

Ofcom Consultation: Procedures for Investigating Breaches of Content Standards

(1) Paragraph A4.38 specifies that Ofcom's Preliminary View, unlike that in respect of other broadcasters as outlined in paragraph 1.25 of existing complaints procedures, will include Ofcom's summary of the broadcaster's initial representations to the regulator. This no doubt enhances the transparency of the process. Paragraph A4.40 then allows the BBC to make further representations based on OFCOM's Preliminary View, following which OFCOM will finalise its decision (paragraph A4.42). However, in contrast to the procedure for Fairness and Privacy complaints (at paragraph A5.31), there is no provision for complainants to have sight of, or to make representations on, the Preliminary View. Complainants are therefore denied the opportunity to comment on the BBC's initial representations to Ofcom, for example by challenging the relevance, materiality, completeness, fairness of selectivity (etc.) of any evidence adduced by the BBC, offering their own additional countervailing or complementary evidence, or challenging the BBC's understanding of the substance of their complaint or the validity of the broadcaster's arguments.

(2) Of course, it should ideally be possible for Ofcom to rely on the BBC to have already provided to complainants, as part of its internal complaints procedure, all evidence and arguments which it considers relevant. In practice, however, an external regulatory process may prompt more serious and formal consideration by the broadcaster. In that case, fresh evidence or arguments could well be presented to Ofcom by the BBC, and reflected in the Preliminary View, which have not been made available to the complainant for comment.

(3) The onus should also be on complainants in their turn, at least as far as is practicable, to marshal all evidence they consider relevant as part of their complaint to Ofcom. Again, in practice, members of the viewing public may not necessarily be aware of, or have ready access to, all relevant evidence, including for example research evidence on controversial issues or previous broadcast content in relation to due impartiality. If such additional evidence is introduced by the BBC in response to the Preliminary View, it would seem essential in the interests of fairness to provide complainants with a right of reply. The overall Ofcom process must ensure that complainants are not disempowered, or placed at a significant disadvantage, in relation to their access to information on which the BBC seeks to rely.

(4) The case for enabling complainants to make representations on the Preliminary View is of course more clear cut in the case of Fairness and Privacy complaints, especially as the 'BBC First' approach does not apply to these. However, providing a right of reply to complainants on other matters, in the light of the BBC's representations as reflected in the Preliminary View, should ensure as far as possible that complainants will accept at the end of the process that their concerns have been fully recognised. It should also mitigate the risk of material evidence not being taken into account by Ofcom, and should thereby result in more robust and transparently defensible final decisions.

(5) Consideration of complainants' responses to the Preliminary View would admittedly increase workloads and extend timescales somewhat. On the other hand, by omitting this stage an imbalance could be created, or could be seen to be created, between the public and the broadcaster in terms of their respective abilities to contribute to a fair outcome. Public perception of the fairness of the process could be impaired if key communications are seen to take place in private between Ofcom and the BBC, and if Ofcom's adjudication process itself appears to lack impartiality at the outset. The likely incidence of FoIA requests and complaints to Ofcom may be greater as a result. In summary, there is a risk of public trust and confidence in Ofcom being forfeited, and the value of Ofcom's role as an independent regulator in the public eye being undermined and indeed becoming a subject of controversy in its own right.