

Review of procedures for handling broadcasting complaints, cases and sanctions

Submission by the BBC

We welcome Ofcom's reviews of its procedures. We believe steps such as the clear separation between the roles of the Ofcom Executive and committees of the Ofcom Board, introduction of an initial assessment stage in consideration of complaints, changes to the review procedure and streamlining of the sanctions process will go a long way to addressing the concerns our dealings with Ofcom have raised. We are also pleased to see that a higher priority will be given to dealing with complaints expeditiously.

We particularly welcome the proposal to make the Ofcom Executive responsible for all first instance decision making. We believe this will help ensure that decisions are consistent, appropriately made in line with precedent and timely. Similarly, we welcome the creation of a Broadcasting Review Committee. Ofcom's Board is the guardian of the public interest, as is the BBC Trust, and it seems appropriate that in cases where, however unfairly, there may be a question mark over in whose interest an initial decision has been made, that it is reviewed by a body with the public interest at its heart.

There are some matters that apply equally to both standards complaints and fairness and privacy complaints, which we discuss first:

Third party representations

We are concerned that there are issues of good faith in considering third party representations. Broadcasters have a considerable incentive to act in good faith in all their dealings with Ofcom. There is no such constraint on third parties. Ofcom may be called upon to adjudicate between conflicting claims without any mechanism for ensuring that both parties are entirely honest, and certainly no possibility of any sanction against a third party for dishonesty.

Publication of complaints in progress

Also, this section says *"Details of programmes that are being investigated will be published on Ofcom's website"*. It is not clear which point in the procedure outlined in paragraphs 27 to 31 will trigger a decision to publish details. We suggest that if a complaint falls at the first substantive hurdle - where the Ofcom Executive decides, without requesting a response from the broadcaster, that there has been no breach - there should be no separate publication of the details. We would argue there is no public interest in reporting the details of complaints that are, prima facie, without substance.

"Broadcaster first"

We accept the principle of encouraging complainants to exhaust the broadcaster's own procedures before recourse to Ofcom, and would be happy to see Ofcom do so more actively. However, we are concerned that

paragraph 26 (of Section 3, and paragraph 21 of Section 4) says “Ofcom will expect the broadcaster to retain the relevant recordings and any related material for the periods required by statute following the date on which the broadcaster may reasonably expect the complainant to have received the broadcaster’s final determination”. The BBC has found that a response to a complaint submitted directly to a programme producer, say, a fortnight after broadcast may not be sent out for some weeks, and then remain unread for further weeks due a complainant’s holiday. There may then be a further delay before submission of a complaint to Ofcom. The statutory 42 day retention period for radio programmes may therefore be exhausted before Ofcom receives the complaint, though that is less likely for television, with its 90 day retention period.

More generally, Ofcom appears to be creating a new jeopardy for broadcasters (a potentially adverse finding if the “Ofcom will expect...” provision is broken) in an area that has previously been reserved for statute.

Standards Complaints

Provisional Decision

Paragraph 34 says: “where Ofcom considers that a breach has occurred... it will draft a decision for publication”. This is not consistent with paragraph 35, which says: “Ofcom will normally draft a Provisional Decision if a breach has occurred”. We suggest deleting the word “normally” from paragraph 35, as we can not envisage any circumstances where a finding of a breach of the Code could properly and fairly be communicated to a broadcaster without a written decision. It would not, for example, be possible to make a reasoned application for a review without a written decision, nor would it be possible for the relevant member of the Ofcom Executive to fairly and transparently decide whether to grant the review.

Publication of decision

We suggest amending the third sentence to “The decision will normally be published in Ofcom’s Broadcast Bulletin” (insert the word “normally”). This would be consistent with the second bullet point in paragraph 38, which suggests that Ofcom recognises there are circumstances where “no decision is published”.

Fairness & Privacy Complaints

Publication of Adjudications

Paragraph 51, as phrased, suggests that the question of whether to “direct the broadcaster to broadcast a summary of its adjudication” is a question appropriately to be decided by the Ofcom Executive. However, it is the only question with potentially adverse effects for a broadcaster which is not explicitly subject to review. If it is Ofcom’s intention that it is not a reviewable decision, we suggest saying so.

Sanctions procedure

In general, because there is no possibility of an appeal against a sanctions decision, it is vital that the sanctions procedure contains sufficient safeguards against error to ensure there is no injustice.

Consideration of sanctions

We believe that members of the Executive who have been involved in the consideration of a complaint before it reaches the Sanctions Committee should have no involvement in the Sanctions Committee's consideration of the matter, and that this should be made explicit in Ofcom's revised procedure. At present the "secretariat function" of the Committee is carried out by an individual who has already formed a clear view on the matter, and there is a significant risk that this clear view will become apparent to those making the sanctions decision. Even if the matter is not, in practice, handled by a single individual, we consider that all the members of the Executive who are involved with the determination that a particular breach potentially merits a sanction, should end their involvement with the matter at that point - and, in particular, should not be present during any hearing. The Sanctions Committee should have entirely separate Executive support, provided by individuals with no previous involvement in the matter.

Publication of the Decision

Some of the decisions of the Sanctions Committee, when first communicated to the BBC, have been found to be unsatisfactory for a variety of reasons. The short notice, and, on occasion, practical problems in dealing with agreed shortcomings, have risked serious injustice. It is possible that a future Broadcasting Sanctions Committee could make an error of fact so serious that its correction should affect the level of sanction. If sanctions decisions are only communicated to broadcasters 24 hours ahead of publication, it is not possible to be confident that errors in the decision can be both corrected and duly taken into account. We therefore believe that the Decision (with level of financial penalty removed) should be sent to the broadcaster no less than five working days before publication.