision will be the subject of prior consultation.”*

Given the experience that we outline in our discussion of Paragraph 4.4 below, we propose that Ofcom undertake to consult on any review and amendment to the procedures. The imposition of new procedures without consultation is not a reasonable action for a regulator to take where both Article 6 and Article 10 ECHR rights are at stake.

Paragraph 4.3 - In the Consultation on these procedures in 2009 we advised Ofcom at length that the use of the term *“directly affected”* has no statutory basis. We do not propose to repeat those submissions here but they are adopted and incorporated here again. (Annexure 1 to this response contains our 2009 consultation response. Our comments on this point can be found at Paragraphs 28 to 32 inclusive.) For all the reasons we set out in 2009 we would again ask that Ofcom accurately reflects the terms of the statute in these procedures and avoids the term *“directly affected”* which confuses the statutory concept of the *“person affected”*.

Paragraph 4.4 - This amendment was introduced into the Procedures without consultation or prior notification to licensees after the last consultation in 2009 :

“In exceptional circumstances, where Ofcom considers it necessary in order to fulfil Ofcom’s duty to protect members of the public from unfair treatment and unwarranted infringements of privacy, Ofcom may consider fairness or privacy

issues in the absence of a complaint from the affected party.”(the Amendment’)

THE 2009 CONSULTATION

Ofcom published its review of procedures for handling broadcasting complaints, cases and sanctions on 11th June 2009 with a closing date for responses of 21st August 2009. Channel 4, the BBC, ITV and Five all submitted individual responses to this previous Consultation.

That Consultation did not include any reference or discussion of the proposed Amendment and for this reason our views were not sought or provided in our or any broadcaster’s response. The Procedures were published on 16th December 2009 shortly before the Christmas break (along with a revised Code, sanctions procedure and standards procedure). No attempt was made by Ofcom to draw the attention of any broadcaster to such a significant amendment to the fairness and privacy procedures.

These circumstances explain our concern with the terms of *Footnote 15* in the present Consultation.

OFCOM’S DUTY

Ofcom is required to have regard to a number of factors set out in sections 3 (2), 3(3) and 3(4) of the Act in the exercise of its duties and, of particular relevance to this and the previous Consultation are the following:

- ‘adequate protection’ for unfair treatment or an unwarranted infringement of privacy;
- the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed;
- that this achieved in a manner that best guarantees an appropriate level of freedom of expression.

The Procedures must also be within the ambit and consistent with the following:

- the Act
- the Broadcasting Act 1990 and 1996 (as amended by the Act)
- Television without Frontiers Directive 89/EEC, as amended by 97/36/EC (updated by the AVMS directive 2007/65/EC)
- the Human Rights Act 1998.

Parliament struck a careful balance between fairness and privacy investigations (complainant initiated investigations) and standards investigations (which can be commenced by a complaint from the public at large or by Ofcom). This is clearly set down in statute and has operated effectively for both broadcasters and complainants for many years. While there is an overlap between fairness/privacy and standards issues, the two types of complaint have different functions and Ofcom

acknowledges this in the Ross/Brand adjudication. Paragraph 10.12 of the Ross/Brand Adjudication states that:

“Finally, the Committee took care when considering the seriousness of the breaches of Rules 2.1 and 2.3 in this case, to distinguish between protection of individual members of the public from unwarranted infringements of their privacy, and protection of the public in general from the harm and offence which may arise from the infringements of the privacy of others (e.g. through humiliation, distress and/or violation of human dignity)”

Standards complaints are concerned with the protection of the public in general from harm and offence. Fairness and privacy complaints are intended for the protection of members of the public from an unwarranted infringement of their privacy or unfairness to them.

There can be some cases where there is an overlap between these two distinct areas and where consideration of unfairness or a breach of privacy in a standards arena may be warranted. For example a standards complaint may arise where public offence is caused by the belief that an individual has been treated unfairly or their privacy has been infringed. Such a complaint centres on the *perceived* harm caused to that individual and the public offence can manifest itself by the perceived humiliation or distress of that individual. However this is distinguishable from a fairness/privacy complaint brought by that individual as this centres on the *actual* harm suffered which can only be measured in real terms by that individual.

This does not however warrant an extension of Ofcom’s powers in the fairness/privacy arena to consider complaints without a complaint from the person affected as defined in the Broadcasting Act. Ofcom cannot substitute itself in place of that individual as it is in no better position to assess the actual harm caused in the absence of the complainant.

We understand that it is Ofcom’s view that it has the power to introduce this amendment on the basis of its general duty under section 3(2) (f) of the Act. We understand that it is Ofcom’s view that this general duty is entirely separate and distinct from its specific statutory obligations under sections 111 and 115 of the Broadcasting Act 1996 (as amended) (‘BA 1996’). We believe that this interpretation of the Act and the extension of Ofcom’s powers in this way are both misconceived and wrong in law.

In our view section 3 of the Act sets out Ofcom’s general duty as the standard to be met as a starting point only. The mechanism by which this duty is met, clearly set out under sections 111 and 115 of the BA 1996, flows from section 3. Ofcom’s published procedures are the practical embodiment of that duty and set out in a transparent, accountable and proportionate manner the way in which the general duty under section 3(2) (f) is to be achieved. This is supported by Ofcom’s own procedures which state that:

“Ofcom has a specific duty under section 107 of the Broadcasting Act 1996 (as amended) (“the 1996 Act”) to draw up a code of practice with respect to fairness and privacy. This code sets out the principles to be observed and practices to be followed by broadcasters to ensure the avoidance of unjust or unfair treatment of people appearing in programmes and unwarranted infringement of privacy of people appearing in (or in connection with the

obtaining of material included in) programmes. Under section 110 of the 1996 Act, Ofcom must consider and, where appropriate, adjudicate on fairness and privacy complaints. Sections 111 to 130 of the 1996 Act provide further detail of certain of the procedures to be followed by Ofcom, complainants and broadcasters in the consideration of complaints relating to fairness and privacy.” [Paragraph 4. 2 of the proposed new Procedures]

The fairness and privacy complaints procedure as drawn up under section 107 have always operated under Ofcom (and formerly under the ITC and BSC) on the strict understanding that complaints must be made by the person affected by the programme or by someone else authorised to make a complaint on behalf of the person affected. This principle has always been widely understood and applied by broadcasters and complainants alike.

THE ABSENCE OF A COMPLAINANT

The Broadcasting Act 1996 (as amended) provides that a complaint of an unwarranted infringement of privacy or unfairness “shall not be entertained” by Ofcom unless it is made by the person affected. This is a mandatory requirement derived from sections 110(1) (b); 111(1) and 130(1).

These proposed Procedures repeat the purported extension of Ofcom’ powers to allow it to consider and adjudicate on privacy and fairness complaints in the absence of a complaint by the person affected. As we have stated above fairness and privacy complaints are intended for the protection of the individual members of the public from unwarranted infringements of their privacy or unfairness to them.

There is often good reason why an individual or company may decide that they do not want to pursue a formal complaint through Ofcom. They may consider that their complaint would not succeed; that it would attract unnecessary public attention; it would not be in their financial interests to pursue; it would place their conduct under scrutiny; or simply they do not want to go through a protracted complaints procedure. However in all cases it is the right of the individual not Ofcom to decide whether they wish to proceed with a formal complaint. These proposed Procedures continue a purported extension of Ofcom’s powers to give them the power to exercise a right granted by statute to individual complainants only. This is in our view misapplication of section 3(4) of the Act and beyond Ofcom’s powers.

In any event this purported extension of Ofcom’s powers is unnecessary as well as ultra vires. Ofcom already have the power to investigate issues of harm and offence in respect of rules 2.1 and 2.3 of the Code (whether initiated by a member of the public or by Ofcom) under its standards duty under section 3(1) of the Act. This addresses the viewers perceived harm (humiliation, distress and violation of human dignity) caused by the treatment of the affected person. Equally the affected person who suffers the actual harm in respect of an infringement of their privacy or unfair treatment of can pursue a complaint under sections 7 and 8 of the Code. Ofcom has provided no evidence of a pressing social need to extend its powers to initiate a fairness/privacy complaint on behalf of an affected person when they have chosen not to pursue this right. This is in our view outside Ofcom’s powers.

COMPLIANCE WITH OFCOM'S OTHER DUTIES

Ofcom's duty to protect under Section 3(2) (f) of the Act is not an absolute duty to protect. It is in fact a qualified duty to provide 'adequate protection'. Ofcom's duty under Section 3(2) (f) is therefore more than adequately met by the provisions of Sections 110(1) (b); 111(1) and 130(1) of the 1996 Act and the application of those provisions under the pre-2009 procedural rules. Ofcom has provided no evidence to demonstrate that 'adequate protection' has not been provided to members of the public from unfair treatment or unwarranted infringements of privacy under the old procedural rules.

Ofcom is also required to have regard to the manner that best guarantees an appropriate level of freedom of expression (section 3(4) (g) of the Act) in performing its duties. We do not consider that Ofcom has complied with this provision on the basis that we do not believe that the power set out in Paragraph 4.4 is either prescribed by law nor is it necessary or proportionate. Prior to 2009 both the public and broadcasters had been fully aware of the parameters within which an affected person could complain (or not as the case may be). This provided both complainants and broadcasters with a fair and transparent system of procedural rules while at the same time provided the correct balancing of the competing Article 8 and 10 rights. In contrast the change which was imposed without consultation creates uncertainty for both licensees and the public at large. Paragraph 4.4 does not define what constitutes 'exceptional circumstances' and as such provides Ofcom with a completely unfettered discretion in this area. We would welcome Ofcom's views on what it considers constitute 'exceptional circumstances'?

In our view this Paragraph also contravenes Ofcom's own guiding principles under section 3(3) of the Act, which requires its regulatory activities to be:

"transparent, accountable, proportionate, consistent and targeted at cases in which action is needed"

We will not repeat our concerns about the lack of transparency and proportionality which we have set out above. However we would question how Ofcom believes this Paragraph is consistent and targeted at cases in which action is needed? Furthermore we are not aware of any cases under Ofcom (or the legacy regulators) where an affected person has declined to make a formal complaint and the regulator has felt the need to initiate an investigation of its own volition. If Ofcom has identified cases where such action is necessary we would be grateful if these could be disclosed to us. In the absence of any such evidence that action is needed we do not believe that the power set out in Paragraph 4.4 is justified.

PROCEDURAL DIFFICULTIES

Paragraph 4.4 also gives rise to a number of procedural problems. If the Paragraph is employed Ofcom would in effect be the complainant, the assessor of the complaint and would ultimately be responsible for the imposition of a sanction. The proposed Procedures currently provide no mechanism by which the different roles played by Ofcom are kept separate in the interests of fairness and transparency, and to ensure that broadcasters are given a fair hearing of their case. At present we consider the procedures are flawed as regards the application of the amendment and in breach of Article 6 (the right to a fair trial).

1. How and who at Ofcom will exercise the judgement that 'exceptional circumstances' are warranted?
2. How will the basis for this assessment be communicated to the licensee and person affected?
3. If the person affected objects to Ofcom taking this forward how will this impact on Ofcom's decision?
4. Will Ofcom still be required to make this assessment within the current 20 working day deadline after transmission of the programme?
5. How would broadcasters be able to seek a review of a decision to entertain such a self-generated complaint?
6. If the person affected objects to Ofcom taking the matter forward, how would the third party representations procedures operate?
7. How would the 'appropriate resolution' procedure work (if, as we argue, it is reinstated) where the person affected has not complained and Ofcom is in effect the complainant?
8. If a hearing is convened Ofcom will in effect be the complainant, investigator, prosecutor and judge. Therefore how will Ofcom ensure that its procedures are transparent, accountable and fair in the absence of the person affected?
9. How will Ofcom ensure that individuals involved in its initial decision to proceed, the entertainment decision and the adjudication stage are kept separate and transparent?
10. How will the sanctions procedure work again in terms of fairness and transparency, particularly any sanctions hearing where the affected person is not attending?
11. How will the penalty guidelines be applied in the absence of any involvement by the person affected?
12. Finally what steps does Ofcom propose to take if the person affected disagrees with the finding or later decides (long after the time limits have expired) that they now want to contribute to the investigation?

We have previously raised all these matters with Ofcom but have yet to receive any specific response to the questions raised. We would therefore ask once again for full

and proper consideration to be given to the legitimate concerns we and other licencees have raised. Given all of the above we propose that Ofcom remove the provision set out in Paragraph 4.4.

Paragraph 4.7 - It is not clear what time limit will run when a complainant complains to Ofcom and a broadcaster simultaneously.

Paragraph 4.10 - Ofcom proposes removing any ability to request a review of the Entertainment Decision. Previously reviews could be requested on the basis that the Entertainment Decision was materially flawed, for example that it was obviously wrong in substance; contained a significant mistake in fact or was reached following a failure in process.

Ofcom proposes no review of its decisions to entertain complaints. Therefore in the event that any steps taken by the regulator are wrong in law or fact the only remedy open to broadcasters will be to seek a judicial review of the decision or decisions made by the regulator. That will include cases where even the most fundamental and easily corrected errors have been made.

These proposals therefore will lead to a more time consuming , expensive , ineffective complaint resolution system for the regulator as Court procedure becomes an inevitability rather than rarity. We urge Ofcom to reconsider the proposed altering of the existing system in this unjust way.

Paragraph 4.12 - We note that Ofcom propose shortening the period for a response to a complaint within 15 working days. The previous position was 20 days which we consider appropriate. The reality of television production is that many production staff are freelance and the collation of material and information to provide a full response can take some time.

Paragraph 4.14 - Ofcom state that having received the broadcaster's response they will "*normally*" prepare a "*preliminary view*." There is no indication when this will not take place. If Ofcom can envisage such circumstances it would be best if these were delineated now.

Paragraph 4.15 - This proposed use of a preliminary view is not as deficient as the scheme proposed for standards complaints as it allows a broadcaster to respond to a complaint before the view is formed. However the proposed procedure leaves it open for both parties to the complaint to make statements to Ofcom that are unseen and unchallenged by the other. We suggest that the scheme follows the usual procedural rule where the party complained about is always entitled to respond to all allegations or complaints made before the matter is adjudicated on. Otherwise a fair hearing will not take place.

We also note the removal of the previous procedure for the conduct of hearings. We criticised these procedures at the last consultation for the failure to allow the complained against to have the final statement. We argued that this made the procedures unfair. The absence of any published procedure is a retrograde step and much worse than what was contained in the 2009 procedures. In order to fulfil its obligations to provide a fair hearing Ofcom should publish in these Procedures detail as to how any oral hearing would be conducted. A failure to do so is manifestly unjust.

Paragraph 4.17 - Channel 4 previously made detailed responses to Ofcom's previous consultation with regard to "directly affected third parties". Rather than repeating those comments again please consider them adopted and incorporated into this response. (Annexure 1 to this response contains our 2009 consultation response. Our comments on this point can be found at Paragraph 27 which refers back to Paragraphs 6 to 14 inclusive.)

Appropriate Resolution - Ofcom have removed from these Procedures Paragraphs 18 and 19 in the Procedures issued in 2009. These continued the existing system of "appropriate resolution" which allowed for resolution of complaints by, for example; the publication of clarificatory statements, apologies or corrections in writing, editing or undertakings not to repeat broadcasts. It was widely understood and accepted by all parties that such a system can reduce the number of complaints that need to proceed to a full regulatory procedure. This must be in the interest of all parties to continue this desirable procedure.

It is always desirable to allow for mediation and other forms of dispute resolution rather than insisting that parties maintain their involvement in a complaints process. The previous system has permitted broadcasters to rectify errors swiftly and effectively in the best interests of a quick and effective remedy for the complainant. We request that the mechanism for appropriate resolution is restored to these procedures.

Paragraph 4.18 - Ofcom states that it may decide to cease consideration of a fairness and privacy complaint in the following circumstances:

- *where the matter(s) complained of are the subject of legal proceedings in the UK or would be more appropriately resolved by legal proceedings in the UK;*
- *where the complaint is frivolous; and,*
- *where it is inappropriate to proceed with consideration of the complaint for any other reason."*

However when referring to legal proceedings the 1996 Act states:

"(a) that the matter complained of is the subject of proceedings in a court of law in the United Kingdom, or

(b) that the matter complained of is a matter in respect of which the complainant or, in the case of a fairness complaint, the person affected has a remedy by way of proceedings in a court of law in the United Kingdom, and that in the particular circumstances it is not appropriate for Ofcom to consider a complaint about it,"

We consider that the revised procedures should reflect this wording. It continues to be of concern to all broadcasters who are threatened with legal proceedings by complainants or their agents, who then proceed to employ Ofcom procedure as a way of conducting pre-action 'fishing exercises' for evidential or other material concerning the broadcast to support their claim. We are strongly of the view that where threats of litigation have been received it is inappropriate for Ofcom to

entertain a complaint. Such threats rely on there being a legal remedy and the statute says that where there is such a remedy by way of court proceedings then a complaint should not be entertained.

Removal of Provisional Decision - Ofcom propose to remove the existing procedural provision which allows a broadcaster to review a Provisional Decision and comment on factual inaccuracies and typographical errors.

We consider the retention of this provision essential to ensure that such errors are corrected before the wider public and press are misinformed. A failure to correct such errors may have consequences for third parties especially members of the public and also professionals involved in the production of programmes, as well as for Ofcom.

Requesting a review - Ofcom proposes removing any ability to request a review of the final Decision it reaches. Previously reviews could be requested on the basis that the Decision was materially flawed, for example that it was obviously wrong in substance; contained a significant mistake in fact or was reached following a failure in process.

Ofcom proposes no review of its decisions (including Entertainment Decisions and final Decisions). Therefore in the event that any steps taken by the regulator are wrong in law or fact, the only remedy open to broadcasters will be to seek a judicial review of the decision or decisions made by the regulator. That will include cases where the even the most fundamental and easily corrected errors have been made.

Ofcom's proposal to remove all appellate procedures within these procedures is contrary to natural justice and a remarkable proposal for a regulator to make. For example, other regulators such as the Advertising Standards Authority, PhonePayPlus, the Information Commissioner, Financial Services Authority, and the Press Complaints Commission all have such procedures. A system without such appellate procedures would be an unreasonable departure from the previous system of regulation and separate Ofcom's procedures from other comparable regulators and standards of regulatory practice.

These proposals therefore will lead to a more time consuming, expensive, ineffective complaint resolution system for the regulator as Court procedure becomes an inevitability rather than rarity. As we have done elsewhere in this response we urge Ofcom to reconsider the proposed altering of the existing system in this unjust way.

NON DISCLOSURE

Paragraph 4.22

Whilst there is a reference to the limitations of Ofcom's duty of confidentiality under this paragraph (by way of *Footnote 22*) to its perceived obligations under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004, the limited nature of Ofcom's duty of confidentiality compared to that of licensees should be made clearer in the procedures themselves. Furthermore, it is not accepted that the Environmental Information Regulations 2004 would limit Ofcom's duty of confidentiality in these circumstances. Those Regulations do not apply where Ofcom acts in a quasi-judicial capacity. In addition for both the Environmental Regulations 2004 and for the Freedom of Information Act 2000,

relevant exemptions under that legislation and obligations under the Communications Act 2003 (S.393) oblige the regulator to consult with the licensee and apply relevant exemptions where appropriate before any disclosure.

Paragraph 4.23 – Time Limits

As with standards complaints Ofcom advise that time limits for broadcasters and complainants may be "*shortened, in appropriate circumstances at Ofcom's discretion*". (This proposal is repeated at Paragraph 5.21 in the proposed sanctions procedures.) As we have previously stated it is unreasonable for a regulator to tailor procedure for particular cases or categories of cases in an ad hoc manner. Both broadcasters and complainants are entitled to know in advance how alleged breaches of broadcast licences will be investigated and adjudicated upon. They are entitled to know in advance the time limits for their dealings with the regulator. It is neither fair nor reasonable for the regulator to retain the ability to shorten periods for response without defining in advance the criteria for such limitation.

OFCOM PROCEDURES FOR THE CONSIDERATION OF STATUTORY SANCTIONS IN BREACHES OF BROADCAST LICENCES

ABOLITION OF BROADCASTING SANCTIONS COMMITTEE

Channel 4 notes the proposed abolition of the Broadcasting Sanctions Committee. The imposition of a sanction against a broadcaster is a serious matter. It is unsatisfactory that the identities of those who would adjudicate on sanctions are not to be disclosed in advance. It is also unsatisfactory that the potential pool of those who could adjudicate is spread so wide. In our view it would be much better if Ofcom could identify who it is that would deal with these serious matters. An entirely ad hoc system of delegated responsibility cannot ensure a consistent and fair approach. Identification of who will adjudicate would be consistent with Ofcom's duties to be transparent, accountable and consistent.

One of the merits of a Sanctions Committee was that it could incorporate different skills including lay representation from the Ofcom Content Board. A balance of skills could be achieved. It is not clear how the proposed new system would ensure that sanctions decisions were being taken by appropriately qualified individuals and that a level field was maintained from decision to decision.

ABSENCE OF REVIEW

As was the case in 2009 there is no appeal or review from the sanctions decisions of Ofcom proposed in these draft Procedures. Therefore where a licensee had a concern regarding the imposition of or the level of the sanction it would only have recourse to judicial review..

This is unsatisfactory and unjust. We would therefore propose an alternative approach:

The sanction decision is taken by Ofcom with a right of appeal to a separately constituted panel consisting of members of Ofcom who have not had any involvement in the previous procedure.

Taking this approach provides a separate appellate step in process and would likely prevent unnecessary and costly litigation.

BROADCASTER REPRESENTATIONS

In **Paragraphs 5.10, 5.11 and 5.12** it is unclear as to whether or not the type of representation is at the broadcaster or Ofcom's discretion. We would propose that the broadcaster can decide if their interests are best served by representing their position in writing or orally or by both oral and written representations.

HEARINGS

As the proposal in **Paragraph 5.13** is that the final decision to sanction may take place without the broadcaster being present we would suggest that Ofcom provide a

statement of reasons alongside the sanction decision when it is imposed. Such a statement could provide the basis for any appeal procedure as we propose or for judicial review if no appellate procedure exists.

PUBLICATION OF A SANCTIONS DECISION

The proposal is that the Ofcom's decision will "*normally*" be sent to a broadcaster 24 hours before publication with the level of any financial penalty omitted. Notification of the financial penalty will then take place immediately before publication of the decision.

Again we note the use of the word "*normally*". When does Ofcom envisage that such prior notification would not take place?

We appreciate Ofcom's desire to prevent information leaking prior to publication. However the publication of substantial financial penalties necessitates a reporting procedure to senior executives and potentially the board of a broadcaster and the preparation of a reasoned response to press inquiries which may be hostile. The lack of a sufficient period of advance notice therefore causes broadcasters serious difficulties..

As a compromise position we propose that a full embargoed copy of the decision including financial penalty is provided to a broadcaster's in house legal team or their external solicitors on a confidential solicitor to solicitor basis. That way the broadcaster's legal function can prepare their advice to be tendered to the broadcaster when the embargo is lifted shortly prior to full publication.

NON DISCLOSURE

Paragraph 5.19

Whilst there is a reference to the limitations of Ofcom's duty of confidentiality under this paragraph (by way of *Footnote 34*) to its perceived obligations under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004, the limited nature of Ofcom's duty of confidentiality compared to that of licensees should be made clearer in the procedures themselves. Furthermore, it is not accepted that the Environmental Information Regulations 2004 would limit Ofcom's duty of confidentiality in these circumstances. Those Regulations do not apply where Ofcom acts in a quasi-judicial capacity. In addition for both the Environmental Regulations 2004 and for the Freedom of Information Act 2000, relevant exemptions under that legislation and obligations under the Communications Act 2003 (S.393) oblige the regulator to consult with the licensee and apply relevant exemptions where appropriate before any disclosure.

CONCLUSION

As we stated at the outset of these detailed comments Channel 4 are willing to meet with Ofcom to discuss these concerns and to assist in the development of fair, just, effective and efficient procedures.

Channel 4 Television
11th February 2011