



# New procedures for handling content standards complaints, investigations and sanctions for BBC programmes

Statement

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# About this document

Under the new BBC Charter and Agreement, the BBC's UK broadcasting and on demand programme services<sup>1</sup> must comply with the Ofcom Broadcasting Code ("the Code"), and Ofcom must secure content standards for the BBC.

When Ofcom receives a complaint, or decides to investigate whether the BBC has breached the Code we will follow our published procedures. Following consultation, this document sets out the final procedures Ofcom will normally follow in relation to the BBC's UK broadcasting and on demand programme services funded by the licence fee when:

- considering and investigating content standards issues under the Code;
- considering and adjudicating Fairness and Privacy complaints under the Code; and
- considering the imposition of sanctions for breaches of the Code.

These procedures will come into effect when Ofcom takes over responsibility for regulating the BBC on the Effective Date contained in the Charter, which is 3 April 2017.

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<sup>1</sup> Such as the BBC iPlayer and iPlayer Kids (both audiovisual and sound programmes).

# Contents

Section		Page
1	Introduction	1
2	Consultation responses and Ofcom's decisions on new procedures for handling BBC content standards complaints, investigations and sanctions	4
<b>Annex</b>		
1	Procedures for investigating breaches of content standards on BBC broadcasting services and BBC on demand programme services	14
2	Procedures for the consideration and adjudication of Fairness and Privacy complaints on BBC broadcasting services and BBC on-demand programme services	24
3	Procedures for the consideration of sanctions for breaches of content standards on BBC broadcasting services and BBC on demand programme services	35

## Section 1

# Introduction

- 1.1 On 15 December 2016, the UK Government published a new Royal Charter and Framework Agreement for the BBC<sup>2</sup>. This will form the constitutional basis for the BBC's operation over the next 11 years, guaranteeing the BBC's independence and providing a framework for how the BBC is governed, regulated and funded.
- 1.2 The Charter introduces full external regulation of the BBC by Ofcom. This means that Ofcom will be required to regulate content standards for the BBC's UK Public Broadcasting Services ("BBC broadcasting services") and the BBC's UK Public On Demand Programme Services ("BBC ODPS")<sup>3</sup> to ensure they meet requirements. The requirements will be set out in Ofcom's Broadcasting Code ("the Code").
- 1.3 This statement sets out Ofcom's decisions on the procedures Ofcom will normally follow in relation to BBC broadcasting services and BBC ODPS when:
  - considering and investigating content standards issues under the Code;
  - considering and adjudicating Fairness and Privacy complaints under the Code; and
  - considering the imposition of sanctions for breaches of the Code.

## Background and statutory objectives

- 1.4 Ofcom's broadcasting duties include securing the application, in the case of all television and radio services, of standards that provide adequate protection:
  - to members of the public from offensive or harmful material in such services: section 3(2)(e) of the Communications Act 2003 ("the 2003 Act"); and
  - to members of the public and all other persons from both unfair treatment in programmes included in such services and unwarranted infringements of privacy resulting from activities carried on for the purposes of such services: section 3(2)(f) of the 2003 Act.
- 1.5 In securing the application of these standards, Ofcom must have regard to the need to secure them in the manner that best guarantees an appropriate level of freedom of expression.
- 1.6 More specifically, Ofcom has a duty under section 319 of the 2003 Act to set such standards for the content of programmes to be included in television and radio services as appear to Ofcom best calculated to secure certain "standards objectives", which are set out in section 319(2). Ofcom is required to establish Codes containing these standards. To meet this duty, Ofcom applies the provisions of the Code.
- 1.7 Similarly, Ofcom has a specific duty under section 107 of the Broadcasting Act 1996 ("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

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<sup>2</sup> <https://www.gov.uk/government/publications/bbc-charter-and-framework-agreement>

<sup>3</sup> Such as the BBC iPlayer and iPlayer Kids (both audiovisual and sound programmes).

avoidance of unjust or unfair treatment in programmes and unwarranted infringement of privacy in programmes (or in connection with the obtaining of material included in such programmes). To meet that duty, Ofcom applies Sections Seven (Fairness) and Eight (Privacy) of the Code.

- 1.8 Ofcom regulates the provision of the BBC's services by virtue of section 198<sup>4</sup> of the 2003 Act to the extent that provision to do so is contained in the BBC Charter and Agreement, the 2003 Act and Part 5 of the 1996 Act. The Charter and Agreement set out the BBC's obligations to comply with the Code and Ofcom's powers to investigate and enforce compliance by the BBC.

## Overview of consultation proposals

- 1.9 Ofcom is required under the BBC Agreement to set and publish procedures for handling and resolving complaints referred to it about the BBC, and for carrying out investigations on its own initiative<sup>5</sup>.
- 1.10 The BBC Agreement states that Ofcom's complaints procedures must give information on how complainants can expect to be treated by complying with at least the following:
- a) the public must know about their right to make a complaint and how;
  - b) referring a complaint to Ofcom must be straightforward and accessible;
  - c) references must be considered and resolved effectively;
  - d) handling of references must be timely; and
  - e) a complaint must be handled in a proportionate manner.
- 1.11 In addition, the procedures must give clear guidance explaining:
- a) how the complaints system works;
  - b) the remedies and sanctions Ofcom has the power to apply;
  - c) where relevant, the availability of other methods of redress in relation to the type of issues raised by the complainant or prospective complainant; and
  - d) how complainants will be notified of the resolution of the complaint and provided with an explanation appropriate to the nature of the complaint.
- 1.12 On 23 January 2017, Ofcom published a consultation on its proposed procedures for handling content standards complaints, investigations and sanctions for BBC programmes. At the same time, Ofcom consulted on a small number of amendments to its existing procedures which apply to all other broadcasters and on demand programme service providers. The statement concluding that review can be found here: <https://www.ofcom.org.uk/consultations-and-statements/category-2/review-procedures-handling-content-standards-and-broadcast-licensing>

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<sup>4</sup> The Government has, in the Digital Economy Bill currently before Parliament, proposed amendments to section 198. It has proposed that, rather than referring to the provision of the BBC's services, section 198(1) will state that it is a function of Ofcom 'to regulate the BBC'.

<sup>5</sup> Clauses 57 and 58 of the BBC Agreement.

- 1.13 Ofcom's proposals on procedures for complaints about content standards on BBC broadcasting services and BBC ODPS were intended to ensure transparency and accessibility for audiences and other stakeholders. They followed closely Ofcom's existing procedures for other licensed broadcasters (which currently apply to BBC services when Ofcom has jurisdiction to consider a complaint). They were designed with regard to our broadcasting duties and to meet the minimum requirements for such complaints procedures as required by the BBC Agreement.

## **Next steps**

- 1.14 This statement concludes Ofcom's consultation on procedures for handling content standards complaints, investigations and sanctions for BBC programmes<sup>6</sup>. Section Two of this document summarises the views of stakeholders on our proposed new procedures and Ofcom's response to these.
- 1.15 The new procedures are set out in Annexes 1, 2 and 3, and come into effect when Ofcom takes over responsibility for regulating the BBC on the Effective Date contained in the Charter, which is 3 April 2017.

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<sup>6</sup> Ofcom will consult on procedures for handling complaints about the BBC's online material when we have the necessary functions in legislation. These functions are intended to be secured as part of the Digital Economy Bill, which is currently before Parliament.

## Section 2

# Consultation responses and Ofcom's decisions on new procedures for handling BBC content standards complaints, investigations and sanctions

- 2.1 Ofcom received nine consultation responses on its proposed procedures for handling content standards complaints, investigations and sanctions for BBC programmes. These were from: the BBC; the Communications Consumer Panel and Advisory Committee for Older and Disabled People ("CCP/ACOD"); ITV and STV ("ITV/STV"); Radio Centre; UK Lawyers for Israel ("UKLFI"); UK Music; and individual respondents Andrew Todd, Peter Saunders and Neil Turner.
- 2.2 Set out below are the proposals on which stakeholders raised issues, a summary of those issues and Ofcom's responses.
- 2.3 The full published responses can be found on Ofcom's website<sup>7</sup>. The final procedures are available at Annexes 1, 2 and 3.

## Stakeholder responses to proposals and Ofcom's final decisions

### 'BBC First'

- 2.4 The most significant difference between Ofcom's existing procedures which apply to other broadcasters and the proposed procedures for the BBC is the 'BBC First' approach for complaints about content standards, other than Fairness and Privacy complaints. The BBC Agreement requires that, except in the case of Fairness and Privacy complaints which Ofcom is required to consider by statute, a complaint should normally in the first instance be resolved by the BBC<sup>8</sup>. If a complainant is not satisfied with the BBC's final response or considers that the imposition by Ofcom of a sanction may be appropriate, or if the BBC has failed to respond within the timeframe set in its own procedures, the complainant will be able to refer their complaint to Ofcom<sup>9</sup>.
- 2.5 ITV/STV requested that Ofcom apply the same approach to all broadcasters so that all standards complaints are handled under a 'Broadcaster First' system. ITV/STV considered that the existing procedures "paid lip service" to encouraging complainants to raise complaints with broadcasters first, but suggested that the "new regime" of BBC regulation offered an opportunity to apply an "even-handed approach". BT and A+E Networks, in their responses to Ofcom's separate consultation on procedures applying to all other broadcasters<sup>10</sup>, also suggested that

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<sup>7</sup> <https://www.ofcom.org.uk/consultations-and-statements/category-2/bbc-content-standards-investigations-and-sanctions>

<sup>8</sup> Clause 56(4)(a) and (5) of the Agreement.

<sup>9</sup> In accordance with Clause 57(1) of the Agreement.

<sup>10</sup> <https://www.ofcom.org.uk/consultations-and-statements/category-2/review-procedures-handling-content-standards-and-broadcast-licensing>

the 'BBC First' model could be extended to other broadcasters who can demonstrate that they have effective compliance and complaints handling systems in place.

- 2.6 Ofcom's procedures for broadcasters other than the BBC clearly state that "[i]n the interests of timely resolution, Ofcom considers that complainants should follow the broadcaster's own complaints procedure before making a complaint to Ofcom"<sup>11</sup>. However, Ofcom also accepts complaints made directly to us. The 'BBC First' approach is required by the new BBC Agreement and the BBC must consult on its complaints handling procedures which must meet certain criteria<sup>12</sup>. We recognise that there may be other broadcasters potentially able to meet a similar set of criteria. However, the BBC's scale and regulatory framework are different. Ofcom will implement the 'BBC First' approach only for the BBC in April 2017. We will review this position over time.
- 2.7 Radio Centre sought reassurance that under the 'BBC First' approach Ofcom will be able to judge if the BBC has repeatedly breached the Code "as would make a broadcaster potentially eligible for a sanction".
- 2.8 To ensure transparency and accountability under the 'BBC First' approach, the Agreement requires the BBC to provide reports to Ofcom about complaints it has received in a form and at such intervals as we may determine<sup>13</sup>. This will enable Ofcom to exercise its ability to intervene on an issue at an early stage, if we consider it necessary, and ensure we are informed of the outcomes of BBC investigations to build and assess its compliance record.

### Relevant time periods

- 2.9 The BBC Agreement requires Ofcom's procedures to provide for it to consider complaints, among other circumstances, "if the BBC has failed to resolve a complaint within the time period set in...[the BBC's own procedures]". This time period was referred to in the proposed procedures as the "BBC deadline", to be inserted when the BBC set its procedures. Under transitional arrangements in the Charter, the BBC must set and publish an interim framework for complaints handling by 3 April 2017, having consulted Ofcom. The BBC must set and publish a final framework for complaints handling, having also consulted the public, by 3 October 2017.
- 2.10 In the BBC's response, it argued that stating that a complainant would be able to refer their complaint to Ofcom if the BBC failed to respond "within the timeframe set in [the BBC's] procedures", while reflecting the Agreement, gave the impression that "Ofcom will regard all complaints as eligible for consideration... as soon as the target times given in the BBC's complaints procedures are exceeded". The BBC stated that its own timeframes were "indicative, rather than intended to apply to 100% of cases" and suggested less restrictive wording for Ofcom to adopt.
- 2.11 Ofcom accepts that there will, in some instances, be investigations which run longer than the planned timeframes and it would not be in Ofcom, the BBC, or the complainant's interests for us to begin an investigation afresh. However, it is an important aspect of the 'BBC First' approach that complainants can refer their complaint to Ofcom if it has not been resolved, or concluded, within a set time period.

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<sup>11</sup> <https://www.ofcom.org.uk/tv-radio-and-on-demand/information-for-industry/guidance/procedures>

<sup>12</sup> Clause 56(3) and (4) of the Agreement.

<sup>13</sup> Clause 56(7) of the Agreement.

- 2.12 The issue of timeliness in the BBC complaints handling process was also raised by UKLFI and an individual, Neil Turner. These respondents called for clarity on BBC complaint timeframes so that complainants know how long a response to their complaint may take and at what point they may refer a complaint to Ofcom.
- 2.13 Ofcom responded to the BBC's draft Interim Complaints Procedures<sup>14</sup> stating that the BBC should make clear in its Interim Procedures that a complainant can refer their complaint to Ofcom if they do not consider that the BBC has handled it in a timely way, and set clear time periods for each stage of its process to indicate the point at which a complainant can refer their complaint to Ofcom. We will update our procedures to reflect the timeframes given in the BBC's own Interim Complaints Framework, when it is published ahead of 3 April.
- 2.14 CCP/ACOD asked for a definition of "timely" with regards to Ofcom's consideration of complaints so that complainants know how long a response may take. Ofcom aims to complete its initial assessment of content standards complaints within 15 working days and any cases it then takes forward for investigation within 50 working days (see paragraphs A1.33 and A1.36 of Annex 1)<sup>15</sup>. We will not normally respond individually but will notify complainants about the outcome of complaints in the fortnightly publication of our Broadcast and On Demand Bulletin (see paragraphs 2.41 to 2.44 for more information).
- 2.15 Ofcom proposed that the BBC must retain recordings of radio programmes for at least 42 days after broadcast; recordings of television programmes for at least 90 days after broadcast; and copies of programmes made available on BBC ODPS for at least 42 days after they cease to be available for viewing. We also proposed that, if a complaint is made, the BBC must retain the relevant recordings or copies, and any related material, for the same periods of days, but running from the date on which the BBC may reasonably expect the complainant to have received its final response to the complaint. No objections were made to these proposals and the proposed retention periods have been included in the final procedures.

### **"Exceptional circumstances"**

- 2.16 Under the BBC Agreement Ofcom may, in exceptional circumstances, intervene at an earlier stage to handle and resolve a complaint which has not been resolved by the BBC<sup>16</sup>. The proposed procedures stated that "exceptional circumstances" may include (but are not limited to) Ofcom having concerns regarding incitement to crime, harm to minors, financial or physical harm, the involvement of under 18s in programmes, problematic issues of a systemic nature within the broadcasting industry that may affect the BBC, or whistleblower complaints related to broadcasting. Ofcom may also launch an investigation in the absence of a complaint.
- 2.17 In its response, the BBC suggested some drafting amendments to the list of examples of circumstances in which Ofcom may consider early intervention. It considered that "harm to minors" should be qualified by the adjective "ongoing", otherwise it could be taken as meaning that Ofcom would exercise step-in powers in all cases in which harm to minors was alleged, and that "financial or physical harm"

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<sup>14</sup> Ofcom's response is available here:

<https://www.ofcom.org.uk/resources/documents/consultations/95141-handling-bbc-content-standards-investigations-and-sanctions/associated-documents/secondary-documents/BBC-draft-Interim-Complaints-Framework.pdf>

<sup>15</sup> For the timeframes on Fairness and Privacy complaints see paragraphs A2.24 and A2.25 of Annex 2.

<sup>16</sup> Clause 57(2) of the Agreement.

should be preceded by the word “severe” (as it was in paragraph 1.24 of the consultation). UKLFI considered that an additional example was where content that is misleading or biased remains available and the subject matter is liable to promote racism, including anti-Semitism.

- 2.18 Ofcom can step in early on any case, if it considers the circumstances exceptional, and the examples given of the types of material which might lead to early intervention are not exhaustive. Likewise, Ofcom will not always consider it necessary to exercise its step-in rights when material of this nature is brought to our attention; we will assess the individual circumstances of each case. Therefore we do not consider it necessary to amend the list of examples.
- 2.19 The BBC commented that if it is Ofcom’s intention to launch an investigation in the absence of a complaint only in exceptional circumstances, then it would be helpful to clarify this. Clause 58 of the Agreement provides that Ofcom may carry out such investigations as it considers appropriate to determine compliance with a specified requirement<sup>17</sup>. Ofcom intends to launch an investigation in the absence of a complaint when it considers it appropriate, in accordance with the Agreement. We have not therefore added “in exceptional circumstances” to this part of the standards procedures.

### **Fairness and privacy**

- 2.20 Ofcom’s proposed procedures for considering fairness and privacy complaints about BBC programmes, like its existing procedures for all other broadcasters which until now have applied to the BBC, explain that in exceptional circumstances Ofcom may consider fairness or privacy issues in the absence of a complaint from “the person affected”. The BBC and ITV/STV argued that Ofcom does not have the statutory power to do this. Channel 4, in its response to Ofcom’s separate consultation on procedures applying to all other broadcasters, argued the same<sup>18</sup>.
- 2.21 Normally, Ofcom requires a complaint from “the person affected” before investigating a fairness and privacy issue. However, where Ofcom considers it necessary in order to fulfil its general duty (under section 3(2)(f) of the 2003 Act) to secure the application of standards that provide adequate protection to members of the public (and all other persons) from unfair treatment in programmes and unwarranted infringements of privacy, Ofcom may consider fairness or privacy issues in the absence of a complaint from “the person affected”. This is the provision in Ofcom’s existing procedures and we proposed to maintain it unchanged in our BBC procedures, although we note the broad scope of clause 58 of the Agreement. Ofcom-initiated fairness and privacy investigations have been rare, given the exceptional nature of the circumstances considered to trigger such an investigation. To date, there have been only six instances in which Ofcom has launched a fairness and privacy investigation in the absence of a complaint from “the person affected”. We will therefore retain this provision.
- 2.22 ITV/STV considered the proposal that Ofcom may direct the BBC to broadcast a summary of an Adjudication if a complaint is upheld or upheld in part was unnecessary and in conflict with Ofcom’s sanctions procedures, and unclear without further explanation of what is meant by “a complainant’s legitimate interests being seriously damaged”. The provision, also found in Ofcom’s procedures applying to all

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<sup>17</sup> The specified requirements are set out in clause 59 of the Agreement.

<sup>18</sup> <https://www.ofcom.org.uk/consultations-and-statements/category-2/review-procedures-handling-content-standards-and-broadcast-licensing>

other broadcasters, reflects section 119 of the Broadcasting Act 1996 and applies in addition to Ofcom's enforcement powers under article 49 of the BBC Charter. Any decision by Ofcom to issue a such direction will reflect our duties to be proportionate and consistent and to target action only at cases in which, in our view, it is merited. Also, this does not preclude Ofcom seeking a broadcaster's comments before issuing a direction under the Fairness and Privacy Procedures where we consider doing so appropriate to ensure fairness.

### **Accessibility of the complaints system**

- 2.23 CCP/ACOD urged Ofcom to ensure that its complaints procedures are accessible to all, and to make sure that the views of older and disabled people can be heard. Ofcom was encouraged to make sure that provision is made for access service users requiring textphones, next generation text services, video relay, email and post. CCP/ACOD welcomed the use already of a dedicated email address for audio description complaints by visually impaired users but recommended extending use of email to other consumers.
- 2.24 We agree that it is essential that our complaints procedures are accessible to all, including for access service users. While complainants are encouraged to use the online webform, Ofcom also provides a postal address and telephone number, including a textphone number. A Video Relay Service to contact Ofcom in British Sign Language is available on Ofcom's website and we have mentioned this in the final procedures. Ofcom also accepts complaints about audio description via a dedicated email address.
- 2.25 CCP/ACOD also stressed the importance of communicating clearly whose responsibility it is to regulate programmes, and where complainants should direct their complaints. CCP/ACOD wanted to see an obligation on the BBC to ensure it accurately signposts the complaints process, and Ofcom was urged to ensure that it is equipped and ready to guide complainants who may contact it in error. UKLFI noted that Ofcom's complaint forms and accompanying instructions should be revised for referral of BBC complaints, and considered that we should consult on them.
- 2.26 Ofcom will update the information on its website about the BBC to make clear how we will handle BBC complaints, the 'BBC First' process and where complaints should be directed. Ofcom has developed new complaints forms specifically for BBC complaints which will be available on the Ofcom website from 3 April 2017. The relevant sections of the website and complaints forms will be kept under review to ensure they are fit for purpose. Ofcom's Contact Centre will be advised where to direct complainants who contact Ofcom in error. Under the BBC Agreement, there are specific obligations placed on the BBC to ensure its complaint procedures are straightforward and accessible, with clear guidance on how the complaints system (including references to Ofcom) works<sup>19</sup>.

### **Anonymity of complainants**

- 2.27 Ofcom proposed in its procedures for investigating breaches of content standards on BBC broadcasting services and BBC ODPS that unless a complainant specifically requests at the time a complaint is made that his/her name and contact details should remain confidential, we may disclose them to the BBC but would consider any request from a complainant to remain anonymous. ITV/STV argued that, other than

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<sup>19</sup> Clause 56(4) of the Agreement.

for whistleblowers, there was no rationale for complainants remaining anonymous, and there were some circumstances where it could be potentially unfair to not be told the identity of a complainant. It made the same point in its response to Ofcom's separate consultation on procedures applying to all other broadcasters.

- 2.28 In applying the standards procedures, Ofcom will be considering the objective question of whether the BBC (as any other broadcaster) has breached a standards requirement. In Ofcom's view, a fair and effective procedure does not, in most cases, require disclosure to the broadcaster of a complainant's identity. Given the BBC First approach, we consider that it will be standard practice to disclose the identity of a complainant to the BBC when investigating a complaint. However, there may be circumstances in which Ofcom will receive representations on anonymity and we will consider these on a case by case basis.

### **Ofcom's initial assessment and consideration of complaints**

- 2.29 When a BBC standards complaint is referred to Ofcom in accordance with our procedures, we proposed first to consider whether, on its face, it raises potentially substantive issues under the Code that warrant investigation by Ofcom. We proposed to do so by reference to the gravity and/or extent of the matter complained of, including, for example, whether it involves ongoing harm, harm to minors and/or financial harm; and whether Ofcom considers the BBC reached an appropriate decision on the matter. In addition, we proposed that if we consider that the BBC has reached an appropriate decision, we will consider whether the imposition by Ofcom of a sanction against the BBC may be appropriate.
- 2.30 UKLFI consider that Ofcom should investigate all complaints that raise potentially substantive issues under the Code that have not been remedied by the BBC. It stated that any assessment of "gravity" should take into account whether the content relates to subject matter whose coverage is liable to promote racism, including anti-Semitism, and the cumulative effect of accuracy and impartiality deficiencies in different programmes about similar subject matter.
- 2.31 We will carefully assess all complaints we receive against the Broadcasting Code rules. Complaints which are considered by Ofcom to raise potentially substantive issues against the Code that warrant investigation are pursued to an investigation. The examples given of the types of content which may be considered to have the gravity to warrant investigation are not exhaustive. Potential breaches on the grounds of incitement, hate speech or abusive and derogatory treatment are treated extremely seriously by Ofcom, and, depending on the facts of each case, will be expeditiously investigated wherever we consider a substantive potential Code issue has been raised.
- 2.32 ITV/STV suggested that "the BBC cannot simply consider complaints against its own Editorial Standards, but must explicitly consider complaints against the Code, as all other broadcasters do".
- 2.33 Schedule 3, paragraph 2 of the BBC Agreement requires the BBC to "set, publish, review periodically, and observe guidelines designed to secure appropriate standards in the content of the UK Public Services". These guidelines must incorporate the provisions of the Ofcom Broadcasting Code. Clause 56(2) of the Agreement provides that "the BBC will consider a complaint... against whether the BBC has observed the editorial guidelines set under paragraph 2 of Schedule 3 whereas Ofcom will consider the complaint against... [the Code]."

- 2.34 An individual, Peter Saunders, queried how Ofcom will receive and consider “bias by omission” complaints about the BBC. The BBC will be required to comply with Section Five of the Code which sets out rules on due accuracy and due impartiality. Application of those rules to the BBC is considered in a statement published by Ofcom on 9 March 2017<sup>20</sup>.
- 2.35 In our proposed procedures, we stated that there may be cases when Ofcom does not consider it necessary to seek representations or information from the BBC before reaching a Preliminary View. ITV/STV argued that it could not see how it could ever be reasonable for Ofcom to come to a Preliminary View without first seeking broadcaster representations, unless the broadcaster had accepted the breach had occurred<sup>21</sup>.
- 2.36 We do not agree, and consider that there may be instances where the facts of the case are clear, or where the BBC has admitted to a breach, such that seeking representations before reaching a Preliminary View is not necessary. The BBC will always be given the opportunity to comment on a Preliminary View before Ofcom reaches its Final Decision, which we consider sufficient in such cases to ensure a fair process.

### **Content Board and Executive involvement**

- 2.37 UKLFI urged Ofcom to avoid using executive staff and members of the Content Board who were formerly BBC employees for the consideration of BBC complaints because of concerns about their objectivity, particularly in considering complaints about the BBC’s coverage of Israel.
- 2.38 Ofcom’s requirement for impartial, objective decision making extends to all executives and non-executive members of Ofcom’s Boards and Committees. Ofcom’s Content Board members are bound by a published Code of Conduct and required to maintain the highest standards of propriety involving integrity, impartiality and objectivity. This applies to all aspects of their role including their provision of advisory opinions on editorial standards decisions.

### **Representations to Ofcom**

- 2.39 An individual, Andrew Todd, and UKLFI made several arguments about the rights afforded to the complainant in Ofcom’s procedures. Ofcom’s proposed procedures were said to be “manifestly unfair” to the complainant as there is no provision for complainants (unlike the BBC) to have sight of, or make representations on, Ofcom’s Preliminary Views or see an advance copy of the Final Decision.
- 2.40 Ofcom notes these views. All complaints are important to Ofcom as they help us understand whether the BBC may be failing to comply with a requirement in a particular case. Ofcom assesses, and investigates where necessary, a standards complaint based on the issues raised. We acknowledge all complaints we receive, but we do not normally correspond any further with individual complainants. Complainants have the opportunity to provide representations when making a complaint. We consider this approach is appropriate in the circumstances, and does

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<sup>20</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0030/98148/Due-impartiality-and-elections-statement.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0030/98148/Due-impartiality-and-elections-statement.pdf)

<sup>21</sup> This issue is considered in more detail in paragraphs 2.26 and 2.29 of Ofcom’s Statement on Procedures for handling content standards and licensing investigations and sanctions for other broadcasters and ODPS providers: <https://www.ofcom.org.uk/consultations-and-statements/category-2/review-procedures-handling-content-standards-and-broadcast-licensing>

not result in any unfairness to complainants. In a standards investigation, we are concerned with assessing whether the BBC has breached the Code and are not concerned with adjudicating on the merits of an individual complaint. Therefore, once we have decided to investigate, we provide the BBC (and any relevant third parties who may be directly affected by the outcome of the investigation) with the opportunity to make representations to us, but not normally complainants.

- 2.41 We have a different procedure for handling complaints about fairness and privacy issues, and, as explained in the Fairness and Privacy Procedures set out in Annex 2, complainants also have the opportunity to make representations on Ofcom's Preliminary View before Ofcom issues its final adjudication. This is because the position of a complainant in a fairness and privacy complaint is different from that of a complainant in a standards case. In order for Ofcom to entertain a fairness or privacy complaint, the complainant must be able to show that they are a "person affected"<sup>22</sup> and they will therefore have a direct interest in the outcome of the complaint.

### **Ofcom's publication of Final Decisions**

- 2.42 Ofcom proposed to notify complainants of the resolution of complaints by publishing its decisions in Ofcom's Broadcast and On Demand Bulletin on its website. This is the same approach as we apply to complaints about other broadcasters and on demand programme services. Ofcom proposed to provide the BBC, for information only, with an embargoed copy of the decision one working day before publication (and, in a separate consultation, to amend our procedures applying to all other broadcasters to make the same provision).
- 2.43 UKLFI argued that the publication of decisions not to investigate in the Broadcast and On Demand Bulletin is inadequate and that Ofcom should contact individual complainants by email with a record of why the complaint was not taken forward. An individual, Neil Turner, said that Ofcom should publish what action was taken to rectify the complaint, when and by whom. ITV/STV said that Ofcom should publish full decisions on complaints which have been the subject of full submissions by the BBC, whether or not a breach is found.
- 2.44 ITV/STV argued that it would be unreasonable to provide any broadcaster with one working day's notice of a decision, which might contain factual errors, and considered that Ofcom provided no rationale for changing its current practice of giving broadcasters 48 hours to respond with corrections. ITV/STV made the same comments in response to Ofcom's separate consultation on our procedures applying to all other broadcasters, as did A+E Networks, BT, Channel 4, and Radio Centre<sup>23</sup>.
- 2.45 Ofcom notes the views summarised in paragraph 2.43. When a complaint is submitted, the complainant will be informed that we will notify them about the outcome of the complaint in the fortnightly publication of our Broadcast and On Demand Bulletin. By publishing a record of the complaints we have received in the Bulletin (listing separately those that, after careful assessment, we have taken forward for investigation and those we consider do not raise issues under the Code),

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<sup>22</sup> As explained in the fairness and privacy procedures set out in Annex 2, a "person affected" means, in relation to a fairness complaint, someone who was a participant in the programme who was the subject of unfair treatment being complained of or had a direct interest in the subject matter of that treatment, and in relation to a privacy complaint, means someone whose privacy was infringed.

<sup>23</sup> See paragraphs 2.43 to 2.47 in Ofcom's Statement on Procedures for handling content standards and licensing investigations and sanctions for other broadcasters and ODPS providers: <https://www.ofcom.org.uk/consultations-and-statements/category-2/review-procedures-handling-content-standards-and-broadcast-licensing>

together with the outcomes of our investigations, complainants can track the progress of their complaints. Ofcom will publish full decisions on complaints taken forward for investigation where it has found the BBC in breach. For the reasons set out at paragraph 2.40 above, we consider this approach is appropriate in the circumstances and does not result in any unfairness to complainants.

- 2.46 Ofcom considers one working day sufficient notice of publication for the BBC and other broadcasters, as it is for stakeholders in other sectors Ofcom regulates. We consider it desirable that the notice period is consistent with that in our enforcement procedures, and that one working day is appropriate given the importance that Ofcom's processes are efficient and transparent. We also note that since the introduction of the previous procedures in 2011, the identification of factual inaccuracies during the 48 hour window before publication provided for in those procedures was extremely rare.

### **Consideration of sanctions**

- 2.47 Ofcom's proposed approach to the consideration of sanctions for breaches of content standards by the BBC was, so far as appropriate, to be consistent with its approach to other broadcasters and on demand programme service providers. We proposed, as with other broadcasters and on demand programme service providers, that we may impose a sanction if we consider that the BBC has seriously, deliberately, repeatedly or recklessly breached the Broadcasting Code.
- 2.48 UKLFI considered that the treatment of directions not to repeat a programme, or to include a correction and/or statement of Ofcom's findings, as sanctions is "wrong in principle and deeply unsatisfactory", and would result in "inordinate delay". UKLFI commented that Ofcom should not just require corrections where the BBC has seriously, deliberately, repeatedly, or recklessly breached the Code, but whenever the BBC has broadcast content that is significantly misleading or lacking due impartiality.
- 2.49 Ofcom's powers to sanction the BBC are set out in the Charter and Agreement. If Ofcom is satisfied that the BBC has failed to comply with a requirement, we may direct the BBC, or accept undertakings from the BBC, to take such steps as we consider will:
- remedy the failure to comply;
  - ensure that the BBC complies with its requirements properly in the future.

We may also impose a fine. Ofcom must not exercise these powers unless it has given the BBC a reasonable opportunity of making representations<sup>24</sup>.

- 2.50 We consider that the types of sanctions and the sanctions procedures we proposed are in accordance with the Charter and Agreement, and the proposal to consider the imposition of a sanction if the BBC has seriously, deliberately, repeatedly or recklessly failed to comply with the Code is appropriate. It is consistent with Ofcom's approach to sanctions for all other broadcasters and on demand programme service providers, and our current ability to impose sanctions on the BBC.

### **Amendments to our existing procedures**

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<sup>24</sup> Article 49 of the Charter.

- 2.51 As noted above in paragraph 1.12 Ofcom also consulted on a small number of amendments to our existing procedures for other broadcasters and on demand programme service providers, including commercial BBC companies licensed by Ofcom. These proposals were to bring the procedures for all broadcasters in line with the new proposed procedures for handling BBC complaints and investigations.
- 2.52 The substantive changes relevant to investigations of content standards issues and Fairness and Privacy complaints were, in particular:
- clarifying the role of members of the Content Board in our investigations and decision making stages;
  - clarifying that, in any one investigation, there will be a different Ofcom Executive decision maker at the Preliminary View stage and at the final decision stage;
  - providing that a broadcaster may request an opportunity to make oral representations to Ofcom following a Preliminary View; and
  - changing how we will notify broadcasters of our final decision prior to publication.
- 2.53 The substantive changes relevant to considering the imposition of sanctions were, in particular:
- clarifying the identity and number of decision makers depending on the nature of the breach being considered for sanction;
  - ensuring that Ofcom will always offer the broadcaster an opportunity to make oral representation following a Preliminary View; and
  - changing how we will notify broadcasters of the final sanction decision prior to publication.
- 2.54 The responses Ofcom received to these proposals and our decisions on them can be found in the statement on that consultation<sup>25</sup>. As a result of responses to those proposals, Ofcom has added, for clarity, the following sentence to paragraph A2.29 of the procedures for considering fairness and privacy complaints at Annex 2: *“This preliminary view is only provisional and may be subject to change in the light of subsequent representations/material provided by the complainant and the BBC<sup>26</sup>: see paragraphs 2.31 and 2.32, below.”*

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<sup>25</sup> <https://www.ofcom.org.uk/consultations-and-statements/category-2/review-procedures-handling-content-standards-and-broadcast-licensing>

<sup>26</sup> including any relevant third party (see “Representations from third parties” text box [in the procedures] below).

## Annex 1

# Procedures for investigating breaches of content standards on BBC broadcasting services and BBC on demand programme services

## Introduction

- A1.1 This document outlines Ofcom’s Procedures for the handling and resolution of complaints (or for the conduct of its own investigations) about the BBC’s compliance with the content standards set under section 319 of the Communications Act 2003 (“the 2003 Act”) and the BBC Charter and Agreement<sup>27</sup>. These Procedures are effective from 3 April 2017<sup>28</sup>.
- A1.2 These Procedures apply to BBC UK Public Broadcasting Services (“BBC broadcasting services”) and BBC UK Public On Demand Programme Services (“BBC ODPS”)<sup>29</sup>.
- A1.3 Under the BBC Charter and Agreement, Ofcom has no remit to consider complaints concerning the BBC World Service and these procedures do not apply to material broadcast on the BBC World Service.
- A1.4 Procedures applying to services provided by BBC commercial broadcasting companies licensed by Ofcom and procedures applying to BBC commercial on-demand programme services notifiable to Ofcom are available separately on the Ofcom website<sup>30</sup>. Further, separate procedures apply to the consideration of Fairness and/or Privacy complaints<sup>31</sup>.
- A1.5 If Ofcom considers it necessary to depart from these Procedures in any material respect in a particular case, for reasons of fairness and/or in order for Ofcom properly to consider a complaint or carry out an investigation, it will write to the BBC (and any other relevant parties) in advance setting out the nature/extent of its departure, and its reasons for doing so.
- A1.6 As material on BBC ODPS (in comparison with broadcast material) will often remain available for viewing, a risk of any harm from a breach of content standards may be ongoing. An example of where it may therefore be appropriate to depart from these Procedures (in particular, to expedite the process) is where a potential breach involves incitement or the protection of minors, and the material remains available for viewing.

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<sup>27</sup> <https://www.gov.uk/government/publications/bbc-charter-and-framework-agreement>

<sup>28</sup> Other methods of redress may be available to complainants through the civil courts. Complainants may wish to obtain legal advice.

<sup>29</sup> Such as the BBC iPlayer and iPlayer Kids (both audiovisual and sound programmes).

<sup>30</sup> <https://www.ofcom.org.uk/tv-radio-and-on-demand/information-for-industry/guidance/procedures>

<sup>31</sup> [The procedures for the investigation of BBC Fairness and Privacy complaints are in Annex 2 of this document.]

## Statutory framework

- A1.7 Ofcom's duties in relation to broadcasting include securing the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services: section 3(2)(e) of the 2003 Act.
- A1.8 In securing the application of those standards, Ofcom must have regard to the need to do so in the manner that best guarantees an appropriate level of freedom of expression: section 3(4)(g) of the 2003 Act.
- A1.9 Ofcom has a further duty under section 319 of the 2003 Act to set such standards for the content of programmes to be included in television and radio services as appear to Ofcom best calculated to secure certain "standards objectives". Those standards objectives are set out in section 319(2), and Ofcom is required to establish codes containing these standards. For the purposes of that duty, Ofcom applies the provisions of the Ofcom Broadcasting Code ("the Broadcasting Code")<sup>32</sup>.
- A1.10 Ofcom regulates the BBC by virtue of section 198 of the 2003 Act to the extent that provision to do so is contained in the BBC Charter and Agreement, the 2003 Act and Part 5 of the Broadcasting Act 1996. The Charter and Agreement set out the BBC's obligations to comply with the Broadcasting Code and Ofcom's powers to investigate and enforce compliance by the BBC.
- A1.11 Under the BBC Charter and Agreement, in addition to the BBC's UK broadcast services, BBC ODPS must comply with the Broadcasting Code so far as Ofcom determines the standards are relevant to the provision of BBC ODPS<sup>33</sup>.
- A1.12 Ofcom is required under the BBC Agreement to set and publish procedures for handling and resolving complaints referred to them about the BBC. Complaints and investigations concerning standards covered by the Broadcasting Code (other than about Fairness and Privacy) will be governed by these Procedures.
- A1.13 Ofcom may launch investigations on its own initiative as well as investigate complaints. The Procedures followed in a complaint-led investigation and an Ofcom-initiated investigation are the same.

## Procedures

### Making a complaint

- A1.14 Complaints about services provided by the BBC (other than those raising issues of Fairness and Privacy) should normally be made to the BBC<sup>34</sup> in the first instance, using one of the following methods:

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<sup>32</sup> [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0027/95760/Broadcasting-Code-Review.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0027/95760/Broadcasting-Code-Review.pdf), with the exception of Sections Seven ("Fairness") and Eight ("Privacy"), which Ofcom applies in relation to Fairness and/or Privacy complaints under separate procedures: see paragraph A1.4 above.

<sup>33</sup> BBC ODPS are also subject to certain statutory requirements under Part 4A of the 2003 Act, including rules in relation to harmful material and product placement.

<sup>34</sup> This 'BBC First' approach does not apply to BBC Fairness and/or Privacy complaints, which may be made directly to Ofcom.

Online, at: <https://www.ofcom.org.uk/tv-radio-and-on-demand/how-to-report-a-complaint>

Phone, on: 037 0010 0222 or 037 0010 0212 (textphone)

Post, to: BBC Complaints, PO Box 1922, Darlington DL3 0UR

- A1.15 Ordinarily, Ofcom will only accept a complaint that has first been considered by the BBC. The BBC considers complaints against its Editorial Guidelines, which reflect the relevant provisions of the Broadcasting Code.
- A1.16 Complaints under these Procedures can be made to Ofcom by any person or body who considers that the BBC has failed to comply with the Broadcasting Code in relation to its broadcasting services funded by the licence fee and/or BBC ODPS in the following circumstances:
- a) if a complainant is not satisfied with the resolution of a complaint by the BBC;
  - b) if a complainant considers, following the resolution of a complaint by the BBC, that the imposition by Ofcom of a sanction, where available, against the BBC may be appropriate;
  - c) the BBC has failed to resolve a complaint within the time period set in the relevant BBC procedures.
- A1.17 See paragraphs A1.24 to A1.26 below for details about the time limits that apply to referral of complaints to Ofcom.
- A1.18 Ofcom may, in exceptional circumstances, intervene at an earlier stage to handle and resolve a complaint which has not been resolved by the BBC. Such circumstances may include (but are not limited to) Ofcom having potential concerns about material that: is likely to incite crime; may cause financial or physical harm, or harm to minors; involves under 18s in a programme or series; raises problematic issues of a systemic nature within the broadcasting industry that may affect the BBC; has resulted in a 'whistleblower' complaint that it may not be appropriate for the BBC to resolve first<sup>35</sup>. Whether Ofcom decides to intervene at an earlier stage in any such complaint will depend on the relevant facts in each case.
- A1.19 Ofcom will consider the complaint and the BBC's final response to it against the Broadcasting Code. Relevant sections of the Broadcasting Code (<https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code>) are as follows:
- Protecting the Under-Eighteens (Section One);
  - Harm and Offence (Section Two);
  - Crime, Disorder, Hatred and Abuse (Section Three);
  - Religion (Section Four);

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<sup>35</sup> See paragraph A1.23 and footnote 32

- Due Impartiality and Due Accuracy and Undue Prominence of Views and Opinions (Section Five);
- Elections and Referendums (Section Six);
- Commercial References in Television Programming (Section Nine);
- Commercial Communications in Radio Programming (Section Ten);

A1.20 Fairness and/or Privacy complaints under Sections Seven (“Fairness”) and Eight (“Privacy”) of the Broadcasting Code must be made under Ofcom’s “Procedures for the consideration and adjudication of BBC Fairness and Privacy complaints”: available at Annex 2, below.

### **Form of complaint and information to be provided**

A1.21 Ofcom requests that complaints are submitted on its complaint form, available at <https://www.ofcom.org.uk/tv-radio-and-on-demand/how-to-report-a-complaint>. Alternatively, you may contact us at: Ofcom, Riverside House, 2a Southwark Bridge Road, London SE1 9HA, or telephone either 0300 123 3333 or 020 7981 3040. If you have a text phone you can call 020 7981 3043 (please note that this number only works with special equipment used by people who are deaf or hard of hearing). A Video Relay Service to contact Ofcom in British Sign Language is available on Ofcom’s website.

A1.22 All complaints should include sufficient detail about the matter complained of. Specifically, complaints should include:

- the name / title of the programme<sup>36</sup> complained about;
- the date and time of the (broadcast) programme or the date the BBC ODPS was accessed;
- the channel on which the programme was broadcast or its location on the BBC ODPS;
- the nature of the complaint and (where possible) the particular parts of the programme complained about;
- the complainant’s full contact details (including e-mail address if available);
- when the complainant submitted a complaint to the BBC;
- the final response the complainant received from the BBC or, if the BBC has failed to reach a decision in the timeframe set out in its own procedures, the most recent correspondence from the BBC on the issue; and
- any other material the complainant considers relevant.

The inclusion of these details (or as many of them as possible) is very important. A failure to provide them may mean that Ofcom is not able to investigate the complaint.

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<sup>36</sup> References to “programmes” in these Procedures include teletext, subtitles and anything included in the BBC’s broadcast services or BBC ODPS.

A1.23 Unless a complainant specifically requests at the time a complaint is made that his/her name and contact details should remain confidential, Ofcom may disclose them to the BBC. Ofcom will consider requests from complainants to remain anonymous<sup>37</sup>.

### **When a complaint can be made**

A1.24 As set out in paragraph A1.15 above, complainants (other than those whose complaints relate to Section Seven (Fairness) or Eight (Privacy) of the Broadcasting Code) should in the first instance submit their complaint to the BBC in accordance with the BBC's own complaints procedure, which provides that complaints should be submitted within 30 working days of broadcast or of the date on which the programme first appeared on the BBC ODPS. Ordinarily, Ofcom will not accept a complaint that has not first been considered by the BBC.

A1.25 [The BBC has [X] working days to consider a complaint and provide a final response to the complainant under its own procedures]<sup>38</sup> (referred to in these procedures as the "BBC deadline"). The complainant should wait to see if they are satisfied with the BBC's final response before referring a complaint to Ofcom. If the complainant is not satisfied (or considers that the imposition by Ofcom of a sanction against the BBC may be appropriate), the complainant should refer their complaint to Ofcom (with the BBC's final response) as soon as possible, and in any event within 20 working days of the final response by the BBC under its procedures. If the complainant has not received a final response to their complaint by the BBC deadline, they may submit the complaint to Ofcom and should do so within 20 working days of the BBC deadline.

A1.26 If a complaint is submitted later than 20 working days after the BBC's final response (or, if no response is received, later than 20 working days after the BBC deadline), complainants should explain why the complaint was not submitted earlier. Ofcom will then consider all relevant factors (including the complainant's explanation for the delay in submitting the complaint and the limited time periods during which the BBC is required to keep recordings)<sup>39</sup> in deciding whether or not Ofcom should investigate the complaint despite the delay in submission.

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<sup>37</sup> This does not apply to whistleblowers. Ofcom is a "prescribed person" under Part IVA of the Employment Rights Act 1996 (as inserted by the Public Interest Disclosure Act 1998) to which "qualifying disclosures" can be made about certain matters, including broadcasting and the provision of television and radio services. Ofcom has published guidance (available on our website at: <https://www.ofcom.org.uk/about-ofcom/policies-and-guidelines>) on how individuals working in the communications sector may contact us if they have concerns about possible wrongdoing at their own organisation (or their former organisation) and where they have been unable to raise or resolve those concerns internally.

<sup>38</sup> [Details to be inserted when the BBC has published its interim complaints handling procedures.]

<sup>39</sup> Ofcom has determined that the BBC must retain recordings of radio programmes for at least 42 days after broadcast; recordings of television programmes for at least 90 days after broadcast; and copies of programmes made available on BBC ODPS for at least 42 days after they cease to be available for viewing. If a complaint is made, the BBC must retain the relevant recordings or copies, and any related material, for those periods of days, running from the date on which the BBC may reasonably expect the complainant to have received its final response to the complaint. <sup>40</sup> Under the BBC Agreement, the BBC must comply with any request to produce recordings of programmes and any related material to Ofcom.

A1.27 In exceptional circumstances (see paragraph A1.18, above), Ofcom may intervene at an earlier stage and consider complaints that have not been considered or determined by the BBC.

### **Ofcom's initial assessment of a complaint**

A1.28 All complaints are important to Ofcom as they help us to understand whether the BBC may be failing to comply with the applicable provisions of the Broadcasting Code in a particular case. Ofcom will log and acknowledge every complaint that it receives. Ofcom will carry out a process of initial assessment, as follows.

A1.29 Ofcom will first consider whether, on its face, a complaint raises potentially substantive issues under the Broadcasting Code that warrant investigation by Ofcom. It will do so by reference to the gravity and/or extent of the matter complained of, including, for example, whether it involves harm to minors or severe financial or physical harm; and whether Ofcom considers the BBC reached an appropriate decision on the matter. In addition, if Ofcom considers that the BBC has reached an appropriate decision, it will consider whether the imposition by Ofcom of a sanction against the BBC may be appropriate.

A1.30 Ofcom may ask the BBC for a copy of the relevant programme at this stage, which must be provided within five working days<sup>40</sup>. We may also request any other background material or evidence we consider may be relevant to Ofcom's initial assessment of the complaint, however we will not normally request written representations from the BBC at this stage.

A1.31 Based on Ofcom's initial assessment of the complaint, the BBC's final response to the complaint under its own procedures, and any other relevant material/evidence from the BBC, Ofcom will consider whether there may have been a breach of particular provisions of the Broadcasting Code that Ofcom considers requires further investigation.

A1.32 If Ofcom considers that a complaint does not raise a substantive issue under the Code which warrants investigation by Ofcom then it will decide not to investigate the complaint further and will notify the complainant by publishing its decision in its Broadcasting and On Demand Bulletin, which is published fortnightly on its website: <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/><sup>41</sup>.

A1.33 Ofcom aims to complete its initial assessment of any complaint within 15 working days.

### **Investigating possible breaches**

A1.34 Other than in cases falling within paragraph A1.35 below, when Ofcom considers that further investigation is required Ofcom will write to the BBC seeking representations. Ofcom will summarise the material parts of the complaint, set out the particular provisions of the Broadcasting Code that it considers relevant and applicable to the complaint, and invite the BBC to make representations in response

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<sup>40</sup> Under the BBC Agreement, the BBC must comply with any request to produce recordings of programmes and any related material to Ofcom.

<sup>41</sup> This may include circumstances where a complaint did raise a potential substantive issue under the Code but the issue was appropriately dealt with by the BBC and an investigation by Ofcom is not warranted.

(including any relevant material/evidence in support of its representations) within 10 working days. Ofcom may request that the BBC provides material/evidence from its own consideration of the complaint<sup>42</sup>. Ofcom will publish details of programmes under investigation on its website, at:

<http://stakeholders.ofcom.org.uk/enforcement/audience-complaints/>.

- A1.35 There may be cases where the matter(s) in issue, on the facts, mean that Ofcom does not consider it necessary to seek representations or information from the BBC to reach a Preliminary View. In such cases, Ofcom will write to the BBC with its Preliminary View on the complaint, as set out in paragraph A1.38 below.
- A1.36 Ofcom aims to complete cases it takes forward for investigation within 50 working days.

### **Representations from third parties**

Ofcom recognises that there may be persons/bodies who may be directly affected by the outcome of Ofcom's investigation and determination of a complaint and who may have interests independent of the BBC (e.g. presenters, producers and/or independent programme-makers). Wherever possible, the BBC should seek to take account of and include the representations of such persons/bodies in its submissions in response to a complaint and confirm to Ofcom that it has done so.

However, such persons/bodies may make representations on their own behalf direct to Ofcom in respect of a complaint that Ofcom proceeds to investigate. In such a case, persons/bodies should seek to make representations to Ofcom as early in an investigation of a complaint as possible, setting out if/to what extent their representations differ from those of the BBC. Ofcom will as appropriate take those representations into account and include those persons/bodies in its decision-making process under these Procedures.

Note: Complainants are not generally third parties from whom Ofcom will seek representations as part of a standards investigation.

Details of Ofcom's live investigations are available in its Broadcasting and On Demand Bulletin at <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/>

### Preparation of Ofcom's Preliminary View

- A1.37 Ofcom will prepare its Preliminary View having taken account of the BBC's written representations, where provided. This Preliminary View is only provisional and may be subject to change in the light of subsequent representations/material provided by the BBC<sup>43</sup>: see paragraphs A1.40 and A1.41, below.

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<sup>42</sup> Under Article 47 of the BBC Charter, Ofcom may require the BBC and any other person to provide information for the purposes of the carrying out by Ofcom of their functions. We are considering whether we require further guidelines on our information gathering powers generally and this will include a consideration of whether we require such guidelines for third parties.

<sup>43</sup> including any relevant third party (see "Representations from third parties" text box below).

A1.38 All draft Preliminary Views will be provided to a panel of Ofcom's Content Board members<sup>44</sup> for their advisory opinion. The decision on Ofcom's Preliminary View will be taken by a senior member of Ofcom's Executive with appropriate Board-delegated authority. Typically, this would be the person who is responsible for overseeing the investigation. The Preliminary View will contain:

- a summary of the complaint;
- a summary of the material parts of the programme/broadcast to which the complaint relates;
- a summary of the BBC's representations;
- the particular provisions of the Broadcasting Code that Ofcom considers are relevant and applicable to the complaint; and
- Ofcom's preliminary assessment of whether any breaches of those provisions have occurred and the reasons for that assessment.

A1.39 If in any case Ofcom considers that it is necessary to obtain further information to ensure that it can fairly and properly prepare its Preliminary View, Ofcom may seek such information before preparing that view<sup>45</sup>.

A1.40 When Ofcom has prepared its Preliminary View, Ofcom will provide it to the BBC (and any relevant third party) and request representations within 10 working days.

A1.41 Ofcom considers that it will normally be able to reach a decision fairly and properly following written representations and without oral representations from the BBC. However, the BBC may, in any particular case, make a written request to make its representations orally to Ofcom in addition to any written representations. Ofcom will agree to such a request if Ofcom considers that an oral hearing is appropriate in view of the nature of the breach under consideration and the complexity of the issues raised<sup>46</sup>.

## **The final Decision**

A1.42 Once Ofcom has received and considered the BBC's representations (and/or any representations from a relevant third party) on its Preliminary View, it will reach its final decision.

A1.43 All draft decisions will be provided to a panel of Ofcom's Content Board members (who have not been involved in the investigation) for their advisory opinion before a final decision is taken. The final decision will be taken by a senior member of Ofcom's executive with appropriate Board-delegated authority, who will not have been involved in the investigation and/or the preparation of the Preliminary View.

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<sup>44</sup> The Content Board is a committee of the main Ofcom Board established by the Communications Act 2003. It includes members with extensive broadcasting experience. See <https://www.ofcom.org.uk/about-ofcom/how-ofcom-is-run/content-board>

<sup>45</sup> Under Article 47 of the BBC Charter, Ofcom may require the BBC and any other person to provide information for the purposes of the carrying out by Ofcom of their functions (see footnotes 38).

<sup>46</sup> The final decision maker would chair any oral hearing

## Publication of Decision

- A1.44 Before publishing the Decision, Ofcom will provide the BBC, for information only with an embargoed copy of the Decision one working day before publication. The Decision will be published in Ofcom's Broadcast and On Demand Bulletin on its website at <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/>.

## Non Disclosure

- A1.45 It is an essential part of the integrity of Ofcom's processes and its ability to regulate fairly that all parties concerned abide by Ofcom's published rules and procedures, including those relating to non disclosure below.

### Non Disclosure

Parties to a complaint (complainants, the BBC, Ofcom and any directly affected third parties) may, unless otherwise indicated, make public the fact that a complaint has been made or that Ofcom is investigating a case. They may also use any information which is already in the public domain.

However, parties should not disclose any correspondence, documents or other material concerning the complaint during the course of the investigation<sup>47</sup>.

Failure to follow this requirement may result in Ofcom ceasing to consider the party's representations.

This does not limit what Ofcom can publish in its decision at the end of the investigation<sup>48</sup>.

## Time limits

- A1.46 Complainants and the BBC should keep to the time limits specified in these Procedures. However, Ofcom may consider it appropriate (in the interests of fairness and/or to carry out an investigation properly) to amend or adapt the time limits set out in the Procedures in a particular case. If a complainant or the BBC seeks an extension to a time limit, they should explain in writing to Ofcom why they believe it is appropriate.

## Sanctions

- A1.47 Where Ofcom decides there has been a breach (or breaches) of the standards set under section 319 of the 2003 Act and the BBC Charter and Agreement (as reflected in the provisions of the Broadcasting Code), Ofcom may determine that it justifies consideration of a sanction against the BBC. Ofcom will make such a

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<sup>47</sup> Ofcom is obliged to meet various statutory obligations relating to the disclosure of information (for example, under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004). Information provided to Ofcom as part of a complaint may need to be disclosed by Ofcom in order to meet such obligations.

<sup>48</sup> Ofcom may (in investigating and publishing its decision) withhold material it believes to be confidential, market sensitive or legally privileged or that it is under some other legal obligation to protect from disclosure. In such cases, the BBC will be notified that relevant material has been withheld and the reasons why.

determination clear in its Decision (under paragraphs A1.42 to A1.43, above) and the “Procedures for the consideration of sanctions in breaches of content standards on BBC broadcasting services and BBC on demand programme services” will then apply (detailed in Annex 3 of this document).

### **Expedited process**

A1.48 In certain circumstances, Ofcom may expedite the process described above (as noted in paragraph A1.5). Examples of when this may occur include (but are not limited to):

- where Ofcom considers there is an ongoing risk of harm as a result of, for example, the participation of under-18s in an ongoing series;
- where Ofcom considers there is an ongoing risk of harm as a result of material on BBC ODPS remaining available for viewing on demand; and
- when concerns about due impartiality arise during an election or referendum period which require determining during that period.

A1.49 Expedition may include Ofcom intervening at an earlier stage to handle and resolve a complaint that has not been resolved by the BBC<sup>49</sup>, allowing substantially less time to provide material and other information, and allowing substantially less time to provide any representations. Ofcom will make clear to the BBC the time limits for responses in such cases.

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<sup>49</sup> Such intervention is generally in exceptional circumstances, which may include (but is not limited to) Ofcom having concerns regarding incitement to crime, harm to minors, severe financial or physical harm, problematic issues of a systemic nature within the broadcasting industry that may affect the BBC, the involvement of under 18s in a programme or series, or whistleblower complaints related to broadcasting.

## Annex 2

# Procedures for the consideration and adjudication of Fairness and Privacy complaints on BBC broadcasting services and BBC on-demand programme services

## Introduction

- A2.1 This document outlines the Procedures for Ofcom's consideration and adjudication of Fairness and Privacy complaints in relation to the BBC's compliance with Ofcom's "fairness code" set under section 107 of the Broadcasting Act 1996 ("the 1996 Act") and the BBC Charter and Agreement<sup>50</sup>. These Procedures are effective from 3 April 2017<sup>51</sup>.
- A2.2 These Procedures apply to BBC UK Public Broadcasting Services ("BBC broadcasting services") and BBC UK Public on-demand programme services ("BBC ODPS")<sup>52</sup>. Fairness and Privacy procedures applying to broadcast services provided by BBC commercial broadcasting companies licensed by Ofcom are available at <https://www.ofcom.org.uk/tv-radio-and-on-demand/information-for-industry/guidance/procedures>.
- A2.3 Ofcom has no remit to consider complaints concerning the World Service and these procedures do not apply to material broadcast on the BBC World Service.
- A2.4 If Ofcom considers that it is necessary to depart from these Procedures in any material respect in a particular case for reasons of fairness and/or in order for Ofcom properly to consider a complaint or carry out an investigation, it will write to the parties concerned in advance setting out the nature/extent of its departure, and its reasons for doing so. (Separate procedures apply for investigating breaches of other content standards for BBC broadcast services and BBC ODPS, at <https://www.ofcom.org.uk/tv-radio-and-on-demand/information-for-industry/guidance/procedures>).

## Statutory framework

- A2.5 Ofcom has a duty under section 3(2)(f) of the Communications Act 2003 ("the 2003 Act") to (among other things) secure the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public (and all other persons) from both unfair treatment in programmes included in such services and unwarranted infringements of privacy resulting from activities carried on for the purposes of such services. In securing the application of those standards, Ofcom must have regard to the need to do so in the manner that best

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<sup>50</sup> <https://www.gov.uk/government/publications/bbc-charter-and-framework-agreement>

<sup>51</sup> Other methods of redress may be available to complainants through the civil courts. Complainants may wish to obtain legal advice.

<sup>52</sup> Such as the BBC iPlayer and iPlayer Kids (both audiovisual and sound programmes).

guarantees an appropriate level of freedom of expression: section 3(4)(g) of the 2003 Act.

- A2.6 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>53</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>54</sup>.
- A2.7 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.
- A2.8 However, in exceptional circumstances, where Ofcom considers it necessary in order to fulfil its duty under section 3(2)(f) of the 2003 Act to secure the application of standards that provide adequate protection to members of the public (and all other persons) from unfair treatment in programmes and unwarranted infringements of privacy, Ofcom may consider fairness or privacy issues in the absence of a complaint from “the person affected” (see paragraph A2.10 and the Entertainment Decision text box below). In those exceptional circumstances, Ofcom would set out in advance the procedures that it intends to follow<sup>55</sup>. The procedures would be similar to these, but adapted as appropriate to ensure that they are fair in the particular circumstances.
- A2.9 Ofcom regulates the BBC by virtue of section 198 of the 2003 Act to the extent that provision to do so is contained in the BBC Charter and Agreement<sup>56</sup> the 2003 Act and Part 5 of the 1996 Act. The BBC is required by the 1996 Act to observe Sections Seven (“Fairness”) and Eight (“Privacy”) of the Broadcasting Code in the provision of its broadcast services and in relation to programmes included in those services. Under the BBC Charter and Agreement, the BBC must also observe Sections Seven and Eight in the provision of BBC ODPS, so far as Ofcom determines the standards are relevant to the provision of BBC ODPS, and Ofcom must treat complaints which relate to any programme included in BBC ODPS in the same manner as programmes broadcast by the BBC.

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<sup>53</sup> Unjust or unfair treatment is defined by section 130 of the 1996 Act as including treatment which is unjust or unfair because of the way in which material included in a programme has been selected or arranged.

<sup>54</sup> <https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code>

<sup>55</sup> As Ofcom does, for example, in relation to complaints made to the Election Committee.

<sup>56</sup> <https://www.gov.uk/government/publications/bbc-charter-and-framework-agreement>

## Procedures

### Making a complaint: who may make a complaint

A2.10 Fairness and/or Privacy complaints may be made by an individual or by a body of persons (whether incorporated or not). However, Ofcom is normally under a duty not to entertain such a complaint unless it is made by “the person affected” or by a person authorised by him/her to make the complaint on their behalf: for further details on who can make a complaint, see the Entertainment Decisions text box below.

A2.11 The ‘BBC First’ approach, which requires complainants to raise their concerns initially with the BBC, does not apply to those raising issues of Fairness and/or Privacy, which may be made directly to Ofcom. Nevertheless, Ofcom encourages complainants with Fairness and/or Privacy concerns to follow the BBC’s own complaints procedures<sup>57</sup> in the first instance, by one of the following methods:

Online, at: <https://ssl.bbc.co.uk/complaints/forms/?lang=en&reset=&uid=275022859>

Phone, on: 037 0010 0222 or 037 0010 0212 (textphone)

Post, to: BBC Complaints, PO Box 1922, Darlington DL3 0UR

A2.12 If a complainant is then not satisfied with the BBC’s final response, the complaint can be submitted to Ofcom. See paragraphs A2.16 to A2.20, below, for the time limits on making a complaint.

### Form of complaint & information to be provided

A2.13 Fairness and/or Privacy complaints must be submitted to Ofcom in writing. Ofcom will normally only consider such complaints if they are submitted through the completion of Ofcom’s Fairness and Privacy Complaint form, which can be found at: <https://www.ofcom.org.uk/tv-radio-and-on-demand/how-to-report-a-complaint>.

Alternatively, complainants may contact us at: Ofcom, Riverside House, 2a Southwark Bridge Road, London SE1 9HA; tel. 030 0123 3333 or 020 7981 3040. If you have a text phone you can call 020 7981 3043 (please note that this number only works with special equipment used by people who are deaf or hard of hearing). A Video Relay Service to contact Ofcom in British Sign Language is available on Ofcom’s website.

A2.14 All complaints should include:

- the name/title of the programme<sup>58</sup> complained about;
- the date and time of the (broadcast) programme or the date the BBC ODPS was accessed;
- the channel on which the programme was broadcast or location on the BBC ODPS;

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<sup>57</sup> [[link to be inserted]]

<sup>58</sup> References to “programmes” in these Procedures include teletext, subtitles and anything included in BBC UK broadcast services or BBC ODPS.

- the standing of the complainant (i.e. whether the complainant is “the person affected” or authorised by “the person affected” to make the complaint for them: see the “Entertainment Decision” text box below);
- the nature of the complaint and (where possible) the particular parts of the programme complained about;
- the complainant’s full contact details (including email address where appropriate);
- whether (and, if so, when) the complainant has submitted a complaint to the BBC (and full details of it, including the BBC’s response); and
- any supporting material/evidence that the complainant considers relevant to the substance of the complaint and/or their standing to make it.

A2.15 It is very important that the complainant provides as many of these details as possible when making a complaint. Failure to provide these details may prevent Ofcom from identifying the programme/material within a reasonable time and otherwise delay or prevent Ofcom being able to consider the complaint.

### **Time limits on making a complaint**

A2.16 Ofcom may refuse to entertain a Fairness and/or Privacy complaint if it appears not to have been made within a reasonable time after the last occasion when the relevant programme was broadcast (or made available on BBC ODPS): section 111(5) of the 1996 Act. Accordingly, complainants should submit their complaint to Ofcom within 20 working days after broadcast of the relevant programme or after the date on which it was accessed on the BBC ODPS. Ordinarily, Ofcom will not accept a complaint which is submitted after this deadline.

A2.17 Where a complaint is submitted later than 20 working days after broadcast or after the programme was accessed on the BBC ODPS, complainants should explain why the complaint was not submitted earlier. Ofcom will then weigh up all relevant factors (including the complainant’s explanation for the delay in submitting the complaint) and decide whether or not it is appropriate for it to consider the complaint despite the delay in its submission.

A2.18 Where a complainant has previously complained directly to the BBC, the complainant should wait to see if he/she is satisfied with the BBC’s final response (in accordance with its own complaints procedures) before referring it to Ofcom<sup>59</sup>. If the complainant is not satisfied, the complainant should refer his/her complaint to Ofcom (with the BBC’s final response) as soon as possible, and in any event within 20 working days of the final response by the BBC under its procedures. If the complainant has not received a final response from the BBC concerning his/her complaint, the complainant should submit the complaint to Ofcom within 20 working days of the deadline for the BBC’s final response under its procedures.

A2.19 Where a complainant submits a complaint simultaneously to the BBC and to Ofcom, Ofcom will not normally proceed to consider the complaint until the BBC has first

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<sup>59</sup> The BBC is required to ensure that Ofcom’s functions in relation to Fairness and/or Privacy complaints are brought to the attention of the public. (These include functions that enable complainants to ask Ofcom to consider complaints where they are dissatisfied with the BBC’s consideration of the complaint. Amongst other things, the BBC should make clear to complainants the time limits that apply for pursuing complaints with Ofcom).

had an opportunity to resolve the complaint itself under its procedures. In such a case, the complainant should inform Ofcom when he/she has received the BBC's final response, and confirm whether he/she wishes proceed with his/her complaint. (Time will start to run from the date of the BBC's final response as set out in paragraph A2.18, above).

- A2.20 In cases where a complaint is made under the BBC's own complaints procedures, the BBC must retain the relevant recordings, and any related material, for at least 90 days in the case of television, and at least 42 days in the case of radio and BBC ODPS, running from the date on which the BBC may reasonably expect the complainant to have received its final response<sup>60</sup>.

### **Assessing whether to entertain a complaint**

- A2.21 On receiving a complaint Ofcom will forward a copy of the complaint to the BBC and ask it to provide a recording of the programme within five working days<sup>61</sup>. At this stage, we will not normally request the BBC to provide written representations on the substance of the complaint.
- A2.22 If Ofcom considers that it requires further information from the complainant at this stage (for example, about their standing to make a complaint on their own or some other person's behalf, or about the substance of their complaint), it will write to the complainant requesting such information and will also provide it to the BBC.
- A2.23 Ofcom will then decide whether or not to entertain the complaint. This decision about the complaint is called the Entertainment Decision.
- A2.24 Ofcom aims to assess and decide whether to entertain a complaint within 25 working days of receipt of the complaint and any further information requested from the complainant (as set out in paragraph A2.14).

#### **Entertainment Decisions**

As explained above, Fairness and/or Privacy complaints are complaints about unjust or unfair treatment in programmes, or about unwarranted infringements of privacy in programmes (or in connection with the obtaining of material included in them).

These complaints may be made by an individual or by a body of persons (whether incorporated or not). However, Ofcom shall not entertain such a complaint unless it

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<sup>60</sup> Section 117 of the 1996 Act requires the BBC to retain a recording of every television programme for 90 days from broadcast and every radio programme for 42 days from broadcast for the purposes of section 115 of that Act. Under the BBC Agreement, the BBC must retain recordings of programmes for a period determined by Ofcom. Ofcom has determined that the BBC must retain recordings of radio programmes for at least 42 days after broadcast; recordings of television programmes for at least 90 days after broadcast; and copies of programmes made available on BBC ODPS for at least 42 days after they cease to be available for viewing. If a complaint is made, the BBC must retain the relevant recordings or copies, and any related material, for those periods of days, running from the date on which the BBC may reasonably expect the complainant to have received its final response to the complaint.

<sup>61</sup> Under the BBC Agreement, the BBC must comply with any request to produce recordings of programmes to Ofcom.

is made by “the person affected” or by a person authorised by “the person affected” to make the complaint for him/her: section 111(1) of the 1996 Act<sup>62</sup>.

“The Person Affected” is a statutory term defined by section 130 of 1996 Act.

In relation to a Fairness complaint, i.e. a complaint of unjust or unfair treatment in a programme, “the person affected” means:

- a participant in the programme in question who was the subject of that treatment (“Participant” means a person who appeared, or whose voice was heard, in the programme); or
- a person who, whether such a participant or not, had a direct interest in the subject-matter of that treatment.

In relation to a Privacy complaint, i.e. a complaint of unwarranted infringement of privacy in a programme(s), or in connection with the obtaining of material included in a programme(s), “the person affected” means a person whose privacy was infringed.

The 1996 Act then sets out a number of other statutory criteria that must be satisfied before Ofcom may entertain or proceed to consider a Fairness and/or Privacy complaint. In particular, Ofcom is under a duty not to entertain a complaint where it appears to Ofcom that:

- the matter complained of is the subject of proceedings in a court of law in the UK; or
- the matter complained of is a matter in respect of which the complainant or the person affected has a remedy by way of proceedings in a court of law in the UK, and that in the particular circumstances it is not appropriate for Ofcom to consider a complaint about it; or
- the complaint is frivolous; or
- for any other reason it is inappropriate for Ofcom to entertain or proceed with consideration of the complaint.

(If any of the above matters become apparent to Ofcom in the course of considering a complaint, it may cease to proceed with consideration of the complaint).

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<sup>62</sup> This is subject to exceptions. Where “the person affected” is an individual who has died, a Fairness and/or Privacy complaint may be made by his personal representative or by a member of the family of the person affected, or by some other person or body closely connected with him (whether as his employer, or as a body of which he was at his death a member, or in any other way). Equally, where “the person affected” is an individual who is for any reason both unable to make a complaint him/herself and unable to authorise another person to do so for him/her, a fairness complaint may be made by a member of the family of “the person affected”, or by some other person or body closely connected with him (whether as his employer, or as a body of which he is a member, or in any other way): see section 111(2)&(3). (This will be appropriate if “the person affected” is unable to give his/her authority, because, for example, he/she is under the age of 16).

- A2.25 The complainant and the BBC will be provided with a copy of Ofcom's Entertainment Decision indicating whether (and to what extent) Ofcom will be proceeding with consideration of the complaint<sup>63</sup>.
- A2.26 Not all complaints (or all parts of complaints) received will fall into Ofcom's Fairness and Privacy remit. If Ofcom considers that the complaint raises other (i.e. non-Fairness and Privacy) matters that are within Ofcom's wider remit, the complainant may be asked to refer those matters, in the first instance, to the BBC<sup>64</sup>.

## Representations

- A2.27 If a complaint is entertained by Ofcom, then at the same time that it provides the Entertainment Decision to the BBC (under paragraph A2.25, above), Ofcom will also ask the BBC to provide a statement in response to the complaint within 20 working days. In doing so, Ofcom will set out the provisions of the Broadcasting Code which it considers are relevant and applicable to its subsequent consideration of the complaint, and seek representations from the BBC on that basis. Ofcom may also request a transcript of the relevant programme to be provided by the BBC, together with any other relevant material or documentation<sup>65</sup>.
- A2.28 On receipt of the BBC's statement/representations, Ofcom will provide a copy of it to the complainant.

## Preparation of Ofcom's Preliminary View

- A2.29 Ofcom will then prepare its "Preliminary View" on the substance of the complaint, having taken account of the BBC's statement/representations where provided. This preliminary view is only provisional and may be subject to change in the light of subsequent representations/material provided by the complainant and the BBC<sup>66</sup>: see paragraphs 2.31 and 2.32, below.
- A2.30 All draft Preliminary Views will be provided to a panel of Ofcom's Content Board members<sup>67</sup> for their advisory opinion. The decision on Ofcom's Preliminary View will be taken by a senior member of Ofcom's Executive with appropriate Board delegated authority. Typically, this would be the person who is responsible for overseeing the investigation. The Preliminary View will contain:
- a summary of the entertained complaint (or the particular parts of the complaint which have been entertained) as set out in the relevant Entertainment Decision;

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<sup>63</sup> Details of all programmes being investigated (i.e. if a Fairness and/or Privacy complaint has been entertained) will be published on Ofcom's website at:

<http://stakeholders.ofcom.org.uk/enforcement/audience-complaints/>

<sup>64</sup> In accordance with the 'BBC First' approach, complaints other than Fairness and/or Privacy complaints should normally in the first instance be resolved by the BBC.

<sup>65</sup> Under Article 47 of the BBC Charter, Ofcom may require the BBC and any other person to provide information for the purposes of the carrying out by Ofcom of their functions. We are considering whether we require further guidelines on our information gathering powers generally and this will include a consideration of whether we require such guidelines for third parties.

<sup>66</sup> including any relevant third party (see "Representations from third parties" text box below).

<sup>67</sup> The Content Board is a committee of the main Ofcom Board established by the Communications Act 2003. It includes members with extensive broadcasting experience. See <https://www.ofcom.org.uk/about-ofcom/how-ofcom-is-run/content-board>

- a summary of the material parts of the programme(s) to which the complaint relates;
- the particular provisions of the Broadcasting Code which Ofcom considers are relevant and applicable to the entertained complaint;
- a summary of the BBC's statement of representations in response; and
- Ofcom's preliminary assessment of whether any breaches of those provisions have occurred and the reasons for that assessment.

A2.31 Ofcom will then provide the Preliminary View to the complainant and request representations within 10 working days. After receiving any representations from the complainant Ofcom will provide both the Preliminary View and those representations to the BBC, requesting its representations within 10 working days. In some circumstances, Ofcom may decide that it is appropriate, fair and necessary to hold a hearing before reaching a decision<sup>68</sup> (see "Hearings" box below). Where it does so, Ofcom will prepare its Preliminary View after it has held the hearing.

A2.32 Once Ofcom has received and considered the BBC's and complainant's representations (or any representations from relevant third parties (see relevant text below) on its Preliminary View, it will then make its final Adjudication. If Ofcom considers that it is necessary to obtain further information from either party<sup>69</sup> to ensure that it can fairly and properly adjudicate on the complaint (for example, if there is a significant dispute of fact between the complainant and the BBC), Ofcom may seek such further information.

A2.33 Ofcom aims to complete the consideration and adjudication of Fairness and Privacy complaints within 90 working days of the complaint being entertained.

### Hearings

Fairness and/or Privacy complaints made to Ofcom shall be considered either at a hearing, or if Ofcom thinks fit, without a hearing. Ofcom will normally hold an oral hearing if it considers that one is necessary to ensure that it can fairly and properly adjudicate on the complaint. For example, if there is a significant dispute of fact between the complainant and the BBC, or the complainant and/or the BBC requests a hearing. Ofcom will normally give at least 15 working days' notice of the hearing date to the parties. Hearings may take place in England, Northern Ireland, Scotland, or Wales, as appropriate.

Hearings are held in private and each of the following shall be given an opportunity to attend and to make oral representations:

- (a) the complainant;
- (b) the BBC;

<sup>68</sup> The final decision maker would chair any oral hearing

<sup>69</sup> or a relevant third party. Under Article 47 of the BBC Charter, Ofcom may require the BBC and any other person to provide information for the purposes of the carrying out by Ofcom of their functions (see footnote 65).

- (c) the programme-maker responsible for the making of the programme complained about (if not the BBC); and
- (d) any other person who Ofcom considers might be able to assist at the hearing.

Each of the parties may bring to the hearing any other person (normally up to a maximum of three other people). Their names, connection to the case and a description of the role they intend to play at the hearing, should be given to Ofcom at least five working days before the hearing. Ofcom must also be informed if any person to attend a hearing is under the age of 16.

The procedure at the hearing will be at the discretion of Ofcom. Ofcom will write to the parties in advance of any hearing to set out what the procedure will be.<sup>70</sup>

### **Late submission of material/representations**

- A2.34 Parties should only submit representations and relevant material/evidence to Ofcom when requested to do so at the appropriate stages of these Procedures. Ofcom will not normally accept submission of any additional representations or material once it has proceeded to draft its final Adjudication (see paragraph A2.35, below).
- A2.35 Whether such material is admitted will be at Ofcom's discretion. If unsolicited material is admitted it will be provided to the other party who will then be given an opportunity to comment on it.

### **Representations from third parties**

Ofcom recognises that there may be persons/bodies who may be directly affected by the outcome of Ofcom's consideration and adjudication of a complaint and who may have interests independent of the BBC (for example, presenters, producers and/or independent programme-makers). Wherever possible, the BBC should seek to take account of and include the representations of such persons/bodies in their submissions in response to a complaint and confirm to Ofcom that they have done so.

However, such persons/bodies may make representations on their own behalf direct to Ofcom in respect of a complaint which Ofcom proceeds to investigate. In such a case, persons should seek to make representations to Ofcom as early in an investigation of a complaint as possible, setting out if/to what extent their representations differ from those of the BBC. Ofcom will, as appropriate, take those representations into account and include those persons/bodies in its decision-making process under these Procedures.

Details of all programmes being investigated (i.e. if a Fairness and/or Privacy complaint has been entertained) are published on Ofcom's website at:  
<http://stakeholders.ofcom.org.uk/enforcement/audience-complaints/>

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<sup>70</sup> Together with details of who from Ofcom, including any Non-Executive members of Ofcom's Content Board, will attend.

## Publication of Adjudication

- A2.36 Once Ofcom has gathered and considered the relevant evidence and (written/oral) representations submitted by the parties, Ofcom will conclude its consideration of a complaint by preparing a final Adjudication setting out whether the complaint is upheld, not upheld, or upheld in part. All draft Adjudications will be provided to a panel of Ofcom's Content Board members (who have not been involved in the preparation of the Preliminary View) for their advisory opinion before a final Adjudication is taken. The decision on the final Adjudication will be taken by a senior member of Ofcom's executive with appropriate Board-delegated authority who will have overseen the preparation of the draft Adjudication and who will not have been involved in the investigation and/or preparation of the Entertainment Decision and/or the Preliminary View.
- A2.37 Before publishing its final Adjudication, Ofcom will provide the BBC and complainant, for information only with an embargoed draft copy of the final Adjudication one working day before publication.
- A2.38 Adjudications will be published in Ofcom's Broadcast and On Demand Bulletin on its website at <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/>
- A2.39 If a complaint is upheld or partly upheld, Ofcom may direct the BBC to broadcast a summary of its Adjudication. Ofcom will normally make such a direction where there has been a breach of the Fairness and/or Privacy sections of the Ofcom Broadcasting Code which has resulted in a complainant's legitimate interests being seriously damaged and requires publication over and above publication in the Ofcom Broadcast and On Demand Bulletin<sup>71</sup>. Any decision to direct will reflect Ofcom's duties to be proportionate, consistent and targeted only at cases on which, in Ofcom's view, action is merited.

## Non Disclosure

- A2.40 It is an essential part of the integrity of Ofcom's processes and its ability to adjudicate fairly that all parties concerned abide by Ofcom's published rules and procedures, including those relating to non disclosure below.

### Non Disclosure

Parties to a complaint (complainants, the BBC, Ofcom and any relevant third party) may, unless otherwise indicated, make public the fact that a complaint has been made or that Ofcom is investigating a case. They may also use information which is already in the public domain.

However, parties should not disclose any correspondence, documents or other material concerning the complaint during the course of the investigation<sup>72</sup>. Prior to

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<sup>71</sup> But Ofcom may also make such a direction in other cases in which it considers publication over and above publication in the Ofcom Broadcast and On Demand Bulletin is appropriate.

<sup>72</sup> Ofcom is obliged to meet various statutory obligations relating to the disclosure of information (for example, under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004). Information provided to Ofcom as part of a complaint may need to be disclosed by Ofcom in order to meet such obligations.

Ofcom's final decision, the identity of a complainant may only be disclosed by the BBC or a third party to those with a direct interest in the matter complained of.

Failure to follow this requirement may result in Ofcom ceasing to consider the party's representations. This does not limit what Ofcom can publish in its decision at the end of the investigation<sup>73</sup>.

### **Time limits**

- A2.41 Complainants and the BBC should keep to the time limits specified in these Procedures. However, Ofcom may consider it appropriate (in the interests of fairness and/or properly to consider a complaint) to amend or adapt the time limits set out in these Procedures in a particular case. If any complainant or the BBC seeks an extension of a time limit, they should explain in writing to Ofcom why they believe it is appropriate. Ofcom will then decide if an extension is appropriate and inform the other party/parties accordingly.

### **Sanctions**

- A2.42 In the light of its adjudication of a Fairness and/or Privacy complaint, Ofcom may consider that it justifies consideration of a sanction against the BBC. If so, then Ofcom will make that clear in its Adjudication and the "Procedures for the consideration of sanctions for breaches of content standards in the context of BBC services" will then apply (see Annex 3 of this document).

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<sup>73</sup> Ofcom may (in investigating and publishing its Adjudication) withhold material it believes to be confidential, market sensitive or legally privileged or that it is under some other legal obligation to protect from disclosure. In such cases, the BBC will be notified that relevant material has been withheld and the reasons why.

## Annex 3

# Procedures for the consideration of sanctions for breaches of content standards on BBC broadcasting services and BBC on demand programme services

## Introduction

- A3.1 This document outlines the Procedures that Ofcom will normally follow when considering the determination of a sanction against the BBC in relation to a breach of content standards (including in relation to Fairness and Privacy) on UK Public Broadcasting Services (“BBC broadcasting services”) and UK Public On Demand Programme Services (“BBC ODPS”)<sup>74</sup> provided by the BBC<sup>75</sup>. These Procedures are effective from 3 April 2017.
- A3.2 If Ofcom considers it would be fairer and more appropriate to follow a different procedure in any particular case, we will explain to the BBC our reasons for departing from these Procedures. (The urgency of addressing potential ongoing harm where material remains available on BBC ODPS is one example of a reason why it might be appropriate for Ofcom to depart from these Procedures.)

## Statutory framework

- A3.3 Ofcom’s duties in relation to broadcasting include securing the application, in the case of all television and radio services, of standards that provide adequate protection:
- to members of the public from offensive or harmful material in such services: section 3(2)(e) of the Communications Act 2003 (“the 2003 Act”); and
  - to members of the public and all other persons from both unfair treatment in programmes included in such services and unwarranted infringements of privacy resulting from activities carried on for the purposes of such services: section 3(2)(f) of the 2003 Act.
- A3.4 By virtue of section 3(4)(g) of the 2003 Act, Ofcom must have regard to the need to secure that the application of those standards is in the manner that best guarantees an appropriate level of freedom of expression.
- A3.5 More specifically, Ofcom has a duty under section 319 of the 2003 Act to set such standards for the content of programmes to be included in television and radio services as appear to Ofcom best calculated to secure certain “standards

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<sup>74</sup> Such as the BBC iPlayer and iPlayer Kids (both audiovisual and sound programmes).

<sup>75</sup> Sanctions procedures applying to services provided by BBC companies are available on the Ofcom website: <https://www.ofcom.org.uk/tv-radio-and-on-demand/information-for-industry/guidance/procedures> Ofcom has no remit to consider complaints concerning the BBC World Service and these procedures do not apply to material broadcast on the World Service.

objectives”, which are set out in section 319(2). Ofcom is required to establish codes containing these standards. To meet this duty, Ofcom applies the provisions of the Ofcom Broadcasting Code (“the Broadcasting Code”)<sup>76</sup>.

- A3.6 Similarly, Ofcom has a specific duty under section 107 of the Broadcasting Act 1996 (“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>77</sup> in programmes and unwarranted infringement of privacy in programmes (or in connection with the obtaining of material included in them). To meet that duty, Ofcom applies Sections Seven (“Fairness”) and Eight (“Privacy”) of the Broadcasting Code.
- A3.7 Ofcom regulates the BBC’s services by virtue of section 198 of the 2003 Act to the extent that provision to do so is contained in the BBC Charter and Agreement<sup>78</sup>, the 2003 Act and Part 5 of the 1996 Act. The Charter and Agreement set out the BBC’s obligations to comply with the Broadcasting Code and Ofcom’s powers to investigate and enforce compliance by the BBC. Under the BBC Charter and Agreement, in addition to the BBC’s broadcast services, BBC ODPS must comply with the Broadcasting Code so far as Ofcom determines the standards are relevant to the provision of BBC ODPS<sup>79</sup>.
- A3.8 The BBC Charter provides that if Ofcom is satisfied that the BBC has failed to comply with a specified requirement, Ofcom may:
- a) direct the BBC, or accept undertakings from the BBC, to take such steps as Ofcom considers will:
    - (i) remedy the failure to comply;
    - (ii) ensure that the BBC complies with its requirements properly in future,
  - b) serve on the BBC a notice requiring it to pay them, within a specified period, a specified financial penalty. The maximum penalty that may be imposed on any occasion is £250,000<sup>80</sup>.

## **Ofcom’s exercise of its enforcement powers**

- A3.9 The imposition of a sanction is a serious matter. Ofcom may, following due process, impose a sanction if it considers that the BBC has (in relation to any of its broadcast services and/or BBC ODPS) seriously, deliberately, repeatedly<sup>81</sup> or recklessly breached a requirement of the Broadcasting Code.

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<sup>76</sup> Ofcom’s concurrent Broadcasting Code consultation can be found at:

[https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0027/95760/Broadcasting-Code-Review.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0027/95760/Broadcasting-Code-Review.pdf)

<sup>77</sup> Unjust or unfair treatment is defined by section 130 of the 1996 Act as including treatment which is unjust or unfair because of the way in which material included in a programme has been selected or arranged.

<sup>78</sup> <https://www.gov.uk/government/publications/bbc-charter-and-framework-agreement>

<sup>79</sup> BBC ODPS are also subject to certain statutory requirements under Part 4A of the 2003 Act, including rules in relation to harmful material and product placement.

<sup>80</sup> The maximum is specified in section 198(5) of the 2003 Act.

<sup>81</sup> A repeated breach would include, for example: a repeat of the breach of the same requirement as has already been recorded; repetition of the same or similar conduct as that which earlier contravened a requirement; or multiple breaches of other requirements.

A3.10 Examples of the sanctions Ofcom may impose include a decision to:

- issue a direction not to repeat a programme;
- issue a direction to include a correction or a statement of Ofcom's findings (or both);
- issue a direction to restrict access to a programme on BBC ODPS;
- issue a direction to provide additional information to users prior to the selection of a specified programme on BBC ODPS; and/or<sup>82</sup>
- impose a financial penalty.

A3.11 In accordance with the BBC Charter, Ofcom may direct the BBC, or accept undertakings from the BBC, to take such other steps as it considers appropriate in the circumstances of the case.

### **Direction not to repeat a programme**

A3.12 If Ofcom is satisfied that the inclusion by the BBC of a programme in any of its broadcasting services and/or BBC ODPS involved a breach of the Broadcasting Code, it may direct the BBC not to include that programme in the service(s) on any future occasion.

### **Direction to include a correction or statement of findings**

A3.13 If Ofcom is satisfied:

- a) that the BBC has, in relation to any of its broadcasting services and/or BBC ODPS, breached the Broadcasting Code; and
- b) that the breach can be appropriately remedied by the inclusion in the relevant service(s) of a correction or statement of findings (or both),

Ofcom may direct the BBC to include a correction or statement of findings (or both) in the service(s).

A3.14 A direction may require the correction or statement of findings to be in such form, and to be included in programmes at such times, as Ofcom may determine.

A3.15 Where the BBC includes a correction or statement of findings in a service in pursuance of such a direction it may announce that it is doing so in pursuance of a direction.

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<sup>82</sup> In some cases, Ofcom may impose more than one sanction.

## Financial penalty<sup>83</sup>

- A3.16 If Ofcom is satisfied the BBC has, in relation to any of its broadcast services and/or BBC ODPS, breached the Broadcasting Code, it may impose a financial penalty on the BBC.
- A3.17 The imposition of a financial penalty does not preclude the imposition of any other sanction in respect of the same breach(es).

## Decision-making under these Procedures

- A3.18 In accordance with the BBC Charter, Ofcom will not impose a sanction on the BBC unless it has given the BBC a reasonable opportunity of making representations about the matters appearing to Ofcom to provide grounds for the imposition of the sanction.
- A3.19 In sanctions cases under these Procedures, decisions on sanction will be made by two senior members of the Ofcom Executive who have been given appropriate delegated authority by the Ofcom Board (one of whom will be the final decision maker on the breach), together with a Non-Executive member of Ofcom's Content Board.
- A3.20 A decision maker in a sanctions case will not have been involved in the investigation of the breach, up to and including the preparation of the Preliminary View on the breach.
- A3.21 When Ofcom writes to the BBC in accordance with paragraph A3.24 below, it will identify the decision maker(s).

## Procedures

### Consideration of sanctions

- A3.22 The consideration of a sanction under these Procedures follows a decision by Ofcom that the BBC has breached a requirement of the Broadcasting Code. A case will normally be considered for the imposition of a sanction when Ofcom considers that the BBC has seriously, deliberately, repeatedly, or recklessly breached the Broadcasting Code.
- A3.23 Ofcom aims to conclude the consideration of the imposition of a sanction within 60 working days from the date Ofcom records the breach(es) of the Broadcasting Code. However, the circumstances of individual cases can vary considerably and completion may in some cases take longer.
- A3.24 If Ofcom considers that a sanction may be appropriate, it will write to the BBC with the following information, as appropriate:
- details of the breach(es);
  - comments on any issue raised by the BBC that is material to the case;

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<sup>83</sup> Ofcom's Penalty guidelines, which set out how it proposes to determine the amount of the penalties it imposes, can be found at:  
[https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0032/49685/penalty\\_guidelines\\_2015.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0032/49685/penalty_guidelines_2015.pdf)

- details of any relevant cases on which Ofcom has already adjudicated;
- details of the BBC's recent compliance history;
- details of Ofcom's preliminary view that a sanction may be appropriate;
- details of Ofcom's preliminary view on the type and level of any sanction considered to be appropriate and proportionate;
- a summary of the material on which it has relied in reaching its preliminary view; and
- a copy of the relevant documentation<sup>84</sup> that Ofcom has taken into account.

A3.25 Where, at this stage, Ofcom's Preliminary View is that the appropriate sanction should include a financial penalty, it will, as appropriate, consider the penalty in accordance with the Penalty Guidelines published by Ofcom at: [https://www.ofcom.org.uk/data/assets/pdf\\_file/0032/49685/penalty\\_guidelines\\_2015.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0032/49685/penalty_guidelines_2015.pdf).

A3.26 Ofcom will invite the BBC to make representations on its Preliminary View that a sanction may be appropriate and of the type and level of any sanction being considered. Depending on the type and level of any sanction, this may be by written and/or oral representations as Ofcom may consider appropriate (see paragraphs A3.27 to A3.29 below).

### Written representations

A3.27 The BBC will have the opportunity to make written representations on Ofcom's Preliminary View that a sanction may be appropriate and on the type and level of any sanction being considered. The period for written representations will normally be 15 working days, unless otherwise specified. In some circumstances, Ofcom may, if it considers appropriate, seek further information or representations from the BBC<sup>85</sup>.

### Oral representations

A3.28 In addition, Ofcom will offer the BBC the opportunity to attend an oral hearing to make oral representations on the matters referred to in Ofcom's Preliminary View. Ofcom will normally give the BBC at least 15 working days' notice of the date for making those representations. The hearing will be in private and may take place in England, Northern Ireland, Scotland, or Wales, as appropriate. The hearing will be transcribed and the transcript will be provided to the broadcaster. The BBC may bring legal advisers to the oral hearing to assist in presenting its oral representations, although Ofcom may ask that the BBC limits the number of persons attending the oral hearing on its behalf to a reasonable number.

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<sup>84</sup> Ofcom may withhold material it believes to be confidential, market sensitive or legally privileged or that it is under some other legal obligation to protect from disclosure. In such cases, the BBC will be notified that relevant material has been withheld and the reasons why.

<sup>85</sup> Under Article 47 of the BBC Charter, Ofcom may require the BBC and any other person to provide information for the purposes of the carrying out by Ofcom of their functions. We are considering whether we require further guidelines on our information gathering powers generally and this will include a consideration of whether we require such guidelines for third parties.

- A3.29 The procedure for making oral representations will be at the discretion of Ofcom. Ofcom will write to the BBC in advance of the date for hearing the representations, to set out what the procedure will be.

## **Disposal**

- A3.30 After consideration of written and/or oral representations from the BBC, Ofcom may decide that no sanction is appropriate in a particular case. The BBC will then receive written notification to this effect and notification will be published in Ofcom's Broadcast and On Demand Bulletin.

## **Sanctions decision**

- A3.31 If, after considering all the evidence and representations from the BBC, Ofcom believes that a sanction is appropriate, it shall consider and decide which of the available sanctions is appropriate. If Ofcom decides that the sanction should include a financial penalty, it will, as appropriate, have regard to the Ofcom Penalty Guidelines published at:  
[https://www.ofcom.org.uk/data/assets/pdf\\_file/0032/49685/penalty\\_guidelines\\_2015.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0032/49685/penalty_guidelines_2015.pdf).

## **Publication of Sanction Decision**

- A3.32 The Sanction Decision, with a statement of reasons, will be sent to the BBC, for information only, one working day before its publication.
- A3.33 Ofcom will publish its decision on its website. A summary of the Sanction Decision will normally be published in Ofcom's Broadcast and On Demand Bulletin at:  
<http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/>.

## **Non Disclosure**

- A3.34 It is essential to the integrity of Ofcom's processes and its ability to regulate fairly that all parties abide by Ofcom's published rules and procedures, including those relating to non disclosure below<sup>86</sup>.

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<sup>86</sup> Ofcom is obliged to meet various statutory obligations relating to the disclosure of information (for example, under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004). Information provided to Ofcom may need to be disclosed by Ofcom in order to meet such obligations.

## **Non Disclosure**

Ofcom expects the BBC to keep all information, correspondence and documents relating to sanctions cases strictly confidential, unless already in the public domain. In particular, Ofcom expects the BBC to keep strictly confidential any information provided to it by Ofcom as part of the sanctions process, including any provisional indication/decision on the type and level of any sanction that may be imposed<sup>87</sup>.

This does not limit what Ofcom can publish in its decision at the end of the investigation.

## **Time limits**

A3.35 The BBC should keep to the time limits specified in these Procedures. However, Ofcom may consider it appropriate (in the interests of fairness and/or properly to make decisions relating to sanctions) to amend or adapt the time limits in a particular case. If the BBC requires an extension to a time limit it should explain in writing to Ofcom why it believes the relevant time limit should be extended.

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<sup>87</sup> Ofcom may withhold material it believes to be confidential, market sensitive or legally privileged or that it is under some other legal obligation to protect from disclosure. In such cases, the BBC will be notified that relevant material has been withheld and the reasons why.