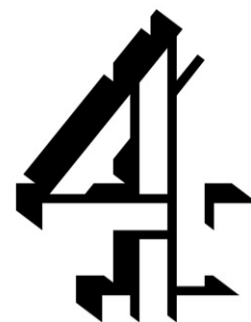


# Channel 4 Response to Ofcom Consultation on the Review of Procedures for Handling Broadcasting Complaints, Cases and Sanctions



## Channel 4

1. Channel 4 is a public service broadcaster licensed by Ofcom to broadcast, currently, the main Channel 4 core service, three free-to-air digital channels (E4, primarily an entertainment channel, More4, primarily a factual and documentary channel) and Film4 a film channel. All four channels are regulated, post broadcast, by Ofcom under its Broadcasting Code ("the Ofcom Code").
2. The Channel 4 main service itself, E4, More4 and Film4 operate under broadly the same regulatory constraints. Channel 4 is obliged under its licence for all these services to ensure compliance with the Ofcom Code and severe sanctions may be imposed by Ofcom for a serious or persistent breach of the Code. In the case of the three digital channels, their licences could be shortened or revoked and in the case of Channel 4 and the other three channels fines of up to 5% of qualifying revenue (i.e. all advertising revenue and sponsorship revenue) can be imposed. All UK broadcasters, including the BBC (with some limited exceptions), ITV, Five and digital channels fall under Ofcom's jurisdiction.
3. The Channel 4 Television Corporation is a public service broadcaster and a statutory corporation with a special and unique statutory remit contained in Section 265(3) of the Communications Act 2003 which provides:

*"The public service remit for Channel 4 is the provision of a broad range of high quality and diverse programming which, in particular-*

  - (a) demonstrates innovation, experiment and creativity in the form and content of programmes;*
  - (b) appeals to the tastes and interests of a culturally diverse society;*
  - (c) makes a significant contribution to meeting the need for the licensed public service channels to include programmes of an educational nature and other programmes of educative value; and*
  - (d) exhibits a distinctive character."*
4. Channel 4 is a publisher broadcaster without an in-house production base, and our programmes are produced by a range of independent production companies. The independent production companies which make our programmes are obliged to comply with the law and with the Ofcom Code. However, Channel 4 cannot, and would not wish to, subrogate our responsibilities for compliance with the Ofcom Code under our licence

from Ofcom and in the event that a controversial or contentious programme is commissioned, legal and editorial staff will work closely with the producers to ensure compliance with the law and with the Ofcom Code. In doing so we are mindful of our rights and duties arising out of the Human Rights Act and the European Convention on Human Rights.

With this background of legislative oversight we turn to the Consultation. We will make observations and suggestions regarding each of the three sets of procedures for **standards cases, fairness and privacy complaints** and for **the determination of broadcasting statutory sanctions**.

## STANDARDS CASES

5. We are surprised to note the document does not make reference to the requirements of Article 6 of the European Convention of Human Rights (which refers to the 'right to a fair hearing') as is the case for the current guidelines for the handling of standards complaints and cases (in programmes and sponsorship). We believe reference to the Convention should be made in this section.

### Representations from directly affected third parties

6. Ofcom proposes the following innovation regarding Standards cases :

*“11. Individuals or bodies who believe that they may be directly affected by a case may make representations to Ofcom during its investigation. Details of programmes that are being investigated will be published on Ofcom’s website, and anyone making a representation of this kind will be expected to do so as early as possible in the investigation. It is to the responsibility of the third party to satisfy Ofcom that it has a sufficient interest in the investigation. In the majority of cases, a third party, (such as a presenter or someone else involved in the production of a programme) will be expected to contribute to the broadcaster’s response to a complaint. However Ofcom acknowledges that, occasionally, it may be necessary for a directly affected third party to make representations directly. Ofcom will consider only representations which it deems relevant to its investigation.*

*12. If Ofcom judges it necessary, the directly affected third party will be provided both with a summary of the complaint(s) (where an investigation results from a complaint) and a summary of any relevant representations which relate to them. The directly affected party will not be given access to the entire case file. Ofcom will give the broadcaster an opportunity to comment on any relevant representations made by the third party. The affected third party is also subject to the requirement of confidentiality in relation to all material submitted and communications/correspondence entered into in relation to the investigation. Failure to follow these requirements may result in Ofcom ceasing to consider the third party’s representations.*

*13. After Ofcom has considered the representations from the directly affected third party, the third party will not be involved any further in the ongoing investigation.”*

Channel 4 does not consider that it is helpful or indeed necessary for representations to be heard from “directly affected” third parties beyond the complainant and the broadcaster. In practical terms the broadcaster’s submissions already routinely include input from relevant third parties e.g. the producers, presenters and contributors as appropriate to the standards complaint. This constructed term has no statutory basis that we can see and is confusingly similar to the concept of a “person affected” as provided for in the Broadcasting Act 1996 in relation to Fairness and Privacy complaints.

7. The guidelines proposed by Ofcom do not define what “directly affected” may mean in the context of a Standards complaint and the absence of any clear definition will leave this procedure open to abuse, particularly by individuals and interests groups who may have their own agenda in wanting to make third party representations.
8. Our understanding from reading Paragraph 11 above is that Ofcom may be envisaging a situation where someone involved in the production process such as a presenter may consider that they have a separate or conflicting interest than the broadcaster (and producer) and would require to make separate submissions to ensure that they were fairly treated during the complaints process. The legislative cloak for introducing such a third party intervention may stem from Ofcom’s overriding duties of fairness but the proposed guidelines are drafted in such a wide manner that third parties who have had no involvement in the production process may well consider that they are now afforded a right to become involved in making representations during Ofcom’s adjudication of standards complaints. Such an extension to the pool of persons able to make representations would unnecessarily prolong the regulatory process in the consideration and adjudication of standards complaints and may well lead to a chilling influence on broadcasters’ abilities to properly express themselves freely in terms of Article 10 of ECHR. Many bodies, pressure groups, political parties, representatives of foreign governments, professional bodies etc may all consider themselves to be “directly affected third parties”.
9. The lack of a narrow, explicit definition of who can make such representations opens up the real possibility of standards complaints being used by such groups as a way of furthering their agendas with a consequent restriction on broadcasters’ freedom to make programmes editorially unfettered by considerations of defending complaints from those with an axe to grind. Already broadcasters are regularly assailed by legal letters, PR representations and orchestrated email campaigns and other protests from such third parties. By this proposed innovation Ofcom will provide encouragement for the merely interested rather than the actually affected to become involved in the regulatory process.
10. Furthermore in attempting to provide such third party representations Ofcom is proposing a system which is inherently unfair to those third parties should they become involved. Unlike interveners in a judicial review process for example, the third party is not to be provided with access to the full case file. In addition Ofcom “will consider only representations which it deems relevant to its investigation.” Also the proposal is that once Ofcom has considered such representations the third party will not be involved any further in the process.
11. In our view such proposals highlight the difficulty Ofcom is creating for itself. A third party whose representations are ignored, or one who considers they should have a continuing involvement in the process may well engage in judicial review. Even in cases where third party’s input is welcomed by Ofcom their involvement may lead to significant delay in dealing with the standards complaint. This will ultimately affect a broadcaster’s ability to repeat a programme or series until such process has been completed.

In these circumstances we suggest that Ofcom redraft these guidelines to narrowly define such third parties as those directly involved in the making or broadcast of the programme.

12. In addition we suggest that the involvement of such third parties takes place only where Ofcom has identified that an investigation or judgement is likely to demonstrate some

material difference between the broadcaster and the third party directly involved in the production. A first step in considering whether or not a third party should be involved would be to ask the broadcaster if their submission to Ofcom has been compiled with the cognisance and acquiescence of those involved in making the broadcast programme. In the event that Ofcom has identified a conflict of interest between broadcaster and third party or where the broadcaster has alerted Ofcom to such a conflict of interest then and only then may it be appropriate to seek third party involvement. In those cases full involvement in the process to its conclusion would be fair and proportionate.

13. This approach is commensurate with the system of regulation imposed by statute. Ofcom is entitled to regulate broadcasters by reference to their compliance with the Ofcom Code. It is not a clearing house for all those who wish to make representations about programmes. In carrying out its regulatory function Ofcom has of course to be fair to those who may suffer consequences as a result of the adjudication of standards complaints. However the duty of the broadcaster is to respond to Ofcom's investigations and in the first instance it is the broadcaster's responsibility to ensure that it fairly reflects the views of those third parties directly involved in the production of the programme provided always that they are relevant to the standards complaint or issues raised by Ofcom. It should only be in the most exceptional circumstances that a third party who has been involved in the making of a broadcast would require any separate representation.
14. Separately, if Ofcom do wish to institute some wider form of third party representation we would suggest that this proposal forms part of a separate consultation with broadcasters. Any such wider right of intervention would require to be justified with reference to legislation and measured against the requirements of ECHR. We would argue that a comprehensive exercise would be necessary to ensure that only those third parties that could identify themselves as "victims" in terms of ECHR jurisprudence would be entitled to become involved in what is a quasi-judicial process.

### **Time Limits**

15. In paragraph 14 Ofcom advise that time limits may be extended in "exceptional circumstances". Such circumstances are not defined but we would hope and expect that a reasonable approach continues to be taken by the regulator to extensions particularly in cases where a considerable amount of material requires to be examined by the broadcaster and where in all fairness several individuals involved in making the programme may require to be contacted who have moved onto other productions.
16. Following on from this we note that in paragraphs 15 and 16 Ofcom is introducing clear up targets for its "straightforward" and "complex" investigations. Channel 4 welcomes these targets but appreciates that there may be complex cases where both parties may require additional time to fairly conclude the standards procedures.

### **Failure to follow procedures**

17. Ofcom advise that a failure by broadcasters to follow procedures may result in "Ofcom taking additional regulatory action". It would be helpful if definition could be given to such potential regulatory action.

### **Making a Complaint**

18. In Paragraph 24 we suggest that in the interests of transparency we believe Ofcom should always disclose the identity of complainants to broadcasters unless there are compelling reasons why a complainant's identity should not be disclosed.
19. Paragraph 25 refers to Complainants making their complaint within 20 days of the broadcast "or of the occurrence of the matter complained of". This last phrase ambiguously gives rise to the idea that a complaint could be made prior to broadcast. We assume that this is not Ofcom's intention and that Ofcom may be referring to format breaches for example relating to advertising. We would request that the ambiguity of this wording be clarified.
20. Also in Paragraph 25 Ofcom advise that in the event of a complaint being made more than 20 days they will "take into account all relevant factors, including the reason for the delay in submitting the complaint...". Channel 4 would suggest that this section should also explicitly advise that Ofcom will take into account the "reason and length of the delay".

### **Investigation**

21. In Paragraph 30 it would be ideal if Ofcom always advised the broadcaster of its reasons for deciding that no breach has occurred. Such advice always assists broadcasters in ascertaining where Ofcom considers reasonably accepted standards lie.

### **Provisional Decision**

22. In Paragraph 35 we consider that it should be made explicit that the broadcaster can also make comments on the Provisional Decision where it considers that there has been an error in law as well as in fact or typographically and that time period before publication should be made clear. We also suggest that it should be possible for a review to take place before publication to the public or press takes place. It would be regrettable if open publication and the commencement of sanctions proceedings were to take place before any questions of the legality and accuracy of the Provisional Decision had not been resolved.

### **Requesting a Review**

23. Our comments regarding Paragraph 35 have an effect on Paragraph 38. In our view the time for seeking a review should run once the broadcaster has had sight of the provisional decision and not from the date of publication in the Ofcom Broadcast Bulletin.

### **Grant of a Review**

24. We would suggest that the criteria set out in Paragraph 39 are explicitly tied to the criteria for the grant of a review set out in Paragraph 41. Examples of what Ofcom would consider to be other "compelling reasons" for a grant would be helpful.
25. We also believe the test for allowing a review is too high in the proposed procedures. A party who has put forward a case that a decision is materially flawed will, by definition, have a reasonable prospect of success. We believe the test in the current procedures,

that a party has put forward an arguable case that a decision is flawed, to be the appropriate one.

26. We also suggest that where a review has been sought and rejected or granted then that procedure should be referred to and explained in the final Ofcom decision. Examples of occasions where reviews have taken place may dissuade or encourage similar reviews in other cases and provide a helpful precedent to both broadcasters and complainants.

## HANDLING OF FAIRNESS & PRIVACY COMPLAINTS

### Representations from directly affected third parties

27. We make the same comments regarding this innovation in handling fairness and privacy complaints as we did regarding standards complaints. We refer you to our earlier suggestions regarding third part interventions.

### Procedures

#### Making a complaint

28. In Paragraph 17 of the proposed Procedures Ofcom states that *"fairness and privacy complaints must be made by a person or body **directly affected** by the programme, or by someone else authorised to make the complaint on behalf of a person or body **directly affected**."* (emphasis added)
29. The use of the term "directly affected" has no statutory basis. Again at Paragraph 23 of the proposed new guidelines there is a definition of "the person affected" which is not a correct rehearsal of the terms of the relevant statute :
30. Under section 110 of the 1996 Broadcasting Act ("the Act"), Ofcom has the duty to consider and adjudicate on complaints made in accordance with sections 111 and 114 of the Act which relate:

*"(a) to unjust or unfair treatment in programmes to which section 107 applies, or*

*(b) to unwarranted infringement of privacy in, or in connection with the obtaining of material included in, such programmes."*

The term "fairness complaint" is used to refer to these complaints.

#### Section 111

A "fairness complaint" can be made by an "individual or by a body of persons, whether incorporated or not", but "shall not be entertained" by Ofcom unless made by "the **person affected**" or someone "authorised" by the person affected to complain for them: section 111(1).

#### *the "person affected"*

The complaint must be made by the "person affected". So the complainant must be a "person" - an individual or "body of persons" (corporate or not) – who is "affected".

The Act defines "the person affected" as follows:

*"(a) in relation to any such unjust or unfair treatment as is*



*mentioned in section 110(1), ["the person affected"] means a participant in the programme in question who was the subject of that treatment or a person who, whether such a participant or not, had a direct interest in the subject-matter of that treatment, and*

*(b) in relation to any such unwarranted infringement of privacy as is so mentioned, means a person whose privacy was infringed".  
A "participant" in relation to a programme means "a person who appeared, or whose voice was heard, in the programme".*

These definitions above are found in section 130 of the Act.

31. In terms of who can bring a complaint, then, the position is clear where a person who appeared in the programme and was the subject of the treatment. Otherwise, the person must have a "direct interest in the subject matter of the treatment" that is said to be unjust or unfair. There is no definition of what constitutes a "direct interest". Clearly, it must be "direct" rather than "indirect".
32. Likewise there is no reference at this point in the statute to a person or body being "directly affected" or "alleged unfair treatment" or a "sufficiently direct interest" all of which are terms used in Paragraph 23.

We would suggest that Ofcom take the opportunity while revising these procedures to reflect the terms of the statute and to avoid the term "directly affected" which confuses the statutory concept of "the person affected".

33. In addition the term "a sufficiently direct interest" appears in the statute not when the assessment is being made as to whether or not a person is "affected". The concept of "a sufficiently direct interest" is used in section 111 (7) (a) where Ofcom "may" refuse to entertain a complaint of unjust or unfair treatment if:

*"the person named as the person affected was not himself the subject of the treatment complained of and it appears to [Ofcom] that he did not have a sufficiently direct interest in the subject-matter of that treatment to justify the making of a complaint with him as the person affected".*

So there may be situations where someone is "a person affected" and may have a "direct interest" but nevertheless Ofcom can refuse to entertain the complaint because that direct interest is not "sufficiently direct".

Again we would suggest that the procedures follow the exact terms of the statute.

34. This is also a suggestion we would make when the procedures set out the criteria that must be satisfied before a fairness and privacy complaint can be entertained by Ofcom.

In Paragraph 23 Ofcom state:

*"The criteria are detailed below:*

- *the matter(s) complained of must not be the subject of legal proceedings in the UK or be more appropriately resolved by legal proceedings in the UK;*
- *the complaint must not be frivolous; and,*
- *it must not be inappropriate to entertain or proceed with consideration*
- *of the complaint for any other reason. “*

However when referring to legal proceedings the 1996 Act states :

*“(a) that the matter complained of is the subject of proceedings in a court of law in the United Kingdom, or*

*(b) that the matter complained of is a matter in respect of which the complainant or, in the case of a fairness complaint, the person affected has a remedy by way of proceedings in a court of law in the United Kingdom, and that in the particular circumstances it is not appropriate for Ofcom to consider a complaint about it, “*

We consider that the revised procedures should reflect this wording. It is often the case that broadcasters are threatened with legal proceedings by complainants or their agents who then proceed to employ Ofcom procedure as a way of conducting a ‘fishing exercise’ for evidential or other material concerning the broadcast. We are strongly of the view that where threats of litigation have been received it is inappropriate for Ofcom to entertain a complaint. Such threats rely on there being a legal remedy and the statute says that where there is such a remedy by way of court proceedings then a complaint should not be entertained.

### Assessing a complaint

35. In Paragraph 22 we suggest that the drafting of this paragraph should clarify that the identify of the complainant will be disclosed to the broadcaster with a copy of the complaint itself.

### Hearings

36. We note that the procedure at a hearing will be at Ofcom’s discretion. We assume that as with any other quasi-judicial process due regard will be had to the usual considerations of natural justice. In that regard we welcome the outline of the hearing procedure set out by Ofcom.

However we consider that the complainant should not have the final statement but that the defender broadcaster should be afforded the last word as they are facing the complaint. We also suggest that the procedures allow for either party to make a supplementary statement if new material or allegations have been raised in the final statements.

37. We are also concerned at the inequality in a hearing taking place when the complainant refuses or is unable to attend. As broadcasters are required to attend hearings this inevitably results in the broadcaster being singled out for examination in the absence of the complainant. Furthermore it allows the complainant to address issues raised by the broadcaster at a hearing in correspondence and does not allow Ofcom to scrutinize a

complainant in the same way as a broadcaster. Since the aim of such a hearing is to allow Ofcom to “advance its understanding of a case, or if it is necessary to ensure that the proceedings are fair” we believe that Ofcom require both parties to attend a hearing failing which an adverse inference can be drawn against the complainant. Where a complainant fails to attend a hearing and only the broadcaster is present, Ofcom should abandon the hearing and instead proceed by way of written submission.

### **Unsolicited material**

38. Footnote 31 concerning such material allows for a complainant’s material to be withheld from the broadcaster. In fairness we consider that the note should allow for a broadcaster’s confidential, market sensitive or legally privileged material to be withheld also.

### **Requesting a Review**

39. We suggest that Paragraph 40 includes the possibility that there has been an error in law.

### **Grant of a Review**

40. Examples of what Ofcom would consider to be other “compelling reasons” for a grant would be helpful.
41. We also suggest that where a review has been sought and rejected or granted then that procedure should be referred to and explained in the final Ofcom decision. Examples of occasions where reviews have taken place may dissuade or encourage similar reviews in other cases.
42. We believe the test for allowing a review is too high in the proposed procedures and Ofcom has not stated its case for why it believes the current test (that a party has put forward an arguable case that a decision is flawed) needs to be changed. In our view, the current test is the appropriate one.

### **Broadcasting Review Committee**

43. Our comments in respect of the conduct of any hearing (referred to above) equally applies if an oral hearing is necessary.

## **GUIDELINES FOR STATUTORY SANCTIONS**

### **Procedures**

44. As set out in Paragraph 16 and subsequent paragraphs the regime envisaged by Ofcom is that sanctions will be decided upon by a new committee, the Broadcasting Sanctions Committee.
45. Clarity is required to ensure that a broadcaster who wishes to request a review of a decision in a standards case may do so before a case is referred to the Broadcasting Sanctions Committee. As presently drafted a broadcaster may only request a review after publication, but a decision that has been referred to the Sanctions Committee will not be published until after consideration by the Sanctions Committee. Special provision must therefore be made for cases which have been finalised in accordance with paragraph 36 of the proposed standards guidelines but which are then referred to the Sanctions Committee to ensure a broadcaster can request a review of the decision prior to consideration by the Committee, in accordance with Ofcom's duty to target regulatory activity only at cases in which action is needed.
46. In addition once seized of the matter there is no appeal or review from the sanctions decisions of the Broadcasting Sanctions Committee. Therefore a disgruntled broadcaster would only have recourse to judicial review if they had a concern regarding the imposition of or the level of the sanction.

This seems unsatisfactory. We would therefore propose two alternative approaches:

Either the initial decision regarding a sanction could be taken by the Executive with a right of appeal to the Broadcasting Sanctions Committee. This approach would mean that the initial decision to impose a sanction and the level of that sanction was taken by the body who has dealt most closely with all stages of the case and who are most closely acquainted with the facts;

Or

The sanction decision is taken by the Broadcasting Sanctions Committee with a right of appeal to a separately constituted Broadcasting Sanctions Committee consisting of members who have not had any involvement in the previous procedure.

Taking either of these approaches provides a separate appellate step in process and would likely prevent litigation.

### **Broadcaster representations**

47. In Paragraph 20 it is unclear as to whether or not the type of representation is at the broadcaster or Ofcom's discretion. We would propose that the broadcaster can decide if their interests are best served by representing their position in writing or orally or by both oral and written representations.

48. While the Sanctions Committee will not be bound by the provisional view of the chair of the committee as to whether a sanction will be imposed or not, the committee should be required to set out their written reasons for any departure from the chair's provisional view.

## **Hearings**

49. As the proposal in Paragraph 23 is that the final discussion of a sanction takes place without the broadcaster being present we would suggest that the Committee provide a statement of reasons alongside the sanction decision when it is imposed. Such a statement could provide the basis for the appeal procedure we propose or for judicial review if no appellate procedure exists.

## **Publication of a sanctions decision**

50. The proposal is that the Committee's decision will be sent to a broadcaster 24 hours before publication with the level of any financial penalty omitted. Notification of the financial penalty will then take place immediately before publication of the decision.
51. We appreciate Ofcom's desire to prevent information leaking prior to publication. However the publication of sometimes substantial financial penalties often necessitates a reporting procedure to senior executives and potentially the board of a broadcaster and a reasoned response to press inquiries which may be hostile. The lack of a sufficient period of advance notice therefore causes broadcasters difficulty.
52. As a compromise position we propose that a full embargoed copy of the decision including financial penalty is provided to a broadcaster's in house legal team or their external solicitors on a confidential solicitor to solicitor basis. That way the broadcaster's legal function can prepare their advice to be tendered to the broadcaster when the embargo is lifted shortly prior to full publication.

**Channel 4 Television**  
**21 August 2009**