

RESPONSE OF CHANNEL 5 BROADCASTING LTD TO THE REVIEW OF OFCOM'S PROCEDURES FOR HANDLING BROADCASTING COMPLAINTS, INVESTIGATIONS AND SANCTIONS

Channel 5 welcomes the opportunity to respond to this consultation about changes to Ofcom's broadcasting complaints, investigations and sanctions procedures. We recognise the case for streamlining procedures and making them quicker and more efficient and appreciate that Ofcom wishes to ensure high quality decision making while instituting these changes.

However, we have concerns about several aspects of what is being proposed. In particular, we are worried that due process may be sacrificed in the interests of expediting complaints – which could result in greater costs in the longer term, if licensees see their only chance of reviewing Ofcom's decisions is to pursue judicial review proceedings.

In this short response we set out our main concerns with the new procedures Ofcom is proposing. We would welcome the opportunity to discuss these and other concerns in more detail.

The Preliminary View

A major innovation in the new Ofcom procedures is the idea that Ofcom should form a "preliminary view" of potential breaches of its Codes.

We can see the sense in Ofcom introducing a new triage system both to weed out complaints that have no merit and to identify blatant abuses of the Codes. However, for more complicated cases, the idea is fraught with procedural dangers.

We are concerned that Ofcom will come to a view about the likelihood of a breach without considering the full facts and context of the case. We recognise that in some cases the new procedures would allow Ofcom to require further information from a broadcaster than just a recording of the programme. But asking a broadcaster to provide information without informing it of the full nature of the case being investigated does not guarantee that all relevant information will be supplied.

We are further concerned that once Ofcom has arrived at a view (whether it takes proper account of all the facts or not), broadcasters would face an uphill task persuading Ofcom to change its mind. The clear danger is that broadcasters would be put in the position of being assumed guilty until they can prove themselves innocent.

We believe there is a crucial difference between, on the one hand, Ofcom forming a view of what the relevant issues might be in a case and, on the other, coming to a considered view about whether there has been a breach.

In our view, broadcasters should be informed of what is being alleged against them, be able to set out their views on a potential breach and submit evidence in support before Ofcom comes to a view (even a preliminary one). Only when Ofcom has assembled all relevant evidence should it arrive at a considered view. The alternative is that Ofcom ends up playing the role of prosecutor as well as judge and jury in its treatment of licensees.

Appeal Procedures

Channel 5 is deeply concerned at Ofcom's proposal to abolish the review procedure in both licence breach cases and fairness and privacy cases. It is a fundamental tenet of legal and quasi-judicial procedures for there to be a proper procedure through which decisions can be challenged.

Ofcom's existing procedures are already fairly restrictive in specifying the bases on which a review can be entertained. The party seeking review must demonstrate that an Ofcom adjudication is "materially flawed, for example if it is believed that the Decision is: obviously wrong in substance; or contains a significant mistake of fact; or has been reached following a failure of process"¹. We understand that in practice Ofcom has had very few appeals to consider, as most broadcasters either accept Ofcom's initial decision or are unable to provide sufficient grounds for an appeal.

However, in a small number of cases Ofcom's initial decision has been found to be flawed and its decision making has benefited from the existence of an appeal procedure.

Channel 5's most recent experience of an Ofcom appeal procedure concerned the series *Sex: How To Do Everything*, shown on our channel Fiver in early 2009. Following a complaint and investigation, Ofcom decided there had been three separate breaches of the Broadcast Code. Channel 5 submitted a detailed appeal, arguing that in its decision Ofcom had failed to take full account of the context of the programme and had also made some errors of fact. After considering our appeal, Ofcom reversed its original position and decided there had been no breaches of the Code.

We believe that if the proposed procedures had been in place, we would not have been able to challenge the accuracy of Ofcom's decision. The only course of action open to us would have been to seek judicial review of Ofcom's decision – which would have been expensive and time consuming for both parties.

¹ *Procedures for the handling of broadcasting standards or other licence-related cases* (paragraph 30) and *Procedures for the handling of Fairness and Privacy complaints* (paragraph 32)

We believe the existence of an appeal procedure not only allows broadcasters to challenge decisions which they believe are questionable, it also provides a safety valve for Ofcom to look again at difficult or controversial decisions and consider them more fully in light of new evidence and arguments.

Ofcom argues that the two stage procedure it is proposing (preliminary view followed by final decision) obviates the need for a review or appeal mechanism. But a key characteristic of the current system is that the people who undertake reviews (the Broadcast Review Committee) are separate from and independent of the officers who took the original decision. Such separation is a fundamental feature of any appeal procedure.

The new procedures Ofcom is putting forward are likely to mean that under delegated powers the same individual who draws up the preliminary view will also be taking the final decision. We recognise that Ofcom's highly experienced and well qualified staff are well placed to make judgements about complaints and investigations. But if the same officer is drawing up the preliminary view and deciding on the final verdict, not only is there a risk of that individual wishing to see his or her initial view vindicated, that person cannot be judged to be independent in the way that would be understood in any other appeal procedure.

Even if the preliminary view is drawn up by one officer and the final decision taken by another, both belong to the same standards department with the same (direct or ultimate) line manager - which means no-one from outside the team whose job is to take an initial view on all complaints would be taking an independent view. We strongly believe the independence of the appellate body to be essential to any bone fide appeals procedure.

Appropriate Resolution Procedure

Channel 5 disagrees with Ofcom's proposal to do away with the existing "appropriate resolution" procedure for fairness and privacy cases. We believe this proposal is misconceived, not least as it could well lead to an increase in Ofcom's workload.

In our experience many people who complain about a programme on privacy or fairness grounds do not want to go through an entire formal hearing. Rather, they want their grievance to be recognised and some undertaking given regarding the future. So a letter from a broadcaster acknowledging their concerns and possibly agreeing to edit a programme before it is repeated is sufficient to satisfy or at least ameliorate a complainant's concerns.

By removing this procedure, it puts complainants in the position of having to either pursue a fully fledged complaint or let the matter drop; and broadcasters in the position of having either to admit fault or to defend fully their programmes (which can involve considerable resources). Broadcasters would no longer be able to propose a way to meet the complainant's grievance without admitting fault.

Broadcast Review Committee and Broadcast Sanctions Committee

Channel 5 does not agree with the abolition of these bodies.

As we argued above in respect of appeals procedures, we believe it is essential that an independent body hears appeals; an appeals procedure of the sort we believe necessary must be independent of the original decision taker(s).

We also believe that if a case is sufficiently serious for sanctions to be considered, then a committee of appropriate weight and seniority should consider it and be responsible for the decision. Such are the seriousness of some potential sanctions – a fine or revocation of a licence – decisions should not be taken by officers alone or by any individual members, lay or professional.

Response Times

We are concerned that Ofcom is proposing to reduce the time in which broadcasters must respond to fairness and privacy cases from 20 working days to 15 working days. These cases are often the most contentious and difficult to deal with, as a considerable amount of information often needs to be gathered and assessed; this can be compounded if (as often happens) the production team has disbanded since completing the programme. This change seems arbitrary and not in the interests of obtaining a fair and accurate outcome.

Delegated Powers

Channel 5 welcomes Ofcom's clarification as to who is to be responsible for making decisions in all these cases. As we have stated already, Ofcom has experienced and well qualified staff well placed to make judgements about complaints and investigations. However, in order for Ofcom's systems to have credibility we believe it is important for all concerned to know who is taking a decision in a particular case, and therefore for the individual caseworker to be named. We also believe contentious and complicated cases must be considered at the highest level. It may therefore be desirable for a phrase along the lines of "person of sufficient seniority and experience" to be included in the description of those to whom it is appropriate for Ofcom to delegate its functions.

Channel 5 Broadcasting Ltd

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