

**CHANNEL 4 RESPONSE TO OFCOM'S  
CONSULTATION ON PROCEDURES FOR HANDLING  
CONTENT STANDARDS AND LICENSING  
INVESTIGATIONS AND SANCTIONS 2017**



## **Channel 4**

Channel 4 is a publicly-owned, commercially-funded public service broadcaster, with a statutory remit to be innovative, experimental and distinctive. Channel 4 was set up as a publisher-broadcaster, commissioning all of its content from the independent production sector rather than from an in-house base. Our not-for-profit model means that we work to maximise investment into remit, and in particular, high-quality, original UK content. In addition to the main Channel 4 service, Channel 4's portfolio includes E4, More4, Film4 and 4Music, as well as an ever-growing range of online activities that includes All4 as well as standalone digital projects.

Channel 4 welcomes the opportunity to respond to this Consultation.

We will make our comments referring to the paragraph numbering used in the Annexes to the Consultation:

### **Proposed Procedures for investigating breaches of content standards for television and radio. (Annex 4)**

1. **A4.4** We note that if Ofcom considers it necessary to depart from the Procedures it will write to the broadcaster in advance setting out the nature/extent of the departure, and its reasons for doing so. This is not a new provision and broadcasters have raised concerns about it at previous consultations in 2009 and 2011.

We consider it should also be incumbent upon Ofcom to set out at the same time the procedure and timescale that is then being proposed so that the broadcaster (and any other relevant party) can assess whether or not the departure from the procedures is warranted and/or will affect the right to a fair hearing.

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 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 consultations in 2009 and 2011 affording Ofcom an unfettered discretion to alter procedures were challenged by broadcasters during those consultations. 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.

2. **A4.9** We note that Ofcom may launch investigations on its own initiative as well as investigate complaints. We consider that if such investigations are launched by Ofcom at its own initiative

that the genesis of such a self-generated investigation is set out for the broadcaster so it can understand how it was decided that such an investigation was appropriate.

3. **A4.23** We note that at the same time as requesting a copy of the relevant programme Ofcom may also ask for any other background material or evidence Ofcom considers may be relevant to Ofcom's initial assessment of the complaint but not normally request written representations from the broadcaster at this stage. We consider that it should be made explicit that Ofcom will provide the broadcaster with detail of the complainer and complaint at the time of the request for "material or evidence". Our experience is that complaints to Ofcom can be employed as stalking horses for litigation, complaints to the Information Commissioner's Office, and for public relations campaigns. It may be that there are discussions that have to take place between broadcaster and Ofcom before evidence can be provided and the context of the request is needed. It may also be necessary for a broadcaster to provide accompanying written explanation regarding the material Ofcom seeks in order that any important context may be understood.
4. **A4.27** We do not understand why it is desirable that Ofcom would proceed to issue a Preliminary View without having afforded the broadcaster an opportunity to make representations. Even in situations where Ofcom consider that a breach of the Code is a matter of objective fact it does not follow that a broadcaster would take the same view and natural justice requires that representations are allowed before the first instance decision of a Preliminary View is reached. This is especially so where Ofcom say "there may also be other specific cases where the matters in issue, on the facts, mean this approach is appropriate." It is unclear what "other specific cases" would be and we suggest that the broadcaster should always be asked to consider if written representations should be made.
5. **A4.35** It is not clear to us how this process can amount to a proper hearing if the panel of Ofcom's Content Board members ("the Panel") and the senior member of Ofcom's executive have not been privy to the material in the investigation.

As we understand it what is being proposed is that someone will consider the programme, the complaint, and any relevant material, issue a Preliminary View and then consider the representations in response to the Preliminary View. They will then draft a Decision.

That draft Decision will then be given to the Panel who have not seen the material and they then provide an opinion to a senior member of Ofcom's executive who has had no prior involvement and who then reaches a final decision.

It is unclear how this process affords a fair hearing. It is unclear how the Panel can decide to alter the Decision drafted by the person who investigates and who has drafted the Preliminary view. It is unclear how the ultimate decision maker can reach a fair decision. This process seems to run the risks of arbitrary decision making made on bases that have not been canvassed with the broadcaster.

We have previously discussed with Ofcom during Consultations the need for an adequate appellate process. These proposals do not provide that. We suggest that Ofcom review this proposal.

6. **A4.36** Previously embargoed decisions have been provided to a broadcaster with two days' notice. We see no reason why this should be reduced to one working day before publication. A decision may need to be discussed internally with editorial, legal, press and executive teams

especially if a breach of the Code is being recorded. A sufficient period is required to fairly digest a decision and prepare for publication and two days seems a reasonable period.

### **Proposed Procedures for the consideration and adjudication of Fairness and Privacy Complaints (Annex 5)**

7. **A5.3** We note that if Ofcom considers it necessary to depart from the Procedures it will write to the broadcaster in advance setting out the nature/extent of the departure, and its reasons for doing so. This is not a new provision but we consider it should also be incumbent upon Ofcom to set out at the same time the procedure and timescale that is then being proposed so that the broadcaster (and any other relevant party) can assess whether or not the departure from the procedures is warranted and/or will affect the right to a fair hearing. We have expanded on this in our discussion of A4.4 above.
8. **A5.7** Considering fairness or privacy issues in the absence of a complaint from the person affected.

This amendment was introduced into the Procedures without consultation or prior notification to licensees after a consultation in 2009.

### **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 Communications Act 2003 ("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)
- The EC Directive 2010/13/EU ("The Audiovisual Media Services Directive").
- 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 proposed procedures which state at A5.5 and A5.6:

*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 treatment<sup>32</sup> 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”)<sup>33</sup>, and 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.*

*A5.6 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.*

The fairness and privacy complaints procedure as drawn up under section 107 had 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 had 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 A5.7 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. A5.7 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 A5.7 and elsewhere in the Procedures in this Consultation is justified.

### Procedural Difficulties

A5.7 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 resolution without a full complaint process work 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 would ask once again for full and proper consideration to be given to the legitimate concerns we and other licensees have raised. Given all of the above we propose that Ofcom remove the provision set out in A5.7.

9. **A5.27** The existing procedures state that "the preliminary view is only provisional and may be subject to change in light of subsequent representations/material provided by the complainant and the broadcaster. We suggest that this clarification is reinstated especially as the Preliminary View is provided to the complainant before the broadcaster sees it.
10. **A5.34** Previously embargoed Adjudications have been provided to a broadcaster with two days' notice. We see no reason why this should be reduced to one working day before publication. An Adjudication may need to be discussed internally with editorial, legal, press and executive teams especially if a breach of the Code is being recorded. A sufficient period is required to fairly digest a decision and prepare for publication and two days seems a reasonable period.



### **Proposed General Procedures for investigating breaches of broadcast licences (Annex 6)**

11. **A6.5** –We have outlined our observations regarding the undesirability of departure from Procedures in our discussion of A4.4 and A5.3 above.
12. **A6.27, A6.29,A6.44 and A6.46** – We are unclear in what circumstances it would not be appropriate to publish details of cases under investigation ,no longer under investigation or cases where braches have been found or not found, or where Decisions have been resolved. We would welcome some more information from Ofcom as to when they consider this non-publication would be necessary. Our inclination would be towards transparency.
13. **A 6.35, 6.42, A6.43** – We make the same observations as we did regarding A4.35 above. The involvement of the Content Board and senior members of Ofcom’s executive may be desirable but these procedures should provide a clear path to decision making with the provision of fair appellate procedures.
14. **A6.45-** Previously embargoed Decisions have been provided to a broadcaster with two days’ notice. We see no reason why this should be reduced to one working day before publication. A Decision may need to be discussed internally with editorial, legal, press and executive teams especially if a breach is being recorded. A sufficient period is required to fairly digest a decision and prepare for publication and two days seems a reasonable period.

### **Proposed Procedures for the consideration of statutory sanctions in breaches of broadcast licences (Annex 7)**

15. **A7.3** We have outlined our observations regarding the undesirability of departure from Procedures in our discussion of A4.4 and A5.3 above.
16. **A7.15 – A7.19** As we similarly discussed regarding A4.35 above we are puzzled by the proposals for the decision making process under these and the other Procedures.

We can see the advantage in having an appellate process for decision making. However the proposed internal steps through Ofcom involving the Content Board and Executive do not achieve this. Ultimately a broadcaster is met with a decision that they cannot appeal to anyone within Ofcom who has not been involved in the initial decision making process.

### **Proposed Procedures for investigating breaches of rules for on-demand programme services (Annex 8)**

17. **A8.3** We have outlined our observations regarding the undesirability of departure from Procedures in our discussion of A4.4 and A5.3 above.
18. **A8.29** – Please see our comments regarding A4.23 above.
19. **A8.41** - As we similarly discussed regarding A4.35 above we are puzzled by the proposals for the decision making process under these and the other Procedures.

20. **A8.42** - A sufficient period is required to fairly digest a decision and prepare for publication and two days seems a reasonable period rather than one.

**Proposed Procedures for the consideration of statutory sanctions arising in the context of on-demand programme services (Annex 9)**

21. **A9.3** We have outlined our observations regarding the undesirability of departure from Procedures in our discussion of A4.4 and A5.3 above.
22. **A9.9** We make the same point as before relating to decision makers. In this set of procedures what is proposed is that the primary decision maker will not have been involved in the investigation or drafting of the Preliminary View. So it will be a separate decision maker who receives submissions regarding the Preliminary View and who finally decides on acquittal or sanction in A9.19 or A9.20 . We consider that it would be a fairer and more effective process to have whoever conducts the investigation and drafting of the Preliminary Review to receive representations on that Preliminary View and then to take an initial decision on whether there has or has not been a breach and to decide upon a sanction. Then it would be better to allow the ODPS provider an appeal against those decisions to the Executive and Content Board personnel who had not been involved before.

**Conclusion**

We thank you for the opportunity to contribute to this consultation. Channel 4 are of course willing to meet with Ofcom to discuss any of the observations we have made and to assist in the development of fair, just, effective and efficient procedures.