

## **Ofcom review of procedures for handling broadcasting complaints, cases and sanctions**

### **Response of Channel 5 Broadcasting Ltd (Five) to Ofcom's consultation on proposals for new procedures for the handling of standards cases and fairness & privacy complaints and for the determination of broadcasting statutory sanctions**

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#### **Introduction**

1. Channel 5 Broadcasting welcomes Ofcom's aims to create more straightforward processes aimed at dealing with complaints more quickly, of ensuring consistency between all the procedures, of the creation of a Broadcasting Review and Broadcasting Sanctions committees, and of the introduction of a mechanism to closing complaints during the initial assessment process where they clearly do not raise any issues that warrant further investigation.
2. There are, however, three areas which are of particular concern to us:
  - Ofcom's proposal to introduce a concept of "directly affected third parties" appears to be a disproportionate response to the very limited and exceptional circumstances in which such a party may have an interest in making representations to Ofcom on a complaint;
  - The inability of a broadcaster to request an appeal of a decision in standards complaints and cases prior to publication;
  - The omission of any provision for a broadcaster to request an appeal of Ofcom's most important decision: the decision to impose a statutory sanction.
3. We have provided comments on each of the three sets of procedures separately although it should be assumed that where we have commented against a draft provision that is contained in more than one set of procedures our comments apply equally to the provision where repeated in the other procedure(s).

#### **Proposed guidelines for the handling of standards cases in programmes, advertising and sponsorship, and of other licence-related cases.**

#### **Overview and general information**

4. Paragraphs 1 and 4 We do not understand why the procedures are described as those that Ofcom will “normally” follow when considering complaints or cases. No other procedures are provided for in the document, and the statement appears contrary to the statement in paragraph 4 which states that complaints and investigations about issues raised concerning any relevant requirement “*will be governed* by these procedures” (emphasis added), and Ofcom’s duty under section 325(2) of the Communications Act 2003 to establish procedures for the handling and resolution of complaints about the observance of standards. As the consultation document notes, it is of paramount importance that these procedures are written and implemented in ways that benefit citizens, consumers and broadcasters. In the event that Ofcom wished to follow another procedure, it should not do so without the consent of those involved. Alternatively, if Ofcom wishes to provide for situations where it is not appropriate to follow these procedures, it must state that now and provide criteria for determining where these procedures would not be followed.
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.

### **Confidentiality**

6. Paragraph 10 We believe the obligation to preserve confidentiality requires a greater degree of prominence than is the case in the present document. We suggest the drafting of the second sentence in this paragraph 10 could be improved to read:  
Of particular importance is the obligation on all parties to a complaint to treat all correspondence, documents and other material concerning the complaint as confidential.
7. The footnote to the shaded box headed “Confidentiality” assumes that Ofcom will only 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 from the broadcaster, yet there may be occasions where it is also necessary to withhold such material from the complainant, or from a directly affected third party. The footnote should be amended to reflect that the party from whom the material is withheld will be notified as such together with the reasons why.

8. We believe the procedures should provide clarification on the circumstances in which complainants, broadcasters, and/or directly affected third parties may disclose material submitted and communications/correspondence entered into in relation to the complaint or case. For example, broadcasters may wish to consult a third party with relevant knowledge or expertise, and it may be necessary to disclose confidential material as part of that process.

### **Representations from directly affected third parties**

9. Whilst we accept that there may occasionally be limited circumstances in which publication by Ofcom of a decision in respect of a standards complaint and case may have an impact on a third party we believe the drafting of the current proposal is too wide.
10. We believe the phrase “directly affected third party” is ambiguous and risks confusion with the definition of “person affected” in relation to the handling of fairness and privacy complaints.
11. We also believe the drafting to be too broad in that any number of individuals or broadcasters may argue they were, or would be, directly affected by a case. For example, in the case of an investigation into the promotion of programme-related material in a programme, a wide number of broadcasters who broadcast promotions for material of a similar nature may seek to argue that they would be directly affected by Ofcom’s decision in the case. In the case of a complaint about the broadcast of potentially offensive or harmful material, any number of viewers may argue that they were also directly affected by the material, and any number of broadcasters may argue that they would be directly affected by the decision.
12. In our view, the notion of a “directly affected third party” making representations to Ofcom during an investigation where they learn of an investigation following publication of details of it on Ofcom’s website is contrary to Ofcom’s obligation to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, and targeted only at cases in which action is needed.
13. The process cannot be described as transparent because it will require those who believe that they may be directly affected by a case to refer constantly to Ofcom’s website for details of any cases under investigation. Nor is it clear that the details of

the programme under investigation will include sufficient information to enable a party who believes they may be directly affected by a case to assess properly whether they are so, and publication of sufficient information may contravene the obligation on the part of all parties, including Ofcom, to maintain confidentiality during the investigation of a complaint.

14. The process cannot be described as accountable given that there is no right of review of Ofcom's decision in respect of whether a party is directly affected, either on the part of that party or of the broadcaster, and no obligation on Ofcom to explain its reasoning for deciding whether a party sufficiently meets the criteria.
15. Nor is it proportionate. The proposed procedure can serve only to lengthen and complicate Ofcom's investigations into complaints and cases; consideration of whether a party is directly affected will inevitably delay the process, as will the provision of the relevant representations in the case file and the opportunity for the broadcaster to comment upon them. It is difficult to envisage Ofcom meeting its targets for completing investigations where it is considering representations from parties who may or may not be directly affected.
16. We do not believe that the proposed process corresponds with Ofcom's duty to ensure its activities are targeted only at cases in which action is needed, although we recognise there may be limited circumstances in which a person or body may suffer damage to their reputation as a result of publication of a decision.
17. We believe that the appropriate method for resolving this issue is for Ofcom to consider, when investigating a complaint, whether it believes its decision may result in such a situation. Where it believes this to be the case, Ofcom should seek confirmation from the broadcaster whether that person has been consulted on or contributed to the broadcaster's response to the investigation. Where the broadcaster is unable to provide this confirmation, Ofcom may then decide to contact the third party to invite representations on the substantive points that may result in damage to their reputation, if appropriate.

### **Time limits**

18. Paragraph 14 Any third parties who are permitted to contribute to the process must be under the same obligation to comply with the time limits imposed on complainants and broadcasters.

19. Paragraph 16 We believe the drafting of the second sentence could be improved to read:  
  
‘Complex’ cases are those in which Ofcom needs to contact the broadcaster to investigate the complaint.
20. Paragraph 17 We believe the drafting of the first sentence could be improved to read:  
  
Where either party requests a review of a decision in accordance with these procedures and that review is granted by Ofcom...
21. Paragraph 18 We believe Ofcom should provide parties with an explanation of the reasons why it is not able to conclude its consideration within the specific time limits when it provides them with an indication of when it expects to be able to do so, in accordance with Ofcom’s duty to act in an accountable and transparent manner.

### **Making a complaint**

22. Paragraph 20 We do not believe it is necessary for Ofcom to provide examples of the matters about which complaints can be made under the procedures, and we suggest the second sentence and associated bullet points should be deleted.
23. Paragraph 22 We believe Ofcom should *require*, not request, that standards complaints are submitted on its complaints form. This ensures complainants provide all necessary information at the point of first contact and will assist Ofcom in meeting its stated targets although we recognise that provision should, of course, be made for complainants who are unable to complete the form.
24. Paragraph 24 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.
25. Paragraph 25 We believe greater clarity is required of the first sentence to ensure the time limits in relation to programmes are always 20 working days of the broadcast of the relevant programme. This will avoid the implication that a complaint must be submitted within 20 working days of the occurrence of an incident which is the subject of a complaint in a programme.

26. Ofcom should also take into account the length of any delay in deciding whether to investigate a complaint made later than 20 working days after broadcast, as well as the reasons for it. The words "the length of and" should be inserted between "including" and "the reason for" in the fourth sentence of this paragraph.
27. The footnote to the final sentence of paragraph 25 mistakenly refers to BBC3 instead of BBC2.

### **Assessing a complaint**

28. Paragraph 27 We do not agree with the statement in the second sentence of this paragraph that it is "not appropriate" for broadcasters to provide written responses on the substance of the complaint during Ofcom's initial assessment. In our experience it is sometimes helpful for a broadcaster to provide Ofcom with information which may help it understand or investigate a complaint quickly. We suggest the drafting of this sentence is amended to read:

At this stage it is not necessary for broadcasters to provide a written response on the substance of the complaint but Ofcom may consider any information broadcasters wish to provide to assist Ofcom in the initial assessment.

### **Investigation**

29. Paragraphs 29 and 30 Where Ofcom considers that a complaint does raise potential issues, broadcasters should always be informed when Ofcom proceeds to investigate. The current drafting suggests Ofcom will inform broadcasters that it has decided no breach has occurred "where appropriate". In the interests of accountability and transparency we believe broadcasters should always be told when Ofcom has decided that no breach has occurred following an investigation, regardless of whether the broadcaster has been invited to provide a written response to the complaint.
30. Paragraph 31 In accordance with our submissions regarding the identify of the complainant, the second sentence of paragraph 31 should be amended to read:

At this stage Ofcom will provide details of the complaint and the identity of the complainant to the broadcaster.
31. Paragraph 34 The drafting of this paragraph should be clarified to read:

Where Ofcom considers that a breach has occurred having taken into account the response of the broadcaster, it will draft a summary of its decision for publication.

### Provisional Decision

32. Paragraph 35 We note that broadcasters will have the opportunity to provide comments on factual or typographical errors in a Provisional Decision prior to publication in Ofcom's Broadcast Bulletin. We believe the inclusion of the words "factual or typographical" is unhelpful at this stage because it limits a broadcaster's scope to provide comment on other matters to Ofcom. This is linked to our ability to request a review of a decision, which is dealt with below.

### Publication of decision

33. Paragraph 36 The language of this paragraph suggests Ofcom may change its decision following receipt of comments from the broadcaster, given that the first sentence reads that Ofcom will "finalise its decision", not "finalise its summary of the decision". It is entirely appropriate for Ofcom to have the ability to change its decision prior to publication, but we feel this is not clearly expressed in the procedures as currently drafted.

### Requesting a review

34. We are concerned that broadcasters may only request a review of a decision after publication. We believe this to be disproportionate in that a broadcaster's interests and/or reputation may be harmed by the publication of a decision and the resulting media interest. However, we do not believe it necessary for a broadcaster's ability to request a review to be confined to a review by the Broadcasting Review Committee. We believe it is appropriate for broadcasters to be given the opportunity to make further representations to Ofcom prior to Ofcom finalising its decision. We therefore suggest that broadcasters that are found to have breached a relevant requirement are permitted to make further representations to Ofcom at the Provisional Decision stage where the broadcaster believes Ofcom's provisional decision to be flawed.
35. Paragraph 39 A party who requests a review will always believe that a decision is obviously wrong in substance, so we do not see how that could be a ground for requesting a review of a decision that a party believes is materially flawed. We suggest this paragraph is redrafted to read:
- A request for a review must set out each of the grounds on which the review is requested and the facts in support of each chosen ground for appeal.

## **Grant of a Review**

36. We 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.

## **Proposed guidelines for the handling of Fairness & Privacy complaints**

### **Overview and general information**

37. Paragraph 1 The word “normally” should be removed from the first sentence; Ofcom should always follow its published procedures in accordance with the principles of transparency and accountability.

### **Confidentiality**

38. Paragraph 6 The points we have made regarding confidentiality in Standards complaints and cases at paragraphs 6 to 10 of this response apply equally to these draft guidelines.
39. We also believe greater emphasis should be placed on the parties' obligation not to take any steps which could compromise the fair adjudication of the matter by Ofcom or otherwise constitute an abuse of process. In our view, this obligation should be separated out from the heading of Confidentiality. It may also be helpful to provide examples of actions or behaviour which may fall into this category, such as attempting to contact witnesses.

### **Representations from directly affected third parties**

40. Paragraphs 7-9 The points we have made regarding representations from directly affected third parties in Standards complaints and cases at paragraphs 9 to 17 of this response apply equally to these draft guidelines. We also stress the need to avoid confusion between “directly affected third parties” and “the person affected” as defined by the Broadcasting Act.

### **Time limits**

41. Paragraph 10 We believe the provision which enables Ofcom to extend the time limits “in exceptional circumstances” to be too high a test. There may be any number of reasons why a party is unable to reply within the specified time limit, and Ofcom should



retain discretion to extend them even where the circumstances are not exceptional. We suggest the deletion of the words “in exceptional circumstances”.

42. Paragraphs 12 and 13 We do not believe it is appropriate for the term ‘straightforward’ to be used to describe both those standards cases in which Ofcom does not need to contact the broadcaster and those fairness and privacy cases adjudicated upon following one exchange of written statements or complaints resolved by way of appropriate resolution. We believe using the same word for two different types of approach risks confusion. Similarly, it is confusing to describe ‘complex’ standards cases as those in which Ofcom needs to contact the broadcaster, and ‘complex’ fairness and privacy cases as those adjudicated upon following two exchanges of written statements and/or a hearing. The differing targets for ‘straightforward’ and ‘complex’ cases in the two draft procedures only adds to the confusion. We suggest fairness and privacy cases are labelled differently to standards cases.
43. Paragraph 18 We believe Ofcom should provide parties with an explanation of the reasons why it is not able to conclude its consideration within the specific time limits when it provides them with an indication of when it expects to be able to do so, in accordance with Ofcom’s duty to act in an accountable and transparent manner.

## Procedures

### Making a complaint

44. Paragraph 17 We believe the drafting of this section could be included to confirm that fairness and privacy complaints *can only* be made by the “person affected” (as defined) or by a person authorised by him or her to make the complaint for him or her. We do not believe the introduction of the phrase “directly affected” is helpful in this regard.
45. Paragraph 19 We believe Ofcom should *require*, not request, that fairness and privacy complaints are submitted on its complaints form. This ensures complainants provide all necessary information at the point of first contact and will assist Ofcom in meeting its stated targets.
46. Paragraph 20 Ofcom should also take into account the length of any delay in deciding whether to investigate a complaint made later than 20 working days after broadcast, as well as the reasons for it. The words “the length of and the” should be inserted

between “including” and “the complainant’s explanation” in the fourth sentence of this paragraph.

### **Assessing a complaint**

47. Paragraph 22 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.
48. We do not agree with the statement in the second sentence of this paragraph that it is “not appropriate” for broadcasters to provide written responses on the substance of the complaint during Ofcom’s initial assessment. In our experience it is sometimes helpful for a broadcaster to provide Ofcom with information which may help it understand or assess a complaint quickly. We suggest the drafting of this sentence is amended to read:

At this stage it is not necessary for broadcasters to provide a written response on the substance of the complaint but Ofcom may consider any information broadcasters wish to provide to assist Ofcom in the initial assessment.

### **Entertainment Decision**

49. We do not believe the summary of the criteria that must be satisfied before a fairness and privacy complaint can be entertained by Ofcom to be an accurate representation of the legislation. In particular, the Broadcasting Act provides that Ofcom shall not entertain or proceed with the consideration of a fairness complaint if it appears to them that the matter complained of is a matter in respect of which the complainant 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.<sup>1</sup> There is no provision for Ofcom to consider whether the matter complained of must be “more appropriately resolved” by legal proceedings.
50. In our view, the legislation enables Ofcom to refuse to entertain complaints where it is aware or suspects that a complainant is using Ofcom’s complaint procedure as a “fishing expedition” to obtain evidence for use in legal proceedings, or where Ofcom’s procedure is being used as a precursor to determining whether legal proceedings are likely to be successful. In these cases Ofcom could find that the matter complained of is a matter in which the complainant has a remedy by way of proceedings in a court of law and could decide that, in the particular circumstances (i.e. that the complainant is using the procedure to obtain evidence for use in litigation, or test the strength of

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<sup>1</sup> s.114(2), Broadcasting Act 1996.

proposed court proceedings) it would not be appropriate for Ofcom to consider the complaint.

51. There is also a typographical error in the shaded grey box headed Entertainment Decision in that the criteria are separated by four bullet points when only three are listed.
52. Paragraph 25 The second sentence of this paragraph should be amended to read:  
However, if the complainant has raised other matters which are within Ofcom's remit, the complaint will be passed to an appropriate section of Ofcom for assessment.  
Ofcom should not investigate matters which have not been raised by the complainant.
53. Paragraph 27 We welcome the opportunity for broadcasters to provide a proposal for 'appropriate resolution' of entertained complaints. We have found this procedure to be very useful in resolving complaints, and the flexibility the procedure offers permits broadcasters to find solutions to complaints which provide redress to the complainant more readily than Ofcom's powers would allow were it to consider the complaint.
54. We believe the procedure should be further extended to permit complainants to respond to a broadcaster's proposal for 'appropriate resolution' with an indication of the resolution he would be prepared to accept. This will enable broadcasters to fully understand the complainant's concern and to decide whether it is able to meet it. It would also be consistent with Ofcom's duty to target its regulatory activity only at cases in which action is needed.
55. We therefore propose that paragraph 28 is amended to read:  
Ofcom will not proceed with the consideration and adjudication of a complaint if the resolution that is proposed is accepted by the complainant, or if resolution proposed by the complainant is accepted by the broadcaster.
56. Paragraph 30 The words "of receipt" should be added to the end of this paragraph to clarify the date by which the broadcaster is normally expected to respond.
57. Paragraph 31 The words "Following the exchange of written statements" should be added to the beginning of this paragraph to clarify that Ofcom would not decide to hold a hearing before the broadcaster has been asked to provide at least one written statement in response.

58. In addition, the words "Following consultation with the parties as to their availability" should be added to the beginning of the third sentence to ensure that all parties and witnesses are able to attend. Clarification should also be provided here that Ofcom will not hold a hearing where the complainant cannot or will not attend.

### **Hearings**

59. We are concerned that the complainant appears to be given the last word under the normal procedure at a hearing. Given that it is the broadcaster who must answer the complaint, the broadcaster should be given the opportunity to respond to every statement made by the complainant. The procedure should be amended to provide that the complainant's brief final statement will normally be followed by the broadcaster's brief final statement.

### **Disposal**

60. Paragraph 34 Our arguments made at paragraphs 49 and 50 herein regarding whether Ofcom is required to cease consideration of a fairness and privacy complaint where the matter complained of "would be more appropriately resolved by legal proceedings in the UK" are repeated here. We do not believe this is an accurate reflection of the legislation, and are of the view that Ofcom's discretion to cease consideration of a complaint is wider than the drafting currently suggests.

### **Requesting a review**

61. Paragraph 39 The words "of receipt" should be added between "working days" and "of the relevant decision."
62. Paragraph 40 A party who requests a review will always believe that a decision is obviously wrong in substance, so we do not see how that could be a ground for requesting a review of a decision that a party believes is materially flawed. We suggest this paragraph is redrafted to read:
- A request for a review must set out each of the grounds on which the review is requested and the facts in support of each chosen ground for appeal.
63. Paragraph 41 Although the other party is not required to make any representations on receipt of a request for review we would appreciate clarification of whether any representations a party may choose to make would be considered.

### Grant of a review

64. We believe the test for allowing a review is too high in the proposed procedures and Ofcom has not set out a case as to 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.

## Proposed guidelines for the consideration of statutory sanctions in broadcasting or other licence-related cases

### Overview and general information

65. Paragraph 1 As we have stated in relation to our response on the other procedures documents, we do not understand why the procedures are described as those that Ofcom will “normally” follow. If Ofcom wishes to provide for situations where it is not appropriate to follow these procedures, it must state that now and provide criteria for determining whether these procedures would not be followed.
66. Paragraph 14 We believe Ofcom should provide the broadcaster with an explanation of the reasons why it is not able to conclude its consideration within the specific time limits when it provides it with an indication of when it expects to be able to do so, in accordance with Ofcom’s duty to act in an accountable and transparent manner.

### Procedures

#### Referral

67. Paragraph 16 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.

### Consideration of sanctions and Broadcaster representations

68. Paragraphs 20 and 21 As acknowledged in the guidelines, the imposition of a sanction against a broadcaster is a serious matter. Broadcasters must therefore always be given the opportunity to make written representations on the Chair of the Committee's provisional view of the type and level of any sanction being imposed, and by attendance at a hearing to provide oral representations when the imposition of a financial penalty or shortening or revocation of a licence is being considered.
69. Paragraph 22 A new sub-heading, "Decision", is required before this paragraph.

#### **Publication of a sanctions decision**

70. Paragraph 28 A broadcaster faced with the imposition of a sanction has very little time to prepare its response to Ofcom, particularly as summaries of decisions of the Sanctions Committee can run to many pages . A broadcaster may also need to notify and consult with its Board of Directors and a parent company that may be based overseas. It will also wish to prepare its response to the media. 24 hours prior to publication is an unacceptably short period for a broadcaster to react to a decision, particularly when the broadcaster may not have prior notice of when the decision will be provided.
71. We suggest a broadcaster is given no less than two working days' advance notice that the Committee's decision is going to be sent to the broadcaster, which should be sent three working days before its publication. This would enable broadcasters a sufficient and fair opportunity to comment on factual accuracy, errors or omissions, before publication, to brief its Board, and to prepare its media response.
72. If Ofcom is not minded to extend the time limits set out above because it is concerned about breaches of confidentiality we suggest Ofcom should consider providing the Committee's decision to the broadcaster's professional legal advisors according to the timetable suggested above. Lawyers are subject to additional professional duties in respect of receipt of confidential documents which should provide Ofcom with the assurance it needs that its decisions will remain confidential until publication. This would at least allow the broadcaster's legal advisors sufficient time to comment on factual accuracy, errors or omissions, and to prepare appropriate briefings to the broadcaster's Board.
73. We are also concerned by the proposal that the level of any financial penalty would be omitted from the Committee's decision until publication. The broadcaster will already

have received details of the Chair of the Committee's provisional view on the type and level of any financial penalty. Whilst we understand Ofcom's need to maintain confidentiality until publication we suggest consideration is given to providing broadcasters with an indication that the level of financial penalty is within or outside a range of, for example, ten percent of the amount expressed in the Chair's provisional view.

74. Paragraph 30 We do not understand why the procedures contain no provision for a broadcaster to request a review of the decision of the Broadcasting Sanctions Committee; again, Ofcom has provided no reasoning for this. It is anomalous that the most serious decision that can be taken about a broadcaster is the only one that cannot be reviewed. The only possible redress for a broadcaster who wishes the Committee's decision to be reviewed would be under an application to the courts for a judicial review of the decision which seems neither proportionate, nor desirable for broadcasters or for Ofcom.
75. Ofcom's power to impose sanctions is delegated to the Broadcasting Sanctions Committee. The consultation document contains no detail as to the composition of the Committee, but we assume that it will be formed from a pool of members of the Ofcom Board and/or Content Board. We believe that a broadcaster should have the ability to request a review of a decision of the Sanctions Committee. A request for a review would be required to set out each of the grounds on which the review is requested and the facts in support of each chosen ground for appeal.
76. The decision whether or not to grant a view could be taken by a senior member of the Ofcom Board (e.g. the Chairman, Deputy Chairman, or Chief Executive Officer) not previously involved in the case. A review would be granted where that Board member considered that the broadcaster had put forward an arguable case that the decision was flawed.
77. Any review granted would be undertaken by a Broadcasting Sanctions Review Committee, drawn from members of the Ofcom Board and/or Content Board who had not sat on the Broadcasting Sanctions Committee. This committee would have powers similar to those enjoyed by the Broadcasting Review Committee when considering reviews under the standards or fairness and privacy procedures, namely to either:
  - a. uphold the decision of the Broadcasting Sanctions Committee;

- b. quash the earlier decision in whole or in part and remit the decision back to the Broadcasting Sanctions Committee with reasons for the Broadcasting Sanctions Committee to reconsider in light of those reasons; or
- c. substitute its own decision for the decision of the Broadcasting Sanctions Committee.

78. We set out these proposals only as a suggestion as to how Ofcom could provide broadcasters with an opportunity to request a review of a decision of the Sanctions Committee and would welcome discussion with Ofcom as to any alternative proposal. We are clear, however, that the ability to request a review of the most serious decision Ofcom can take is fundamental to broadcasters' Article 6 right to a fair hearing and is commensurate with Ofcom's duties to ensure its regulatory activities are transparent, accountable, proportionate, and consistent.

**Channel 5 Broadcasting Limited**

**21 August 2009**