



Broadcasting Code Review

Statement on the Ofcom Broadcasting Code

Statement

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Part 1

Executive Summary

Introduction

- 1.1 This document is the final regulatory statement on changes to the Ofcom Broadcast Code (“the Code”) rules on sexual material and broadcast competitions and voting. It follows the Broadcasting Code Review Consultation (15 June to 4 Sept 2009) and should be read in conjunction with the Consultation document which can be found at <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf>. In addition the revised 2009 Code can be found at <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>. The 2009 Code covers all programmes broadcast on or after 16 December 2009.
- 1.2 As part of its duties and functions in relation to broadcasting under the Communications Act 2003 (“the Act”), Ofcom is required to draw up and, from time to time, revise a code for television and radio services, covering standards in programmes (which include the protection of people under the age of 18 and the application of generally accepted standards so as to provide adequate protection to the public from the broadcast of offensive and harmful material), sponsorship and fairness and privacy. The Ofcom Broadcasting Code (“the Code”) came into effect on 25 July 2005 following extensive public consultation and research during 2004.
- 1.3 Ofcom made a commitment in the 2008/9 Annual Plan¹ to review the Code and consider whether it still reflected the consumer, industry and regulatory environments. In order to understand developments in these areas since 2005 we took into account the following:
- **high profile compliance failings** (notably in relation to competitions and voting and sexual material);
 - **pre-consultation discussions** with stakeholders (including broadcasters and representatives of consumer groups);
 - **consumer research** (in relation to commercial radio and in relation to sexual material); and,
 - **legislative change** in particular the requirements of the EC Audiovisual Media Services (AVMS) Directive which must be implemented into UK legislation by 19 December 2009 and gives rise to a number of mandatory changes to the Code (please see below in paragraph 1.4)
- 1.4 In light of these considerations, we identified certain sections of the Code where we believed targeted revisions were required and consulted on proposed changes². The headline changes we are making following the Consultation, and which are reflected in the 2009 Code, are as follows:
- **A clarified set of rules on sexual material within Code Section One** (Protecting the Under-Eighteens), as discussed at Part 3. The rules do not reflect

¹ http://www.ofcom.org.uk/about/accoun/reports_plans/annual_plan0809/

² <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf>

any change in Ofcom's approach to regulation in this area but are designed to make clear that:

- Material equivalent to the British Board of Film Classification ("BBFC") R18-rating is prohibited;
 - 'Adult sex material' is subject to mandatory restricted access³ ('adult sex material' is described as strong material of a sexual nature broadcast for the primary purpose of sexual arousal);
 - Strong or explicit material of a sexual nature broadcast after the watershed (which is not 'adult-sex material') must be justified by the context; and
 - Pre-watershed material of a sexual nature must be appropriately limited.
- **A clarified set of rules on competitions and voting within Section Two (Harm and Offence)**, as discussed at Part 4 of this document to make clear that:
 - broadcast competitions and voting must be conducted fairly;
 - viewers and listeners must be protected from harm.
 - **Revisions to Section Nine (Sponsorship) and Code Section Ten (Commercial References)**, as discussed at Part 5 of this document.
 - Note: In light of the Government's announcement on product placement⁴ (detailed in Part 5 of this document), the Code Review has been extended in relation to Sections Nine and Ten of the Code.
 - **Mandatory changes to the Code (and the Cross-promotion Code⁵) as a result of the AVMS Directive**
 - The AVMS Directive referred to above amends and updates the Television Without Frontiers ("TWF") Directive. All references to the TWF Directive in the Code have been replaced by references to the AVMS Directive.
 - In addition, Section Ten of the Code has been amended, in line with the AVMS Directive, in relation to product placement in acquired children's programmes. This is discussed in Part 5 of this document.

Rules on sexual material and broadcast competitions and voting

- 1.5 Ofcom received 238 responses to its proposals on the rules in relation to material of a sexual nature (these included a group of 64 respondents, and a further group of 27 respondents, who submitted very similar or identical responses). Ofcom also received 35 responses concerning its proposed rules on broadcast competitions and

³ Mandatory restricted access is discussed at paragraphs 3.55 to 3.58.

⁴ http://www.culture.gov.uk/reference_library/minister_speeches/6194.aspx

⁵ <http://www.ofcom.org.uk/tv/ifi/codes/bcode/crosspromo/>

voting. The responses from those individuals and organisations who did not request confidentiality have been published on Ofcom's website⁶.

1.6 Responses varied but can broadly be categorised as follows:

- Respondents who disagreed with the proposals.
- Respondents who broadly agreed with the proposals but subject to certain amendments and/or guidance.
- Respondents who welcomed the proposals without reservations.

1.7 In responding to the Consultation and in preparing this Statement, we have taken into account each of the responses. Where appropriate we have redrafted the proposed rules and/or offered guidance. In doing so we have taken account of Ofcom's duty to secure its statutory objectives under the Communications Act 2003 and to comply with the Human Rights Act 1998 and the European Convention on Human Rights. As discussed below under 'Approach to impact assessment', the redrafting is for the purposes of clarification only and does not mark any shift in Ofcom's regulatory approach.

1.8 Our approach to each of the rules proposed, and to stakeholders' suggestions of alternative approaches, is laid out in Part 3 (in relation to sexual material) and Part 4 (in relation to competitions and voting). Part 3 also explains our approach to the meaning of "mandatory restricted access" and to associated revisions to rules in the 'Films' section of Section One of the Code.

1.9 The new group of rules in relation to sexual material, published in the revised 2009 Code, does not as stated above mark any change in Ofcom's regulatory approach. Rather the rules are intended to enhance clarity and seek to minimise the risks of material being broadcast that is in breach of the Code and are accompanied by guidance. The new rules in the 2009 Code are as follows:

Sexual material

1.17 Material equivalent to the British Board of Film Classification ("BBFC") R18-rating must not be broadcast at any time.

1.18 'Adult sex material' - material that contains images and/or language of a strong sexual nature which is broadcast for the primary purpose of sexual arousal or stimulation - must not be broadcast at any time other than between 2200 and 0530 on premium subscription services and pay per view/night services which operate with mandatory restricted access.

In addition, measures must be in place to ensure that the subscriber is an adult.

Meaning of "mandatory restricted access"

Mandatory restricted access means there is a PIN protected system (or other equivalent protection) which cannot be removed by the user, that restricts access solely to those authorised to view.

⁶ <http://www.ofcom.org.uk/consult/condocs/bcode09/responses/>

1.19 Broadcasters must ensure that material broadcast after the watershed which contains images and/or language of a strong or explicit sexual nature, but is not 'adult sex material' as defined in Rule 1.18 above, is justified by the context.

(See Rules 1.6 and 1.18 and Rule 2.3 in Section Two: Harm and Offence which includes meaning of "context".)

1.20 Representations of sexual intercourse must not occur before the watershed (in the case of television), or when children are particularly likely to be listening (in the case of radio), unless there is a serious educational purpose. Any discussion on, or portrayal of, sexual behaviour must be editorially justified if included before the watershed, or when children are particularly likely to be listening, and must be appropriately limited.

1.10 Again, as stated above, the new group of rules in relation to broadcast competitions and voting, published in the revised 2009 Code, does not mark any change in Ofcom's regulatory approach. Rather the rules are intended to enhance clarity and seek to minimise the risks of material being broadcast that is in breach of the Code, and are accompanied by guidance. The new rules in the 2009 Code are as follows:

Broadcast competitions and voting

2.13 Broadcast competitions and voting must be conducted fairly.

2.14 Broadcasters must ensure that viewers and listeners are not materially misled about any broadcast competition or voting.

2.15 Broadcasters must draw up rules for a broadcast competition or vote. These rules must be clear and appropriately made known. In particular, significant conditions that may affect a viewer's or listener's decision to participate must be stated at the time an invitation to participate is broadcast.

2.16 Broadcast competition prizes must be described accurately.

(See also Rule 1.30 in Section One: Protecting the Under-Eighteens, which concerns the provision of appropriate prizes for children.)

Note:

For broadcast competitions and voting that involve the use of premium rate services (PRS), broadcasters should also refer to Rules 10.9 and 10.10.

Meaning of "broadcast competition":

A competition or free prize draw featured in a programme in which viewers or listeners are invited to enter by any means for the opportunity to win a prize.

Meaning of "voting":

Features in a programme in which viewers or listeners are invited to register a vote by any means to decide or influence, at any stage, the outcome of a contest.

Commercial references

- 1.11 Issues in relation to Section Nine of the Code (sponsorship) and Section Ten (commercial references) are discussed in Part 5 of this document.
- 1.12 The Consultation proposed extensive changes to Sections Nine and Ten of the Code (in relation to sponsorship and commercial references). However following the closure of the consultation, on 16 September 2009 the Government announced⁷ its intention, subject to consultation⁸, to permit product placement in UK produced television programmes.
- 1.13 Ofcom therefore decided to extend its review of the Broadcasting Code⁹ in order to take into account any possible outcome of the Government's consultation, and the potential wider implications of any change in this area on other rules relating to commercial references in television and radio programming, including the rules relating to sponsorship. Following the outcome of the Government's consultation on product placement, which closes on 8 January 2010, Ofcom will consult on any new proposals for amendments to Sections Nine and Ten.
- 1.14 In addition, Section Ten of the Code has been revised in relation to product placement in acquired children's programmes¹⁰. As of 19 December 2009, under the AVMS Directive, product placement is prohibited in all children's programmes that are produced after this date and transmitted on any service which is subject to UK jurisdiction. Ofcom has therefore amended the Code to reflect this position within 'Meaning of product placement' in Section Ten. We have also drafted guidance for broadcasters on how to comply with the new requirement. This is discussed at paragraphs 5.5 to 5.9 below.
- 1.15 The meaning of "product placement" which follows Rule 10.5 in Section Ten of the Code now states:

10.5 Product placement is prohibited

Meaning of "product placement":

Product placement is the inclusion of, or a reference to, a product or service within a programme in return for payment or other valuable consideration to the programme maker or broadcaster (or any representative or associate of either).

- Prop placement: For the purpose of this rule, references to products or services acquired at no, or less than full, cost, where their inclusion within the

⁷ http://www.culture.gov.uk/reference_library/minister_speeches/6194.aspx

⁸ This consultation closes on 8 January 2010 and can be found at http://www.culture.gov.uk/reference_library/consultations/6421.aspx

⁹ <http://www.ofcom.org.uk/consult/condocs/bcode09/extension/>

¹⁰ Children's programmes in this context are programmes commissioned for, or specifically directed at, audiences below the age of 16.

programme is justified editorially, will not be considered to be product placement. On television, a brief, basic text acknowledgement of the provider of these products or services may be included within the end credits of the programme. This is permitted only where the identity of the product is not otherwise apparent from the programme itself.

- Acquired programmes: With the exception of children's programmes produced after 19 December 2009, Rule 10.5 does not apply to arrangements covering the inclusion of products or services in a programme acquired from outside the UK and films made for cinema provided that no broadcaster regulated by Ofcom and involved in the broadcast of that programme or film directly benefits from the arrangement.

Children's programmes in this context are programmes commissioned for, or specifically directed at, audiences below the age of 16.

Broadcasters should note that all acquired programmes or films must nevertheless comply with all other relevant rules in this Code. In relation to references to products and services in acquired programmes that may have resulted from commercial arrangements, broadcasters should pay particular attention to the requirements of Sections One, Two and Ten of the Code.

- 1.16 Stakeholders should also note that rules in relation to premium rate services in Section Ten of the Code are subject to a consultation on Participation TV. This is discussed below at paragraphs 5.10 to 5.14.

Sections of the Code where no revisions were proposed

- 1.17 The Consultation explained that Ofcom had reviewed the entire Code and decided that only certain areas require changes at present. We invited stakeholders to suggest other sections of the Code which, in their view, should also be reviewed. We also invited stakeholders to suggest any areas where updating of Code guidance would be helpful in order to assist the interpretation and application of the Code.
- 1.18 Stakeholder responses are detailed in Part 6 of this document. Part 6 also explains Ofcom's consideration of the responses including requests to revise current guidance.

Consumer research

- 1.19 Deliberative and qualitative research into consumer attitudes to sexual material and commercial references on radio was published together with the Broadcasting Code Review Consultation. This can be found at: <http://www.ofcom.org.uk/consult/condocs/bcode09/sextv.pdf> and <http://www.ofcom.org.uk/consult/condocs/bcode09/radioresearch.pdf>.
- 1.20 In addition the Consultation document made clear that Ofcom is aware that attitudes towards offensive language can change over time. We have therefore commissioned research on public attitudes towards offensive language in order to establish current levels of acceptability in this area and to inform Ofcom's application of the Code. This research will be published in 2010.

Approach to impact assessment

- 1.21 The Consultation document did not contain a separate impact assessment document. Instead the consultation document as a whole assessed the impact of the proposed changes on stakeholders (including citizens and consumers; and radio and television broadcasters). In relation to the proposed rules on sexual material and competitions and voting, our assessment of the impact on stakeholders was that there would be no change to Ofcom's regulatory approach.
- 1.22 Similarly this Statement as a whole addresses issues in relation to impact raised by stakeholders. Where stakeholders challenged Ofcom's assessment of impact (for example some stakeholders argued that proposed new Rule 1.19 increased the regulatory burden in relation to strong sexual material, others that it diminished it) we have reflected on our proposals, re-drafted where appropriate and provided accompanying guidance. Following these revisions our view remains that our regulatory approach remains unchanged but that the clarity provided in the new rules will assist in minimising the risks of material being broadcast that is in breach of the Code.
- 1.23 In relation to equality (whether in Northern Ireland or the rest of the UK) including gender, disability or ethnicity, the Consultation document argued that our approach to regulation as a result of the revised rules would remain unchanged, and therefore we did not consider that our proposals would have any particular implications for people to whom these considerations relate. This approach was not challenged by stakeholders and is discussed at paragraphs 3.134, 3.141, 4.55 and 4.57 below.

Broadcasting Code 2009

- 1.24 As discussed above we have updated and revised the Code which can be found at <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>

Guidance

- 1.25 As also discussed above we have updated and revised guidance in relation to the revised rules on sexual material and broadcast competitions and voting (discussed in Parts 3 and 4 of this document). Guidance to the Code can be found at <http://www.ofcom.org.uk/tv/ifi/guidance/bguidance>.

Part 2

Background

Introduction

- 2.1 This part of the Statement explains the background to Ofcom's review of the Broadcasting Code ("the Code"), the proposals made in the Broadcasting Code Review Consultation document and Ofcom's consideration of stakeholder responses. It should be read in conjunction with Ofcom's Broadcasting Code Review Consultation Paper which sets out the rationale for our proposals and approach to impact assessment <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf>. In addition the revised 2009 Code can be found at <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>. The 2009 Code covers all programmes broadcast on or after 16 December 2009.
- 2.2 The key developments that have taken place and are explained further in this chapter are as follows:
- 2006-2009: Serious compliance failings in standards in relation to Sexual Material and Competitions and Voting;
 - 2008: Ofcom's Annual Plan commits to further develop the Code following changes in the consumer, industry and regulatory environment¹¹;
 - 15 June to 4 Sept 2009: Ofcom consultation on proposed changes to its rules on Sexual Material, Competitions and Voting, Sponsorship and Commercial References¹²; consumer research on sexual material¹³ and commercial radio¹⁴ also published;
 - 9 October 2009 Ofcom announces an extension of its review of the Broadcasting Code in relation to commercial references¹⁵, following the Government's announcement of its intention, subject to consultation¹⁶, to permit product placement in UK produced television programmes¹⁷;

¹¹ http://www.ofcom.org.uk/about/accoun/reports_plans/annual_plan0809/

¹² <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf>

¹³ <http://www.ofcom.org.uk/consult/condocs/bcode09/sextv.pdf>

¹⁴ <http://www.ofcom.org.uk/consult/condocs/bcode09/radioresearch.pdf>

¹⁵ <http://www.ofcom.org.uk/consult/condocs/bcode09/extension/>

¹⁶ This consultation closes on 8 January 2010 and can be found at http://www.culture.gov.uk/reference_library/consultations/6421.aspx

¹⁷ http://www.culture.gov.uk/reference_library/minister_speeches/6194.aspx

- 16 December 2009: In this current document Ofcom publishes its Statement on the Broadcasting Code Review, and also publishes a revised Code¹⁸ and relevant Guidance¹⁹;
- 19 December 2009: the Audiovisual Media Services (AVMS) Directive must be implemented into UK legislation by this date.

What did the Broadcasting Code Review Consultation propose?

- 2.3 As part of its duties and functions in relation to broadcasting under the Communications Act 2003 (“the Act”), Ofcom is required to draw up and, from time to time, revise a code for television and radio services, covering standards in programmes (which include the protection of people under the age of 18 and the application of generally accepted standards to protect the public from the broadcast of offensive and harmful material), sponsorship and fairness and privacy. The Ofcom Broadcasting Code (“the Code”) came into effect on 25 July 2005 following extensive public consultation and research during 2004.
- 2.4 Ofcom made a commitment in the 2008/9 Annual Plan to review the Code and consider whether it still reflected the consumer, industry and regulatory environments. In order to understand developments in these areas since 2005 we took into account the following:
- **high profile compliance failings** (notably in relation to competitions and voting and sexual material);
 - **pre-consultation discussions** with stakeholders (including broadcasters and representatives of consumer groups);
 - **consumer research** (in relation to commercial radio and in relation to sexual material); and,
 - **legislative change** in particular the Audio Visual Media Services (AVMS) Directive which must be implemented into UK legislation by 19 December 2009 and gives rise to a number of mandatory changes to the Code (please see below at paragraph 2.7).
- 2.5 In light of these considerations, we identified certain sections of the Code where we believed targeted revisions were required. However we did not identify a need to revise all the rules in the Code. Where the factors listed above have not suggested that rules should be revised, we proposed leaving the rules unchanged but invited stakeholders, as part of the Consultation, to comment on this approach and on whether additional guidance would be helpful (please see Part 6 of this document).
- 2.6 The headline changes proposed in the Consultation were as follows:
- **A clarified set of rules on sexual material within Code Section One** (Protecting the Under-Eighteens), as discussed at Part 3 of this document;

¹⁸ <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>

¹⁹ <http://www.ofcom.org.uk/tv/ifi/guidance/bguidance>

- **A clarified set of rules on competitions and voting within Section Two** (Harm and Offence), as discussed at Part 4 of this document; and,
- **Significant revisions to Section Nine (Sponsorship) and Code Section Ten** (Commercial References). As discussed at Part 5 of this document, and at paragraph 2.2 above, this element of the Code Review has been extended to 2010.

2.7 In relation to the requirements of the AVMS Directive, stakeholders should note that this amends and updates the Television Without Frontiers (“TWF”) Directive. In light of this all references to the TWF have been replaced in the revised Code, and in the Cross-Promotion Code²⁰ by references to the AVMS Directive which must be implemented into UK legislation by 19 December 2009. In addition, in light of the AVMS Directive, Section Ten of the Code has been amended in relation to product placement in acquired children’s programming (as discussed below at paragraphs 2.23 to 2.24).

Sexual Material Rules

2.8 Ofcom has carried out a number of investigations over the last five years which have highlighted serious compliance failures in relation to the broadcast of material of a sexual nature, and some of these have resulted in Ofcom imposing significant financial penalties.

2.9 The 2005 Code contained rules which sought to ensure that material of a sexual nature was appropriately scheduled and, where appropriate, access to it was restricted in order to protect under-eighteens. Ofcom now considers it would be helpful to clarify the rules that relate to the broadcast of material of a sexual nature, in particular in relation to the distinctions within the range of such broadcast material.

2.10 The Consultation proposed grouping together rules in relation to sexual material which, until now, have been dispersed in different parts of Section One and, in addition, proposed adding a new rule.

2.11 As discussed in the Consultation, the purpose of the new rule was to encourage more detailed consideration of the contextual justification for the broadcast of strong sexual material (where the primary purpose for broadcast is not sexual arousal and, therefore, mandatory access restrictions²¹ *do not* apply). It was also designed to assist broadcasters in distinguishing between strong sexual material and ‘adult-sex’ material where mandatory access restrictions *do* apply (e.g. by PIN protection).

2.12 The proposed rules were designed to make clear that regulation in relation to material of a sexual nature continued to require that:

- **Material equivalent to the British Board of Film Classification (“BBFC”) R18-rating** was prohibited;
- **‘Adult-sex’ material** - material broadcast for the primary purpose of sexual arousal - was subject to mandatory restricted access;

²⁰ <http://www.ofcom.org.uk/tv/ifi/codes/bcode/crosspromo/>

²¹ We proposed replacing the term “encryption” (used in the 2005 Code) with the term “mandatory restricted access”. Our approach to mandatory restricted access is discussed at paragraphs 3.55 to 3.58.

- **‘Strong’ sexual material** must be justified; and
 - **‘Pre-watershed’ material of a sexual nature** must be appropriately limited.
- 2.13 Stakeholder responses to each of the proposals are detailed in Part 3 of this document. Part 3 also explains Ofcom’s consideration of the responses and re-drafting of the proposed rules. In addition we have provided a meaning for “mandatory restricted access” and we have amended the rules in the ‘Films’ section of Section One of the Code in order to ensure a consistent approach to its requirements. We are also publishing guidance to assist stakeholders in assessing material subject to these rules.
- 2.14 Having taken account of stakeholders’ responses, we have amended the rules where appropriate and added accompanying guidance. We do not believe that the revised rules change the amount or nature of sexual material that can be broadcast under the Code, nor that the rules mark a change in our regulatory approach. Rather we believe that the rules will clarify and reinforce the current position and thereby help to reduce compliance failures in the future. This in turn will benefit viewers by reducing the risk of material being broadcast that is in breach of the Code.

Broadcast Competitions and Voting Rules

- 2.15 Ofcom has carried out a number of high-profile investigations over the last three years which have highlighted serious consumer protection issues that can potentially result from the unfair or misleading conduct of broadcast competitions or voting.
- 2.16 The 2005 Code contained rules which sought to ensure that consumers were protected and audiences not misled. Ofcom now considers it would be helpful to clarify the rules that relate to broadcast competitions and voting. Additionally Ofcom has relied on broadcasters complying with the general requirement that they do not materially mislead audiences in the portrayal of factual matters. As there were no current specific rules which relate to audience voting, in the Consultation document we proposed replacing the single rule in relation to competitions in Section Two with a number of new rules covering both competitions and voting, together with proposed meanings to accompany the new rules.
- 2.17 Stakeholder responses to each of the proposals are detailed in Part 4 of this document. Part 4 also explains Ofcom’s consideration of the responses and re-drafting of the proposed rules. In addition we are publishing guidance to assist stakeholders in complying with these rules.
- 2.18 Having taken account of stakeholders’ responses, we have amended the rules where appropriate and added accompanying guidance. We do not believe that the revised rules change regulation in this area. As with the rules on sexual material, we believe that the rules will clarify and reinforce the current position and thereby help to reduce compliance failures in the future. This in turn will benefit viewers by reducing the risk of material being broadcast that is in breach of the Code.

Commercial references

- 2.19 Issues in relation to Section Nine of the Code (sponsorship) and Section Ten (commercial references) are discussed in Part 5 of this document.
- 2.20 The Consultation proposed extensive changes to Sections Nine and Ten of the Code (in relation to sponsorship and commercial references). However following the

closure of the consultation, on 16 September 2009 the Government announced²² its intention, subject to consultation²³, to permit product placement in UK produced television programmes. Ofcom therefore decided²⁴ to extend its review of the Broadcasting Code in order to take into account any possible outcome of the Government's consultation, and the wider potential implications of any change in this area on other rules relating to commercial references in television and radio programming, including the rules relating to sponsorship.

- 2.21 Following the outcome of the Government's consultation on product placement, Ofcom will then consult on any new proposals for amendments to Sections Nine and Ten.
- 2.22 We will consider the responses to our further consultation on these sections of the Code. In doing so, and in revising any rules, we will also take account of responses to the proposals we have received to date, where these relate to rules which, in Ofcom's view, are unaffected by the Government's eventual decision on product placement.
- 2.23 In addition Section Ten of the Code has been revised in relation to product placement in acquired children's programming. Product placement is currently prohibited under the Broadcasting Code. However arrangements covering the inclusion of products or services in a programme acquired from outside the UK and films made for cinema are not covered by this prohibition, provided no broadcaster regulated by Ofcom and involved in the broadcast of the programme directly benefits from the arrangement.
- 2.24 Under the AVMS Directive, as of 19 December 2009, product placement is prohibited in all children's programmes that are produced after this date. Ofcom has therefore amended the Code to reflect this position and drafted guidance for broadcasters on how to comply with the new requirement. This is discussed at paragraphs 5.5 to 5.9 below.
- 2.25 Stakeholders should also note that rules in relation to premium rate services in Section Ten of the Code are subject to a consultation on Participation TV. This is discussed below at paragraphs 5.10 to 5.14.

Sections of the Code where no revisions were proposed

- 2.26 The Consultation explained that Ofcom had reviewed the entire Code and decided that only certain areas required changes at present. We invited stakeholders to suggest any other sections of the Code which, in their view, should also be reviewed. We also invited stakeholders to suggest any areas where updating of Code guidance would be helpful in order to assist the interpretation and application of the Code.
- 2.27 Stakeholder responses are detailed in Part 6 of this document. Part 6 also explains Ofcom's consideration of the responses including requests to revise current guidance.

²² http://www.culture.gov.uk/reference_library/minister_speeches/6194.aspx

²³ This consultation closes on 8 January 2010 and can be found at http://www.culture.gov.uk/reference_library/consultations/6421.aspx

²⁴ <http://www.ofcom.org.uk/consult/condocs/bcode09/extension/>

Consumer research

- 2.28 Deliberative and qualitative research into consumer attitudes to sexual material and commercial references on radio was published together with the Broadcasting Code Review Consultation. This can be found at: <http://www.ofcom.org.uk/consult/condocs/bcode09/sextv.pdf> and <http://www.ofcom.org.uk/consult/condocs/bcode09/radioresearch.pdf>.
- 2.29 Ofcom also has a number of rules relating to offensive language both in Section One of the Code (in relation to protecting the under-eighteens), and Section Two of the Code (in relation to generally accepted standards). These rules are interpreted in light of Ofcom's understanding of the views of viewers and listeners, and this is underpinned by consumer research.
- 2.30 Ofcom considers that the rules in relation to offensive language provide adequate information to stakeholders regarding the requirements to ensure offensive language complies with the Code. Where compliance issues have arisen the rules have been sufficiently robust to deal with them. We did not therefore propose revisions to the rules in the Consultation. However, we are aware that attitudes towards language can change over time. Therefore, we have commissioned research on public attitudes towards offensive language in order to establish current levels of acceptability in this area and inform Ofcom's application of the Code. This research will be published in 2010.

Approach to impact assessment

- 2.31 Ofcom's aim is to ensure that the Code appropriately furthers the interests of citizens and consumers and the radio and television industries; and enables Ofcom to meet its duties effectively and efficiently. Ofcom seeks to provide adequate protection for consumers and an appropriate level of freedom of expression for broadcasters, while remaining responsive to changes in the industry and regulatory environment since the publication of the current Code.
- 2.32 The Consultation document did not contain a separate impact assessment document. Instead the consultation document as a whole assessed the impact of the proposed changes on stakeholders (including citizens and consumers; and radio and television broadcasters). In relation to the proposed rules on sexual material and competitions and voting, our assessment of the impact on stakeholders was that the proposed rules did not represent a change to Ofcom's regulatory approach.
- 2.33 Similarly this Statement as a whole addresses issues in relation to impact raised by stakeholders. Where stakeholders challenged Ofcom's assessment of impact (for example some stakeholders argued that proposed new Rule 1.19 increased the regulatory burden in relation to strong sexual material, others that it diminished it) we have reflected on our proposals, re-drafted where appropriate and provided accompanying guidance.
- 2.34 Our assessment of the impact of these proposals on stakeholders was broadly that broadcasters would have a better understanding of the regulatory principles already in place, as discussed in Ofcom's published findings²⁵, and so avoid future compliance failures. Viewers and listeners would also benefit in that the revised rules are intended to provide greater clarity for broadcasters and therefore to minimise the

²⁵ <http://www.ofcom.org.uk/tv/obb/>

risks of material being broadcast that is in breach of the Code. Having considered the responses to the Consultation, and re-drafted in light of these, this remains our view.

- 2.35 In relation to equality (whether in Northern Ireland or the rest of the UK) including gender, disability or ethnicity, the Consultation document argued that our approach to regulation as a result of the revised rules would remain unchanged, and therefore we did not consider that our proposals would have any particular implications for people to whom these considerations relate. This approach was not challenged by stakeholders and is discussed at paragraphs 3.134, 3.141, 4.55 and 4.57 below.

Ofcom's review of procedures for handling broadcasting complaints, cases and sanctions

- 2.36 Stakeholders should note that Ofcom has recently consulted on its procedures for handling broadcasting complaints, cases and sanctions. The review is intended to streamline and simplify Ofcom's complaints handling and sanctions procedures, providing stakeholders with a more efficient and responsive process²⁶.

Ofcom's consultation on Participation Television and premium rate services

- 2.37 On 3 November 2009 Ofcom published its regulatory statement and further consultation entitled Participation Television: Rules on the promotion of premium rate services (PRS)²⁷. Section 4 of that document provides the wording of the new Broadcasting Code rules in relation to premium rate numbers and revised guidance is also provided.
- 2.38 As discussed in Part 5 of this document, Ofcom does not intend to bring into effect the changes to the Broadcasting Code in respect of PRS (discussed immediately above) until the conclusion of the Participation Television Consultation process.
- 2.39 The Participation Television consultation will close on 15 January 2010. After this period, Ofcom will publish a statement bringing into force the changes to the Broadcasting Code. Until then all Ofcom licensees must continue to comply with the existing rules on premium rate numbers in Section Ten of the Broadcasting Code.

Broadcasting Code 2009

- 2.40 As discussed above we have updated and revised the Code which can be found at <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>

Guidance

- 2.41 As also discussed above we have updated and revised guidance in relation to the revised rules on sexual material and broadcast competitions and voting (discussed in Parts 3 and 4 of this document). Guidance to the Code can be found at <http://www.ofcom.org.uk/tv/ifi/guidance/bguidance>.

²⁶ <http://www.ofcom.org.uk/consult/condocs/broadcasting/condoc.pdf>

²⁷ <http://www.ofcom.org.uk/consult/condocs/participationtv3/ptv3.pdf>

Part 3

Sexual Material Rules (Code Section One)

Introduction

Summary of Proposals

- 3.1 In the Consultation document we proposed a set of rules that clarified the requirements regarding the broadcast of sexual material, within Section One of the Code. The proposed rules were designed to make clear that:
- **Material equivalent to the British Board of Film Classification (“BBFC”) R18-rating** is prohibited;
 - **‘Adult-sex’ material** is subject to mandatory restricted access²⁸ (‘adult-sex’ material is described as material broadcast for the primary purpose of sexual arousal);
 - **‘Strong’ sexual material** must be strongly justified; and
 - **‘Pre-watershed’ material of a sexual nature** must be appropriately limited
- 3.2 This part of the Statement should be read in conjunction with Part 4 of Ofcom’s Broadcasting Code Review Consultation Paper of June 2009 (“the Consultation”) which sets out the rationale for our proposals and approach to impact assessment and can be found at: <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf>. In addition the revised 2009 Code can be found at <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>. The 2009 Code covers all programmes broadcast on or after 16 December 2009.

General summary of responses

Responses to the Consultation proposals on sexual material rules

- 3.3 Ofcom received 238 responses to its proposals on the rules in relation to material of a sexual nature (see below at paragraph 3.5 in relation to groups of responses). 125 of these requested confidentiality and are not therefore identified in the summary of responses below.
- 3.4 The responses from those individuals and organisations who did not request confidentiality have been published on Ofcom’s website²⁹. These were from 85 individuals and the following organisations: Aberkenfig Bible Church; Ark of Hope; The British Board of Film Classification (“BBFC”); Box Television; Channel 4; Channel 5 Broadcasting Limited (“Five”); Christian Concern for our Nation & The Christian Legal Centre (“CCFON”); Cornwall’s Community Standards Association; Doctors Who Respect Human Life; Evangelical Connexion of the Free Church of England; Freesat (UK) Limited; Hardwick Baptist Church; Kirby Laing Institute for

²⁸ Mandatory restricted access is discussed at paragraphs 3.55 to 5.58.

²⁹ <http://www.ofcom.org.uk/consult/condocs/bcode09/responses>

Christian Ethics; Lakenheath Baptist Chapel; Mediamarch; Mediawatch-UK; Millwood Hargrave & Livingstone; Momentum Youth; Morality Forum; On Eagles Wings; Participation Television Broadcasters Association Limited (“PTVBA”); S4C; STV Group plc; The Common Good Party; UTV Television; Viacom (including MTV Networks Europe); Viasat Broadcasting Limited; Voice of the Listener & Viewer (“VLV”).

- 3.5 Of the 238 responses, two groups of respondents submitted very similar or identical responses: 64 in support of the points raised by CCFON; and 27 in support of the points raised by Mediamarch.

Overview of responses to the Consultation

- 3.6 Responses varied widely but can broadly be categorised as follows:

- Respondents who disagreed with the proposals from a variety of perspectives:
 - respondents who advocated the prohibition of the broadcast of all material of a sexual nature (in relation to ‘adult-sex’, strong sexual material and/or mild sexual material);
 - respondents who considered the proposed and existing rules imposed a ‘nanny state’ and advocated abolishing both the prohibition on R18 material and the restricted access imposed on ‘adult-sex’ material; or,
 - respondents who considered that the proposed rules would result in the banning of Adult Chat material³⁰.
- Respondents who broadly agreed with the proposals but only subject to certain amendments and/or guidance.
- Respondents who welcomed the proposals without reservations.

Ofcom’s response

- 3.7 In responding to the Consultation and preparing this statement, we have taken into account each of the responses. Where appropriate we have redrafted and/or provided guidance. In doing so we have taken account of Ofcom’s duty to secure its statutory objectives under the Communications Act 2003, and to comply with the Human Rights Act 1998 and the European Convention on Human Rights (“the Convention”). Our approach to each of the rules proposed, and to stakeholders’ suggestions of alternative approaches, is laid out below.
- 3.8 In relation to an assessment of impact, the Consultation document explained that it did not contain a separate impact assessment document. Instead the Consultation document as a whole assessed the impact of the proposed changes on stakeholders (including citizens and consumers; and radio and television broadcasters). Likewise this Statement as a whole responds to issues relating to impact and in addition summarises Ofcom’s position at paragraphs 2.31 to 2.35.

³⁰ Adult Chat material is distinct from ‘adult-sex’ material (referred to at paragraph 3.1), since the primary purpose of the material is revenue generation through invitations to call adult chat lines.

Rule 1.17

Proposal

3.9 Ofcom's Consultation proposed a new Rule 1.17 which stated:

1.17 Material equivalent to the British Board of Film Classification ("BBFC") R18-rating must not be broadcast at any time.

3.10 The new rule is drawn from the 2005 Code Rule 1.25 which stated:

"BBFC R18-rated films or their equivalent must not be broadcast."

3.11 The proposed new rule was drafted to complement a companion rule stating that *"BBFC R18-rated films must not be broadcast"* which would sit in the "Films" section of the Code.

Responses to the Consultation

Respondents who disagreed with the proposals

- 3.12 A respondent considered that the proposed Rule 1.17 did not go far enough. Instead he suggested that it should be revised to read: "material equivalent to the BBFC 'R18' classification and all visual representations of sexual acts within any genre, excluding kissing, must not be broadcast at any time. He stated that material equivalent to the BBFC '18' classification that included scenes of any form of 'real' sexual activity or nudity indicating sexual desire must also not be broadcast at any time and there should be no broadcast of nudity before the watershed.
- 3.13 Mediamarch, and other respondents who shared their views, considered that R18 material, and material equivalent to it, should not be available at all. It asked why material "equivalent to R-18" had not already been classified as R18 and said that, in any event, it should not be separated from the rule in relation to BBFC classified R-18 works. However, Mediawatch acknowledged and applauded the continuing prohibition of R18 classified material but requested clarity over how material "equivalent to" the R18 classification was to be determined bearing in mind that it had concerns about the BBFC classifications.
- 3.14 Similarly CCFON argued for a further strengthening of the proposed Rule 1.17 by suggesting: "BBFC R-18 rated films and material equivalent to the BBFC R-18 rating, whether or not in films, must not be broadcast at any time". The respondents considered that the wording proposed, *"material equivalent"*, was "totally unclear". They argued that the proposed Rule 1.17 needed to be reworded to ensure that the rule covered not just films but all broadcasts including trailers and advertising.
- 3.15 Conversely, two individuals argued that broadcasting restrictions on R18 material should be lifted and stated that its availability in other parts of Europe did not harm under-18's. One of these respondents noted that the broadcast of R18 material was not against the law, although Parliament had had the opportunity to prohibit it within the Communications Act 2003, and therefore argued that Ofcom's prohibition exceeded what Parliament intended. He further noted that Ofcom's research at the time of the Broadcasting Code 2005 publication concluded that there was no empirical evidence to prove that R18 material "seriously impairs the mental or physical development of minors". Instead he argued that some studies point to

positive effects such as lowering the drive for sex crimes and lowering aggression towards others. This respondent argued for the broadcast of R18 material between limited hours (from 11pm), with verification that the user was an adult, and limited to subscription or Pay Per View channels.

Respondents who agreed with the proposals subject to amendments and/or guidance

- 3.16 The BBFC highlighted that its own research showed that the public drew a sharp distinction between ‘soft core’ sex works (currently restricted to encrypted channels which broadcast ‘adult-sex’ material) and ‘hard core’ sex works (currently prohibited on any channel). It said the public expected ‘hard core’ sex works to be clearly labelled as such, separated from other material in the marketplace, and supplied in a manner which severely restricts the possibility of children coming across it. It said that the current prohibition depended on a judgement that the access control systems available at the time of publication of the Broadcasting Code 2005 were insufficiently robust. It said that in 2009 it was arguable that the access control systems available now were sufficient to meet any reasonable test of robustness. However, it said that assuming the status quo in relation to the prohibition of such content was maintained, separation of the rules relating to R18 content and its equivalent seemed sensible. The former was a question of fact – either the content has been classified by the BBFC, or it has not - while the latter involved a judgement about whether a piece of content met a particular set of criteria. It said that it therefore remained logical to retain the former alongside the other rules relating to films classified by the BBFC, and to place the latter (that material which might be equivalent to BBFC R18 in strength), alongside the other rules relating to depictions of sexual activity.

The BBFC also stated that while improving clarity overall, the proposed separation did not remove the difficulties inherent in setting a standard which was based on criteria set and operated by another regulator (i.e. the BBFC). In order to avoid confusion in the future over R18 standards it strongly recommended that the BBFC was fully consulted over the new guidance that was proposed in this area.

- 3.17 One respondent, Five, while agreeing with the proposed new rule, urged greater clarification so that: “clear guidance that will clarify the criteria for the BBFC R18-rating is published alongside the introduction of the new rule.” In addition, and again whilst in agreement with Ofcom’s general approach regarding Rule 1.17, a respondent said that Ofcom assumed that compliance staff would be aware of the types of content that would make a programme equivalent to BBFC R18 in strength and that BBFC documentation was not comprehensive enough to define problematic content (for the benefit of broadcasters).
- 3.18 One respondent agreed with the intention behind the proposed Rule 1.17 but considered that it could be better achieved. The proposal for Rule 1.17 seemed to be to delete the present Rule 1.25 as this rule referred specifically to BBFC R18-rated films and their broadcast whereas the proposed wording of Rule 1.17 did not mention ‘films’ but only material equivalent to them. This respondent suggested a slightly different form of wording for Rule 1.17 as follows: “Neither British Board of Film Classification R18-rated films nor material equivalent to them shall be broadcast”. Andrea Millwood Hargrave and Sonia Livingstone considered the rule a good idea as long as the R18 definition is clear.

Respondents who agreed with the proposals

- 3.19 A number of respondents, including Channel 4, Box Television, Viacom, PTVBA, STV, Viasat, VLV, the Christian Broadcasting Council and the Children's Commissioner for Wales welcomed or did not object to the proposed Rule 1.17.

Ofcom's response

- 3.20 In considering the responses regarding R18-rated and equivalent material, it is useful to consider the background to the regulation of this material. The British Board of Film Classification ("BBFC") R18-rating is a special and legally restricted classification primarily for explicit works of consenting sex or strong fetish material involving adults³¹. These films may only be shown to adults in specially licensed cinemas, and videos may be supplied to adults only in licensed sex shops (not by mail order)³². The Video Recordings Act 1984 does not prohibit the supply of films classified as R18 for broadcast purposes. Therefore the availability of BBFC R18-rated films, or their equivalent (i.e. equivalent material made for television³³), has to be decided within the legal framework for broadcasting.
- 3.21 As noted in Ofcom's response to the 2005 Code Consultation, a balance has to be struck between rights and responsibilities. Article 10 of the Convention (discussed at paragraph 3.8) states that "Everyone has a right to freedom of expression. This right shall include freedom to hold opinions and impart information without interference by public authority, and regardless of frontiers" (see also below at paragraph 3.46). This is not an absolute right and it may be subject to restrictions which are prescribed by law and which are necessary in a democratic society. In this regard, Ofcom's response in 2005 referred to Article 22(1) of the TWF Directive which stated that programmes must not be included in television broadcasts which might "seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence".
- 3.22 In the last Code review Ofcom commissioned an academic review of R18 material and its potential impact on people under the age of eighteen³⁴. Because of ethical restrictions there is a lack of research regarding the exposure of minors to R18 material (i.e. explicit works of consenting sex or strong fetish material), however the research considered that this material did not fall into the category outlined in Article 22(1) of the TWF Directive (as referred to in paragraph 3.22 above) and noted that most European countries already allow its transmission and, self evidently, do not regard it as having potential to "seriously impair" the development of minors. Article 22(1) of the TWF directive is now reflected in Article 22(1) of the AVMS directive and, for the reasons given in Ofcom's 2005 Statement on the Broadcasting Code³⁵, Ofcom concludes that the transmission of R18 material in television broadcasting is compatible with Article 22(1) of the AVMS Directive.

³¹ BBFC Guidelines 2009

³² Video Recordings Act, 1984

³³ See below at paragraph 3.27.

³⁴ R18 Material: Its Potential Impact on People under Eighteen, May 2005
<http://www.ofcom.org.uk/research/radio/reports/bcr/r18.pdf>

³⁵ http://www.ofcom.org.uk/consult/condocs/Broadcasting_code/bcstat/

- 3.23 However in 2005, and based on its research into the effectiveness of PIN protection systems and into the viewing habits of the under-eighteens, Ofcom concluded that

“there is a significant risk, that at least a proportion of children would be able to access R18 material if it were to be broadcast under current security mechanisms. Given the strength of this material and the absence of evidence demonstrating that children could be effectively protected, Ofcom considers a prohibition of this material, in the current environment and for the time being, consistent with its objective to set standards to protect the under-eighteens.”

This continues to be Ofcom’s position in relation to R18-rated films, and material equivalent to this rating, although we accept that future developments could result in our consideration of this issue again in the future. Ofcom will not therefore be amending proposed Rule 1.17 (which will complement a separate rule (Rule 1.26 in the 2009 Code) prohibiting the broadcast of R18-rated films).

- 3.24 It is essential that broadcasters transmitting material which may border the R18-rated category, and those responsible for the compliance of this material, fully understand the criteria by which R18 material and its equivalent should be judged. This is especially important where material made for television has not received a BBFC classification but would be deemed by Ofcom to be equivalent to BBFC R18-rated material.
- 3.25 As discussed above the BBFC defines the R18 category as a special and legally restricted classification primarily for explicit works of consenting sex or strong fetish material involving adults. The BBFC makes clear that R18 material is distinct from BBFC classified “sex works at ‘18’” which are also discussed below under proposed Rule 1.18 at paragraph 3.51). Currently, the BBFC’s classification guidelines state that:

“Sex works are works whose primary purpose is sexual arousal or stimulation. Sex works containing only material which may be simulated are generally passed ‘18’. Sex works containing clear images of real sex, strong fetish material, sexually explicit animated images or other very strong sexual images will be confined to the ‘R18’ category.”

The BBFC also makes clear content which is not acceptable at ‘R18’ for example material in breach of the criminal law, material involving lack of consent (whether real or simulated) and material where the infliction of pain or acts may cause lasting physical harm (whether real or simulated)³⁶.

- 3.26 In order to assist those responsible for compliance, we are providing guidance³⁷ in relation to material equivalent to BBFC R18-rated material which, whilst intended to be informative, is not exhaustive. The BBFC has been consulted on this guidance. It is the responsibility of broadcasters to ensure that they are fully informed regarding the definitions relating to R18 material. These definitions can be usefully obtained from the BBFC Guidelines referred to in the preceding paragraph.
- 3.27 We anticipate providing further guidance regarding broadcast references promoting websites that provide unrestricted access to R18-rated material or its equivalent (i.e. websites without appropriate mechanisms in place to protect minors). This guidance

³⁶ BBFC Guidelines 2009 <http://www.bbfc.co.uk/>

³⁷ www.ofcom.org.uk/tv/ifi/guidance/bguidance

will be issued following the conclusion of decisions on the regulation of R18-rated, or equivalent, video-on-demand material³⁸.

- 3.28 For the avoidance of doubt the proposed Rule 1.17 as drafted at paragraph 3.10 has been included in the Code, and the rule prohibiting the broadcast of R18-rated films remains but is now numbered Rule 1.26.

Rule 1.18

- 3.29 Ofcom's Consultation proposed a new Rule 1.18 which stated:

1.18 'Adult-sex' material - programmes that contain images and/or language of a strong sexual nature which are broadcast for the primary purpose of sexual arousal or stimulation - must not be broadcast at any time other than on premium subscription services and pay per view/night services between 2200 and 0530. In addition mandatory restricted access must be in place. Mandatory restricted access means:

- there is a PIN protected system, or other equivalent protection, that restricts access solely to those authorised to view; and
- there are measures in place that ensure that the subscriber is an adult.

- 3.30 This was to replace the Rule 1.24 of the 2005 Code which stated:

"Premium subscription services and pay per view/night services may broadcast 'adult-sex' material between 2200 and 0530 provided that in addition to other protections mentioned above:

- *there is a mandatory PIN protected encryption system, or other equivalent protection, that seeks satisfactorily to restrict access solely to those authorised to view; and*
- *there are measures in place that ensure that the subscriber is an adult."*

Responses to the Consultation

Respondents who disagreed with the proposals

- 3.31 One respondent agreed that the rule in relation to 'adult-sex' needed to be clarified but disagreed with the proposed amendments. In particular, concern was raised that the proposed definition of 'adult-sex' material contained a serious weakness because it invited dispute regarding the 'primary purpose' of a broadcast. The respondent also argued that the term 'mandatory access restrictions' was not a description of how sexual material can be accessed and nor is it a description of how access to such material can be restricted. It was simply a title referring to restrictions on such access which are mandatory.
- 3.32 A number of respondents disagreed with the proposed rule on the grounds that they considered *all* sexual material should be prohibited from broadcast because of its detrimental impact, particularly on young people under eighteen, regardless of whether there were measures in place to restrict access.

³⁸ <http://www.ofcom.org.uk/consult/condocs/vod/>

- 3.33 CCFON further argued that to ensure protection of young people under the age of 18 years the same mandatory access restrictions, (as set out in Rule 1.18 for ‘adult-sex’ material), should be applied to all programmes and trailers that contain images and/or language of a strong sexual nature, even if they were not broadcast for the primary purpose of sexual arousal or stimulation. The only exception for broadcasting strong sexual material without mandatory restricted access would be if the primary purpose was educational and here there would need to be a strong contextual requirement. In addition, such material should only be broadcast after a new revised watershed of 22:00.
- 3.34 One organisation responded that it believed that strengthening the Code with respect to both ‘adult-sex’ and sexual content would lead to a better outcome of Ofcom’s stated goals than clarifying the Code and introducing new rules in relation to sexual content. It continued that it was of the view that current sanctions do not seem to be preventing breaches of the Code so it doubted that clarifying the Code would lead to fewer breaches.
- 3.35 Mediawatch had concerns about the effectiveness of “measures that ensure the subscriber is an adult”. It also questioned the criteria to be used in determining the primary purpose of the broadcast of ‘adult-sex’ material”. It had further concerns over the BBFC’s classification of material at 18, some of which it contended should have been classified R18, and in its view only the prohibition of the broadcast of such material will effectively protect the under-18’s.
- 3.36 One respondent expressed concern that Ofcom was removing the reference to “premium subscription services and pay per view/night services” when referring to ‘adult-sex’ material in the revised Rule 1.17. This respondent argued that the revised wording of the proposed Rule 1.17 led to a lack of clarity and under the proposed change ‘adult-sex’ material was no longer identified as being primarily a pay-per-view service and of a commercial nature.
- 3.37 Conversely, two respondents argued that the restrictions on ‘adult-sex’ material should be lifted to bring the UK in line with the rest of Europe. One of these respondents argued that Ofcom has not justified limiting ‘adult-sex’ to ‘encrypted’ channels and differentiating it from other material rated 18 or equivalent to a BBFC ‘18’ rating. He stated that sex themed ‘18’ certificate DVD’s are freely for sale and not limited to sex shops as is the case for R18 material. This respondent proposed that the distinction between ‘18’ rated non-sexual material, and ‘18’ rated ‘adult sex’ material be abolished entirely. Or, alternatively, that ‘adult-sex’ material should be allowed on ‘unencrypted’ channels but subject to a 10.30pm watershed, with blocking mechanisms that could be enabled and clear trailers and warnings unless it was broadcast within the adult section of the EPG.
- 3.38 The PTVBA considered that Rule 1.18, together with Rule 1.19, had the potential effect of “outlawing” Adult Chat content (see paragraph 3.7 above). This response is detailed, and responded to, below under Rule 1.19.

Respondents who agreed with the proposals subject to amendments and/or guidance

- 3.39 Five agreed that the rule in relation to ‘adult-sex’ material needed to be clarified. However it said that whilst it supported the proposed amendments in principle it was not clear how Ofcom and broadcasters would assess whether material is being broadcast “for the primary purpose of sexual arousal or stimulation”. It considered that guidance should be provided to clarify how the “primary purpose” of the material

will be assessed and that it was important to clarify that it was the broadcaster's purpose in broadcasting the material that would be relevant, not a viewer's purpose when viewing it. It was also of the view that the rule would benefit from wording that would clarify whether the requirements of the rule would be satisfied where mandatory access restrictions were available to viewers who wished to use them, or whether access restrictions must prevent viewers from viewing the content unless the restrictions were disabled. It said that this appeared to be Ofcom's intention but that this was not adequately reflected in the draft rule.

- 3.40 One organisation said that Rule 1.24 currently specified that the requirement to apply a mandatory PIN protected encryption system (or equivalent mechanism) and the requirement to ensure that measures were in place to ensure the subscriber was an adult were in addition to "*other protections*" mentioned in the preceding rules. However, it said that proposed Rule 1.18 did not refer to these additional protections, namely, appropriate information about the programmes and a detailed billing system, which were also explained to subscribers. It said that Rule 1.18 should be amended to clarify that the additional protections (required currently by Rule 1.23) continue to apply to 'adult-sex' material. Alternatively, it said that Ofcom should clarify that it intended to relax the current rules and explain why this was appropriate.

Respondents who agreed with the proposals

- 3.41 The BBFC said that the proposed clarification would be an improvement because it considered that the current wording of Rule 1.24 contained no definition of 'adult-sex' material and was therefore ambiguous about the acceptability of such material on which services, and at what time. It continued that the definition proposed for 'adult-sex' material closely mirrors the BBFC's long standing definition of 'sex works' as well as the more recent statutory definition of 'pornography' contained in the Criminal Justice and Immigration Act 2008 which it considered could only be helpful; stating that the new wording makes it 'crystal clear' where and when 'adult-sex' material may be broadcast.
- 3.42 Andrea Millwood Hargrave and Sonia Livingstone said that their research suggested that it was material that might fall within the 'adult-sex' category that had most potential to harm young people (through, for example, lack of context) and so it was right to continue mandatory access restrictions. They also welcomed clarity on time and access restrictions.
- 3.43 Box TV and Channel 4 did not consider that the existing rule needed to be clarified but had no objections to the proposed revisions in relation to Rule 1.18. A number of other respondents including STV, Viacom, Viasat, VLV, the Christian Broadcasting Council and the Children's Commissioner for Wales welcomed or had no objections to the proposed revisions and offered no additional comments.

Ofcom's response

- 3.44 In considering the responses regarding 'adult-sex' material, it is useful to consider Ofcom's duties and the legal parameters with respect to the transmission of such material.
- 3.45 As discussed above at paragraph 3.22 Ofcom has a duty under the Human Rights Act 1998 to ensure that as a public body we do not act in a way which is incompatible with the Convention. Therefore in undertaking this review Ofcom has taken into account Article 10 of the Convention which provides for the right of freedom of expression and the right to hold opinions and "to receive and impart information and

ideas without interference by public authority”. Applied to broadcasting, Article 10 protects the broadcaster’s right to transmit material as well as the audience’s rights to receive material as long as the broadcaster ensures compliance with the rules of the Code and the requirements of statutory and common law. As noted previously, Article 10 is not an absolute right and it may be subject to restrictions which are prescribed by law and which are necessary in a democratic society.

- 3.46 Ofcom therefore must balance this right to freedom of expression with the duty to provide adequate protection to members of the public from the inclusion of offensive and harmful material in broadcast services. Ofcom has approached this review of the Code with an acknowledgement that there is a right for content of an adult nature to be broadcast, provided that the material complies with all the relevant rules in the Code. The scope of this review therefore does not extend to prohibition of the broadcast of material of a sexual nature. However, it does seek to ensure that Ofcom continues to meet its duties effectively and efficiently, particularly in terms of protecting young people, by clarifying the current position regarding the broadcast of sexual material and thereby seeking to avoid any future compliance failures.
- 3.47 Section One of the Code: Protecting the Under-Eighteens specifically sets out a number of rules requiring broadcasters to ensure that young people are protected from material which may be harmful to them. The proposals sought to provide additional safeguards to protect young people through clarifying, by the type and degrees of strength of sexual material (i.e R18; ‘adult-sex’; and strong sexual material) the existing Code requirements placed upon the broadcasters.
- 3.48 In relation to arguments that the restrictions placed on the broadcast of ‘adult-sex’ material should be lifted, or conversely that ‘adult-sex’ material should be prohibited in the same way as R18-rated and equivalent material, it is also useful to look at these responses in light of the last Code consultation.
- 3.49 During the 2005 Code consultation Ofcom noted a public opinion survey of 1200 adults (The Public’s View 2002) which found that 76% agreed that people should be allowed to pay extra to view particularly sexually explicit programmes on subscription services. As discussed above Ofcom concluded that R18 material should be prohibited. It also considered that
- “The basis for retaining the restrictions on ‘adult- sex’ material on certain premium subscription services would be that the restrictions are necessary to prevent those under the age of eighteen accessing this material and so the restrictions protect under eighteens. Also it prevents offence to adults who do not wish to see such material”.
- 3.50 It concluded that “The status quo will prevail regarding...a 2200 start for ‘adult-sex’ material plus the other protections currently in place regarding ‘adult-sex’ material”. This continues to be Ofcom’s position.
- 3.51 In judging whether material is ‘adult-sex’ material, and therefore is subject to this rule, broadcasters should be guided by the definitions used by the BBFC when referring to “sex-works at 18”³⁹. As discussed above at paragraph 3.26 the BBFC defines sex-works as “works...whose primary purpose is sexual arousal or stimulation”.
- 3.52 Ofcom considers that ‘adult-sex’ material is material which is broadcast for the primary purpose of sexual arousal or stimulation. For example, if the narrative of a

³⁹ BBFC Guidelines 2009 <http://www.bbfc.co.uk/>

drama or documentary is principally a vehicle for material whose primary purpose is sexual arousal or stimulation, it is likely to be 'adult-sex' material because the strength of the material is unlikely to be editorially justified in context.

- 3.53 Ofcom is providing broadcasters with guidance⁴⁰ in relation to identifying material captured by this rule.
- 3.54 In relation to the reference in Rule 1.18 to "mandatory restricted access", and in response to stakeholder responses, Ofcom acknowledges that the proposed Rule 1.18 does not refer to "other protections" as was the case in the 2005 Code's Rule 1.24. The "other protections" referred to protections mentioned in the 'Films' section of Section One of the Code in which the rule on 'adult-sex' material then sat. The removal of this reference does not represent any relaxation in the regulation of 'adult-sex' material, rather the new rule (at paragraph 3.62 below) seeks to identify those access restrictions which are specific to 'adult-sex' material (as opposed to material referred to in the 'Films' section).
- 3.55 However Ofcom also acknowledges that references to mandatory restricted access must be consistent between both the 'Sex' and 'Films' rules in Section One of the Code. We have therefore removed the explanation of mandatory restricted access from Rule 1.18 and instead provide it separately as a 'meaning' which can be referred to in conjunction with both Rule 1.18 and the relevant rules in the 'Films' section. Please see paragraphs 3.62 and 3.130 to 3.133 below.
- 3.56 Ofcom is also providing guidance in relation to mandatory restricted access⁴¹. As discussed in the 2005 Code guidance on premium subscription film services and pay per view, we consider that viewers who subscribe to premium subscription services have accepted a greater share of responsibility for what is broadcast into the home (and therefore have particular responsibility to oversee children's access to material in this area). Services broadcasting material subject to this rule must provide mandatory restricted access as the default, rather than requiring Personal Identification Number (PIN) setting by the viewer.
- 3.57 A mandatory PIN requires a viewer to input a PIN before accessing the material, irrespective of whether the viewer has set up any domestic security mechanisms, i.e. it is set by the broadcaster/platform provider. For the avoidance of doubt, mandatory restricted access differs from access restricted as part of a commercial arrangement (e.g. premium subscription film services and pay per view services) in that it has a regulatory basis.
- 3.58 In response to concerns that the proposed Rule 1.18 lacks clarity as the rule does not begin with a reference to "premium subscription services and pay per view/night services", it is Ofcom's view that by starting the rule with the words 'Adult-sex' material and following this with an explicit definition of what this is, broadcasters will be absolutely clear what type of content Ofcom referring to. The existing Rule 1.24 does not clearly define what 'adult-sex' material is, nor does it explicitly state that this material must *not* be broadcast without mandatory access restrictions. Indeed, the words "premium subscription services and pay per view/night services" are still referred to within the revised rule to describe the only type of services where 'adult-sex' material is available. Ofcom will however reorder the reference to "2200 and 0530" so that it immediately follows the reference to "time".

⁴⁰ www.ofcom.org.uk/tv/ifi/guidance/bguidance

⁴¹ www.ofcom.org.uk/tv/ifi/guidance/bguidance

- 3.59 Ofcom also considers that the word “material” is more appropriate in describing images or language captured by this rule, and the word “programmes” has accordingly been replaced.
- 3.60 In the interests of clarity Ofcom is replacing the proposed reference to “adult-sex material” with “adult sex material” and refers to “material” in the description of the term.
- 3.61 Ofcom has therefore included the following Rule 1.18 in Section One of the Code:

1.18 ‘Adult sex material’ - material that contains images and/or language of a strong sexual nature which is broadcast for the primary purpose of sexual arousal or stimulation - must not be broadcast at any time other than between 2200 and 0530 on premium subscription services and pay per view/night services which operate mandatory restricted access.

In addition, measures must be in place to ensure that the subscriber is an adult.

Meaning of “mandatory restricted access”:

Mandatory restricted access means there is a PIN protected system (or other equivalent protection) which cannot be removed by the user, that restricts access solely to those authorised to view.

Rule 1.19

- 3.62 Ofcom’s Consultation proposed introducing Rule 1.19 which stated:

1.19 Programmes or trailers which contain images and/or language of a strong sexual nature, which are not broadcast for the primary purpose of sexual arousal or stimulation, can be broadcast after the watershed provided there is strong contextual justification. When considering the strength of the material, and therefore the contextual justification, broadcasters should take account of factors which might include (but are not limited to):

- the amount of sexual material;
- the explicitness of the material, i.e. the nature of the sexual activity and sexual language used, for example how graphic, prolonged or prominent it is;
- the purpose of the sex scenes within the programme, i.e. whether this is to support an editorial purpose. If the purpose is sexual arousal or stimulation of the viewer Rule 1.18 applies;
- whether any plot or narrative provides sufficient editorial context for its inclusion; and,
- whether there is an educational or other perspective to justify the inclusion of material of a strong sexual nature.

(See Rules 1.6 and 1.18 and Rule 2.3 in Section Two: Harm and Offence which includes meaning of “context”.)

- 3.63 This is in addition to the current rules in Section One of the Code.

Responses to the Consultation

Respondents who disagreed with the proposals

- 3.64 A considerable number of stakeholders including CCFON, CARE, Mediamarch, Mediawatch, the Morality Forum, and individuals who sent in responses in support of these organisations argued that the broadcast of “strong sexual material” as identified by the proposed new rule should be prohibited from broadcast primarily because its broadcast would fail to protect young people under 18 years of age. In particular, these stakeholders argued that the definition of strong sexual material, as material not broadcast for the primary purpose of sexual arousal, was flawed. These respondents argued that sexual arousal could occur as a result of showing strong sexual material, even if sexual arousal was not the primary purpose, particularly when young people were exposed to it. Therefore drawing such a distinction between ‘adult-sex’ material (Rule 1.18) and “strong sexual material” as proposed in Rule 1.19 was highly subjective. These respondents argued that the proposals should therefore strengthen the rules to prohibit not just ‘adult-sex’ material but also strong sexual material, as defined in the proposed Rule 1.19, from broadcast.
- 3.65 CCFON further argued that to ensure Ofcom fulfilled its primary duty to protect young people under 18 years of age, all material of a sexual nature should be reserved, or at least only available, on dedicated adult services where a mandatory PIN protection access system was in place. Clarification of the rules regarding material of a sexual nature would only be achieved by introducing definite rules that prevented not only all ‘adult-sex’ material but also strong sexual material from being broadcast. This respondent therefore considered that where sexual material was concerned a considerable strengthening of the rules, not clarification, was required to protect children under 18 sufficiently from material which might seriously impair their “physical mental or moral development” and to assist the consumer not the industry.
- 3.66 Respondents including the Christian Broadcasting Council suggested that if broadcasters considered there were exceptional circumstances for showing strong sexual material on television they should provide the contextual justification to Ofcom in advance of broadcast.
- 3.67 Another respondent additionally suggested that the introduction of a new Rule 1.19 effectively weakened the existing Rule 2.3 as it provided broadcasters with the green light to show strong sexual material that many adults would find offensive under the harm and offence rules.
- 3.68 Mediawatch also argued that the rules on sexual material certainly required clarification with particular regard to terms such as “strong” and “contextual justification” and questioned who could determine whether such material is excessive or likely to cause arousal, or indeed whether there was a serious educational purpose.
- 3.69 Conversely, an individual argued that no restrictions should be placed on the broadcast of sexual material given its free availability on the internet.
- 3.70 In relation to Adult Chat content (see paragraph 3.6 above), the PTVBA considered that Rule 1.18 (together with Rule 1.19) has the potential effect of “outlawing” this content. It noted that Rule 1.18 defined ‘adult-sex’ material as programmes that contained material of a strong sexual nature broadcast for the primary purpose of sexual arousal, and argued that any such content which does not fall within Rule 1.18 must comply with “strict context rules” as envisaged in new Rule 1.19. It also noted

that in paragraph 4.14 of the consultation document Ofcom stated that “The proposed new rule on “strong sexual material” aims to capture material that is broadcast after 21:00 on what are considered general entertainment channels, all of which have widespread appeal”. In the PTVBA’s view Adult Chat which is neither aimed at “sexual arousal or stimulation” nor aired on general entertainment channels and/or strongly justified by context, would be prohibited without access controls. The PTVBA argued that this would have a significant impact on businesses in this market. It requested that the term “strong sexual material” should be clarified and said that there was currently no indication of what was considered to be material of a ‘strong’ nature for the purposes of invoking the tests in the proposed Rules 1.18 and 1.19.

Respondents who did not agree with the proposals unless subject to amendments, or who agreed with the proposals subject to amendments and/or guidance

- 3.71 Five said that the new rule would be helpful although it considered that plot or narrative were only two of the factors which might provide editorial context for the inclusion of strong sexual material and considered that the inclusion of the words “or other factors” (in relation to bullet point 4) would be beneficial.
- 3.72 One respondent said that it welcomed the explicit acknowledgement in the proposed new rule that content of a strong sexual nature could be broadcast after the watershed. However it did not consider that the introduction of a new rule in relation to the creation of a new category of material ‘of a strong sexual nature’ was necessary and said that the suggested criteria for assessing the strength of sexual material could more usefully be contained in guidance. It continued that the ‘strength’ of sexual material (that does not simply have the purpose of sexual arousal) was not easily categorised because such material arose in a range of different contexts and genres. It said that in its view it would be more appropriate for such content to require ‘sufficient contextual justification’.
- 3.73 Another respondent, acknowledged that this new rule was appropriately defined but was concerned that it created ambiguities about how broadcasters would practically comply similar material in future leading to varied and subjective interpretation by different broadcasters. It requested that published Ofcom decisions be accompanied by clips of material.
- 3.74 Viacom did not agree with the proposals for Rule 1.19. It said that the proposed Rule 1.18 would resolve most if not all of Ofcom’s concerns in relation to the broadcast of inappropriate sexual content after 21:00 on channels without mandatory access restrictions. Given this, it said that it was not necessary to introduce a new, detailed set of additional rules which further defined the kind of sexual content that may be shown after 21:00 without access restrictions. It continued that it was concerned that any changes to the Code would lead to additional regulatory obligations on programme genres which are currently unaffected and broadcasting in full compliance with the current Code. Viacom was concerned that the concept of “strong’ contextual justification’ rather than simply ‘contextual justification’ would go far beyond the definition of context provided in Section Two of the current Code where a programme’s context is either appropriate or it is not, and argued that the use of a ‘strong’ is a subjective term which serves to distort an otherwise balanced and proportionate compliance judgement. In addition, another respondent mirrored Viacom’s view that the requirement for contextual justification was already in place and, with the restriction regarding R18 material remaining in place, it considered it unnecessary for Ofcom to regulate beyond the current, established thresholds.

- 3.75 The BBFC said that the proposed Rule 1.19 to some extent mirrored the approach of the BBFC Guidelines which allow at '18', the more explicit images of sexual activity provided they were justified by context, and included a strong presumption that such images would not be considered contextually justified if they appeared in a 'sex work' (or 'adult-sex' programme which it noted is Ofcom's terminology). However it raised concerns that the proposed Rule 1.19 contained no definition of images of a 'strong sexual nature' and that it could consequently be unclear as to whether this new rule would allow films such as *Base Moi*, *9 Songs*, *Districted* and *Taxi Zum Klo* to be broadcast. It continued that if a definition is not to be provided within the Code then it might be helpful to touch on the issue directly in supporting guidance.

The BBFC continued that one of the factors which would be taken into account in order to determine 'strong sex material' would be the 'purpose of the sex scene within the programme' noting that "if the purpose is sexual arousal or stimulation of the viewer Rule 1.18 applies". It said that whilst the purpose of this wording was clear – to prevent the gratuitous inclusion of pornographic scenes in a programme which was not an 'adult-sex' programme - it might nonetheless have the effect of unintentionally capturing a significantly broader range of material.

- 3.76 Box TV did not agree with the proposed rule. It said that the introduction of this rule could impact on broadcasters who provided educational programmes. In addition, it said that the rule did not define 'images and/or language of a strong sexual nature' and without such definition the introduction of this new rule would change the existing rules rather than add clarity as stated in the consultation.
- 3.77 Similarly, Channel 4 said that if the amendments as proposed were implemented, the effect would be to change the Code not just clarify it. It said that its key concerns were that no definition had been provided for 'images and/or language of a strong sexual nature' and there appeared to be no intention to provide accompanying guidance. It was also concerned that Rule 1.19 would require that such material (i.e. that which is considered stronger) could **only** be broadcast after the watershed. Channel 4 said that this was a key and significant difference from the position under the present Code. This would have unintended consequences for programming featuring such material where the primary purpose is not sexual arousal or stimulation but educational and/or other legitimate editorial reasons which would be justified. It said, therefore, that to introduce the concept of a 'strong sexual nature' without defining it created doubt and uncertainty where previously none existed. It continued that the best way to consider "the mischief inherent" in the proposed Rule 1.19 would be to create four classes of material which require specific attention: 'adult-sex'; strong sexual nature; representations of sexual intercourse; and sexual behaviour.
- 3.78 S4C requested guidance on what constituted "images and/or language of a strong sexual nature".
- 3.79 STV suggested that warnings and guidance in relation to sexual material were provided to audiences both in print and on screen.
- 3.80 One organisation said that it appeared that in certain circumstances images or language of a strong sexual nature might be broadcast before the watershed without a PIN or other protections. It said that if this was Ofcom's intention, Rule 1.19 should make it clear that a PIN or other protections were not required and, if this was not Ofcom's intention, the rule should be amended accordingly.

- 3.81 Mediawatch requested a definition of “strong” in relation to the contextual justification for the broadcast of material of a strong sexual nature, and clarification of the criteria to determine the primary purpose of sexual material.
- 3.82 Andrea Millwood Hargrave and Sonia Livingstone were not convinced by the conflation of programmes and trailers in this rule and argued that these should be treated separately since programmes allow for contextual factors while trailers do not. They noted Ofcom research where they said respondents thought trailers were acceptable in principle but their content should not be as graphic as the (‘adult-sex’) material they trailed.

Respondents who agreed with the proposals

- 3.83 Viasat agreed that this rule needed to be added to make clear the considerations broadcasters were required to make when justifying material of a strong sexual nature on an unrestricted service. The VLV and the Children’s Commissioner for Wales also agreed with the proposed changes with no further comments.

Ofcom’s response

- 3.84 As set out above in paragraph 3.46, Ofcom has approached this consultation with an acknowledgement that material of a sexual nature can be broadcast providing it complies with the Code. It is the aim of Section One of the Code to clearly set out the requirements placed upon the broadcasters to ensure appropriate safeguards are in place to protect young people.
- 3.85 The aim of proposed Rule 1.19 is to take account of the fact that images and/or language of a strong sexual nature (i.e material not broadcast for the purpose of sexual arousal which is therefore not ‘adult-sex’ material as defined in the proposed Rule 1.18) can be transmitted after the watershed without access restrictions and to provide additional information and clarity to broadcasters to ensure adequate contextual justification is applied to justify the broadcast of such material. In particular, the new rule proposed in the Consultation required the broadcaster to consider the strength of the sexual material intended for broadcast, as well as whether sufficient contextual factors have been applied to justify its broadcast.
- 3.86 However we recognise that the proposed draft of Rule 1.19 met with widespread concern. In particular respondents, both broadcasters and non-broadcasters, expressed concern about the proposed reference to material “of a strong sexual nature”.
- 3.87 Some stakeholder groups considered that Ofcom was introducing this rule to enable a new category of “strong” sexual content to be broadcast, which should actually be classified as ‘adult sex material’ and therefore only broadcast under mandatory access restrictions.
- 3.88 On the other hand some broadcasting stakeholders expressed concern that the rule would increase the regulatory burden on broadcasters by creating additional compliance obligations. They further argued that the term “strong” was unclear and that the requirement for such material to have “strong contextual justification” was equally unclear. There was also uncertainty about the type of material at which this proposed rule was aimed, and about the intent of the proposed new rule.
- 3.89 Ofcom is content that, as argued in the Consultation document, there is a need for a rule to address material of a strong sexual nature which does not fall into the

category of 'adult sex material' (since it is not broadcast for the primary purpose of sexual arousal) but which must be justified by context. We acknowledge however the concerns raised by stakeholders and therefore have revised, and simplified, the wording which is provided at paragraph 3.100 below.

- 3.90 This revised wording addresses concerns that the previous term 'material of a strong sexual nature' was not sufficiently clear. The BBFC for example queried whether the proposed new rule would allow films that included explicit images of sexual acts to be broadcast. Ofcom intends this rule to apply to material which might contain strong or explicit images (as discussed in the next paragraph). The rule has therefore been re-drafted to instead refer to "images and/or language of a strong or explicit sexual nature". The rule refers to, but does not restrict material to, broadcasts after the watershed. It also makes clear that it addresses material that does not fall under Rule 1.18.
- 3.91 In addition, in response to respondents' concerns, accompanying guidance provides factors relating to sexual material which broadcasters should take account of in ensuring that material complies with this rule. However in the interests of greater simplicity these factors will no longer form part of the rule itself. Examples of the type of material where broadcasters should consider these factors might be a factual entertainment programme on the sex industry which includes graphic, repeated and/or prolonged footage of sexual activity; trailers for 'adult' programmes containing similar footage; or a film or educational documentary containing explicit images of sexual acts. The factors might include the amount, explicitness and purpose of the material and whether it is justified by any plot, narrative, educational or other purpose.
- 3.92 Rule 1.19 set out at paragraph 3.100 below recognises the concerns from respondents that young people under eighteen continue to watch television after the watershed of 21:00. Rule 1.3 requires broadcasters to ensure that children under the age of fifteen are protected by appropriate scheduling from material that is unsuitable for them. However, there is currently no specific rule that extends the protection from unsuitable material to young people up to the age of eighteen after 21:00. Whilst Ofcom recognises that protecting the under-eighteens is a responsibility that must also be shared with parents, carers and broadcasters, it is our view that this proposed new rule will provide broadcasters with clear information that strong or explicit sexual material which is broadcast after the watershed requires the application of proportionate contextual justification.
- 3.93 Ofcom notes that some stakeholders argued that proposed Rule 1.19 would increase the regulatory burden on broadcasters others, conversely, argued that the Rule would reduce it. It is our view that the new rule, when taken as part of a set of rules in relation to sexual material, will provide greater clarity for all stakeholders and will neither increase nor decrease the regulatory burden on broadcasters.
- 3.94 In response to suggestions from stakeholders that Ofcom should review sexual material *before* it is broadcast to ensure that the broadcaster has applied adequate contextual justification for its broadcast, Ofcom does not have powers under the Communications Act 2003 to approve material before broadcast. By providing greater clarity in the Code, and in additional guidance, of the type of material which we would determine as strong or explicit sexual material, as well as setting out the contextual factors we would expect to be applied, it is Ofcom's expectation that broadcasters will have the necessary information to identify the circumstances in which sexual material of this kind can be transmitted.

- 3.95 In response to concerns that Rule 2.3 would be “weakened” by the introduction of Rule 1.19, it is Ofcom’s view that the rules relating to harm and offence (Rule 2.1 and 2.3) will continue to complement and support the new rule in the 2009 Code. The differentiation being that Rule 2.3 would continue to apply to sexual material, including that of a strong or explicit sexual nature, in relation to potential harm and offence to *all* members of the viewing public, whilst the proposed new rule seeks to ensure increased protection to young people under eighteen. In addition, it would be anticipated that the potential for harm and offence for all the viewing public may be lessened if broadcasters are provided with greater clarity of Ofcom’s expectations with respect to material of this nature.
- 3.96 In response to concerns that strong sexual material also has the propensity to generate sexual arousal and therefore, like ‘adult-sex’ material should be only available with a mandatory PIN access restriction, Ofcom has previously set out that there are clear definitions of the types of sexual material which would fall into each category (see paragraph 3.86 above). Whilst it might be the case that strong or explicit sexual material may result in sexual arousal, the defining issue is whether the *primary purpose* is sexual arousal and this is determined by the editorial purpose of the material. The new Rule 1.19 (and supporting guidance) therefore requires broadcasters to ensure that adequate editorial justification exists, and the appropriate contextual justification is applied, so that material for which the primary purpose *is* sexual arousal (i.e ‘adult-sex’ material as defined by proposed Rule 1.18) is not broadcast without a mandatory PIN access restriction.
- 3.97 In relation to Adult Chat content, referred to by the PTVBA, Ofcom has published the Participation TV consultation on rules on the promotion of premium rate services⁴² (this consultation was published on 3 November 2009 and is due to close on 15 January 2010). As discussed in paragraph 5.10 of this document, the Participation TV consultation proposes that licensed services, such as those represented by the PTVBA, should be regulated under the Television Advertising Standards Code and would therefore fall outside the remit of the Broadcasting Code. The impact of that proposal on providers of Adult Chat services is addressed within the impact assessment that forms part of that consultation. As a result we consider that the issues raised by the PTVBA should be addressed as part of that consultation. In the meantime, and as discussed at paragraph 3.93, the new section of rules on sexual material in Section One of the Code does not change current regulatory practice in this area, but rather it clarifies it.
- 3.98 It remains our view that the re-formulated Rule 1.18 and new Rule 1.19 do not change our existing approach to regulation. However, in placing together all of the rules in the Code that relate directly to sexual material, from R18 content through all the levels to pre-watershed material, we seek to ensure that broadcasters have a clear structure upon which to identify and apply the relevant rules to the content they propose to broadcast.
- 3.99 Following stakeholder responses, Ofcom has therefore included the following Rule 1.19 in Section One of the 2009 Code:

1.19 Broadcasters must ensure that material broadcast after the watershed which contains images and/or language of a strong or explicit sexual nature, but is not ‘adult sex material’ as defined in Rule 1.18 above, is justified by the context.

⁴² <http://www.ofcom.org.uk/consult/condocs/participationtv3/>

(See Rules 1.6 and 1.18 and Rule 2.3 in Section Two: Harm and Offence which includes meaning of “context”.)

Rule 1.20

3.100 Ofcom’s Consultation proposed new Rule 1.20 which stated:

1.20 Representations of sexual intercourse must not occur before the watershed (in the case of television), or when children are particularly likely to be listening (in the case of radio), unless there is a serious educational purpose. Any discussion on, or portrayal of, sexual behaviour must be editorially justified if included before the watershed, or when children are particularly likely to be listening, and must be appropriately limited.

3.101 This was previously Rule 1.17 which stated:

“Representations of sexual intercourse must not occur before the watershed, or when children are particularly likely to be listening, unless there is a serious educational purpose. Any discussion on, or portrayal of, sexual behaviour must be editorially justified if included before the watershed, or when children are particularly likely to be listening, and must be appropriately limited and inexplicit”.

Responses to the Consultation

Respondents who disagreed with the proposals

3.102 One organisation argued that the words “...and *inexplicit*” should not be removed from the wording of this rule as “*appropriately limited*” did not offer enough clarity. This respondent strongly felt that the removal of the word “*inexplicit*” significantly changed the meaning of the rule.

3.103 Other respondents including Mediamarch argued that there was no justification at all for the broadcast of sexual material before the watershed. Sexual material should not be shown earlier as it would never be “appropriately limited” or “editorially justified”. These stakeholders argued that such definitions are not specific enough and result in too many opt-outs. Introducing a set of “clear-cut rules” which would allow programme makers to work within a well-defined framework would reduce the risk of inappropriate material being screened in the first place”. They added that there “must be a shift towards those organisations bearing the responsibility for proving their output is not harmful before letting it loose on society”.

3.104 One stakeholder lacked confidence that the requirement of a ‘serious educational purpose’ or editorial justification could be applied and argued that there was a real risk that broadcasters would, if they so wished, find ways of exploiting such criteria.

3.105 Some respondents including CCFON, expressed strong objections to the proposed changes as they said they represented a serious weakening of the rules not clarification. They considered that this rule required strengthening by a full revision of the watershed which they argued was now out-of-date and better suited to 22:00. They expressed concern about the existing definition of “when children are particularly likely to be listening” as they considered it too weak and vague. Instead, they suggested that where references to the watershed, and when children were particularly likely to be listening, were included these should be replaced with the

following: “before the revised higher watershed time of 22:00 and other times when children are likely to be listening”.

- 3.106 CCFON also argued that generally Ofcom should be adopting a far more precautionary approach. The emphasis should be proving that no harm was likely to result from the material shown rather than allowing excuses such as “editorial justification”.
- 3.107 Mediamarch made specific reference to the term “when children are particularly likely to be listening” and stated that with, new ways of viewing and listening, children could be listening and watching at any time.

Respondents who agreed with the proposals subject to amendments and/or guidance

- 3.108 The BBFC said that public concern with regard to children seeing representations of a range of sexual activities not covered by the narrow definition ‘sexual intercourse’ was just as great. It said that it might therefore be worthwhile giving consideration to replacing ‘sexual intercourse’ with a term that encompasses a rather broader range of sexual activity (including oral and anal sex).
- 3.109 Another respondent had no objection to the rule being amended as proposed although it said that clarification of ‘representations’ of sexual intercourse as opposed to a ‘portrayals’ of sexual behaviour would be desirable. It said that it assumed the former referred to images/audio of actual/real sexual intercourse and the latter referred to any images/audio whether actual or fictional/simulated. It requested that Ofcom might usefully clarify this in guidance. Viasat said that a clear explanation of the meaning of ‘sexual behaviour’ was needed because this description could be interpreted very differently. It suggested that a separation within the rule between ‘sexual intercourse’ and ‘sexual behaviour’ may usefully create a distinction between the two.
- 3.110 Channel 4 did not object to the clarification or the proposed amendments but, in so doing, added that Rule 1.20 should be confined to ‘actual representations’ of sexual intercourse. It said that a rocking car might constitute a representation of sexual intercourse but was unlikely that such a representation was meant to be covered by Rule 1.20. Channel 4 requested guidance on “sexual behaviour” and how this differs from “images and/or language of a strong sexual nature”.
- 3.111 Another organisation said the existing rule required no further clarification. However, it said that if the rule were to be amended it considered that the words “*and inexplicit*” should remain because “*appropriately limited*” would not provide enough clarity i.e. it left the limitation open to interpretation by broadcasters.
- 3.112 Mediawatch requested a definition, in relation to pre-watershed material, of the terms “must be appropriately limited” and “serious educational purpose”.
- 3.113 Andrea Millwood Hargrave and Sonia Livingstone agreed with the importance of editorial justification in this rule but were unconvinced by the reference to “television” since they considered this was not distinguished from “television-like” services referred to in the AVMS Directive.

Respondents who agreed with the proposals

- 3.114 Box TV, the VLV, Five, STV, Viacom and the Children's Commissioner for Wales agreed with the proposed clarification and amendments to Rule 1.20 to replace existing Rule 1.17.
- 3.115 The PTVBA agreed with the re-wording of this rule but considered that Ofcom has missed the opportunity to "clarify inconsistencies that are occurring in practice". It argued that pre-watershed material that has been found to breach the Code, when broadcast on its members' channels, has been deemed allowable in mainstream programming despite the absence of any context based justification.

Ofcom's response

- 3.116 Ofcom notes stakeholder responses to the proposed changes to current Rule 1.17. It is Ofcom's view, based on experience in regulating this area, that by removing the words "and inexplicit", the reference to "appropriately limited" would still adequately explain the requirements upon broadcasters in relation to material broadcast before the watershed.
- 3.117 In response to arguments that no representations of sexual intercourse should be broadcast before the watershed (in the case of television) or when children are particularly likely to be listening (in the case of radio), Ofcom would like to stress that the rule clearly states "unless there is a serious educational purpose". It is our experience from regulating such material that no significant regulatory concerns have arisen with respect to pre-watershed programming containing references of a sexual nature and that broadcasters have taken care to ensure such content is editorially and contextually justified. The proposed changes do not represent any change in the interpretation of this rule and are intended to enhance clarity.
- 3.118 We note respondents' comments on the terms "*representations of sexual intercourse*" and "*portrayal of sexual behaviour*" used in both the current and proposed rule. However in practice it is our experience that these terms have not caused concerns in either the compliance or regulation of such material. However Ofcom notes the requests for guidance from stakeholders and will consider revising guidance on an on-going basis.
- 3.119 Ofcom notes arguments from some stakeholders that the watershed should be revised to 22:00. Rule 1.4 which requires broadcasters to observe the watershed (i.e. material unsuitable for children should not, in general, be shown before 21:00 or after 05:30) was not a rule where revisions were proposed as part of the Consultation. However these comments have been noted in addition to the comments summarised in Part 6 of this Statement.
- 3.120 In relation to stakeholder views on material that has been found in breach of Ofcom's Code, these decisions are explained, on a case by case basis, in its published Broadcast Bulletins⁴³.
- 3.121 Ofcom has therefore included Rule 1.20, as drafted at paragraph 3.101, in the 2009 Code.

Associated revisions

- 3.122 Ofcom proposed a number of revisions which arise from the proposed rules on sexual material.

⁴³ <http://www.ofcom.org.uk/tv/obb/>

- 3.123 Ofcom proposed re-ordering so that ‘Exorcism, the occult and the paranormal’ is repositioned after ‘Films, premium subscription film services, pay per view services, ‘adult-sex’ material on premium subscription services’.
- 3.124 Ofcom proposed grouping together the rules regarding sexual material (discussed above) under an expanded set of rules in relation to sexual material in Section One of the Code.
- 3.125 Ofcom proposed amending the heading ‘Films, premium subscription film services, pay per view services, ‘adult-sex’ material on premium subscription services’ within Section One so that it reads ‘Films, premium subscription film services, pay per view services’.
- 3.126 Ofcom proposed clarifying the distinction between “*the watershed*”, in relation to television, and “*when children are particularly likely to be listening*” in relation to radio, by inserting references to television and radio in each of the relevant rules in Section One (as above in new Rule 1.20). This affects the following rules: 1.6, 1.10, 1.11, 1.12, 1.13, 1.14, 1.16, 1.17 and 1.19.

Responses to the Consultation

- 3.127 Respondents including Box TV, Channel 4, Five, STV, the Christian Broadcasting Council, the PTVBA, Viacom, and the Children’s Commissioner for Wales responded that they agreed with the proposed associated revisions in Section One of the Code.

Ofcom’s response

- 3.128 Ofcom notes the agreement of stakeholders with the associated revisions proposed in the Consultation Document.
- 3.129 Following our revisions to Rule 1.18 above, and the inclusion of a ‘meaning’ for mandatory restricted access, we have also made two further associated revisions in the ‘Films’ section.
- 3.130 Rule 1.22 in the 2005 Code stated:
- “Premium subscription film services may broadcast up to BBFC 15-rated films or their equivalent, at any time of day provided:*
- *there is a protection system (a mandatory PIN or other equivalent protection) pre-2000 and post-0530, that seeks satisfactorily to restrict access solely to those authorised to view when material other than BBFC U-rated or PG-rated or their equivalents is shown; and*
 - *those security systems which are in place to protect children are clearly explained to all subscribers.”*
- 3.131 Rule 1.23 in the 2005 Code stated:
- “Pay per view services may broadcast up to BBFC 18-rated films or their equivalent, at any time of day provided:*
- *there is a protection system pre-2100 and post-0530 (a mandatory PIN or other equivalent protection), that seeks satisfactorily to restrict access solely*

to those authorised to view when material other than BBFC U-rated or PG-rated or their equivalents is shown;

- *information is provided about programme content that will assist adults to assess its suitability for children;*
- *there is a detailed billing system for subscribers which clearly itemises all viewing including viewing times and dates; and*
- *those security systems which are in place to protect children are clearly explained to all subscribers.”*

3.132 In order to ensure consistency over references to mandatory restricted access these rules have been revised (and re-numbered) as follows:

1.24 Premium subscription film services may broadcast up to BBFC 15-rated films or their equivalent, at any time of day provided that mandatory restricted access is in place pre-2000 and post-0530.

In addition, those security systems which are in place to protect children must be clearly explained to all subscribers.

(See meaning of “mandatory restricted access” under Rule 1.18 above.)

1.25 Pay per view services may broadcast up to BBFC 18-rated films or their equivalent, at any time of day provided that mandatory restricted access is in place pre-2100 and post-0530.

In addition:

- information must be provided about programme content that will assist adults to assess its suitability for children;
- there must be a detailed billing system for subscribers which clearly itemises all viewing including viewing times and dates; and
- those security systems which are in place to protect children must be clearly explained to all subscribers.

(See meaning of “mandatory restricted access” under Rule 1.18 above.)

Equality Impact Assessment and Alternative approaches

3.133 As part of the Consultation document, stakeholders were invited to comment on the impact of Ofcom’s proposed rules. This included impact in relation to equality (whether in Northern Ireland or the rest of the UK) including gender, disability, or ethnicity.

3.134 We also invited stakeholders to offer any alternative approaches to the proposed set of rules in relation to sexual material. Stakeholders were reminded that any alternative approaches must secure Ofcom’s regulatory objectives under the Communications Act 2003, the Audiovisual Media Services Directive, the AVMS Directive (Implementation) Regulations 2009 and Article 10 of the European Convention on Human Rights

Responses to the Consultation

- 3.135 Most respondents did not wish to suggest an alternative approach to the proposed set of rules in relation to sexual material and used this section of the consultation to further address the proposed rules discussed above.
- 3.136 In addition, one individual urged Ofcom to take a fresh look at the portrayal of women in the media, arguing that sexual material, including music videos, present women in an ornamental, marginal and degraded sexual role. It was further argued that the Consultation did not go far enough to address the sexualised portrayal of women which promoted sexism and misogyny, and did not regulate this area in the way in which racism and homophobia were recognised and regulated.
- 3.137 Another respondent suggested that, with the agreement of broadcasters, examples of problematic content could be compiled periodically and distributed between licensees with an accompanying explanation from Ofcom as to why the content is problematic. It said that seeing examples of specific content in context would be more beneficial than simply reading it in the Broadcasting Bulletin and would assist broadcasters in achieving compliance.
- 3.138 Other respondents addressed the issue of research: Andrea Millwood Hargrave and Sonia Livingstone noted the importance of context in relation to material of a sexual nature. They said that available audience research shows that such material, especially in family viewing segments, can offend although children may value sexual themes and milder content as a means of gaining information. They noted that the importance of the watershed is supported by research, and a widespread understanding that parents must take greater responsibility after the watershed. They said “It seems that the public’s main concern is protection for children rather than a wider concern to protect values and morals in society more generally – with the exception of sexual violence where regulation remains expected”.
- 3.139 CCFON, and individuals who share the views of CCFON, believed that the research study on sexual material conducted for this consultation was insufficient. Any changes to the Code should be “weighted in favour of the important objective of protecting minors” rather than facilitating the broadcaster’s commercial aims.

Ofcom’s response

- 3.140 In relation to issues of equality, one respondent invited Ofcom to take a fresh look at the portrayal of women in the media, in relation to sexual material. However respondents did not raise issues suggesting that the impact of the proposed rules was to change regulation in relation to equality (whether in Northern Ireland or the rest of the UK) including gender, disability, or ethnicity.
- 3.141 While respondents have not put forward specific alternatives to the proposed set of rules, Ofcom has noted all the contributions to this section of the Consultation.

Part 4

Competition and Voting Rules (Code Section Two)

Introduction

Summary of proposals

- 4.1 In the Consultation document we proposed a set of rules that clarified the requirement for broadcast competitions and voting to be conducted fairly, and aimed to protect viewers and listeners from harm. These rules elaborated on current Rule 2.11 of the Code and introduced references to voting.
- 4.2 This part of the Statement should be read in conjunction with Part 5 of Ofcom's Broadcasting Code Review Consultation Paper, which can be found at <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf>. This document sets out the rationale for our proposals and our approach to impact assessment. In addition, the revised 2009 Code can be found at <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>. The 2009 Code covers all programmes broadcast on or after 16 December 2009.

General summary of responses

Responses to the Consultation proposals on competitions and voting rules

- 4.3 Ofcom received 35 responses concerning its proposed rules on competitions and voting – 23 from organisations and 12 from individuals. Of these, 12 organisations and 4 individuals requested confidentiality and are not therefore identified in the summary of responses below.
- 4.4 The responses from those individuals and organisations who did not request confidentiality have been published on Ofcom's website⁴⁴. These were from 8 individuals and the following 11 organisations: Box Television; British Broadcasting Corporation ("BBC"); Channel 4; Channel 5 Broadcasting Limited ("Five"); RadioCentre; S4C; STV Group plc; UTV Television; Viacom Group; Viasat Broadcasting Limited; Voice of the Listener & Viewer ("VLV").

Overview of responses to the Consultation

- 4.5 Responses varied but were largely supportive of modified rules concerning broadcast competitions and voting. They can be summarised as follows:
- Respondents who supported the proposed rules without reservation;
 - Respondents who broadly supported the proposed rules but with amendment; and
 - Respondents who did not support the proposed rules.

⁴⁴ <http://www.ofcom.org.uk/consult/condocs/bcode09/responses/>

Ofcom's response

- 4.6 In responding to the Consultation and preparing this statement, we have taken into account each of the responses. Where appropriate we have redrafted and/or offered guidance. In doing so we have taken account of Ofcom's duty to secure its statutory objectives under the Communications Act 2003, and to comply with the Human Rights Act 1998 and the European Convention on Human Rights ("the Convention"). Our approach to each of the rules proposed, to the proposed meanings of terms used within them, and to stakeholders' suggestions of alternative approaches, is laid out below.
- 4.7 In relation to an assessment of impact, the Consultation document explained that it did not contain a separate impact assessment document. Instead the Consultation document as a whole assessed the impact of the proposed changes on stakeholders (including citizens and consumers; and radio and television broadcasters). Likewise this Statement as a whole responds to issues relating to impact and in addition summarises Ofcom's position at paragraphs 2.31 to 2.35.

Proposed new meanings

- 4.8 Ofcom's Consultation proposed the introduction of new meanings for "broadcast competitions" and "voting", which stated:

Meaning of "broadcast competition":

A competition featured in a programme in which viewers or listeners are invited to enter for the opportunity to win a prize.

Meaning of "voting":

Features in a programme in which viewers or listeners are invited to register a vote to decide or influence the outcome of a contest (at any stage).

Responses to the Consultation

- 4.9 The BBC suggested that a "competition" should be defined as "an element featured in a programme which requires viewers and/or listeners to exercise skill or judgement or to display knowledge for the purpose of winning a prize", and should not therefore include a prize draw.
- 4.10 Box TV and Channel 4 both suggested that, to provide further clarity, the meanings of "broadcast competition" and "voting" should reflect the definition of "programming" as set out in the proposed Section Nine of the Code.
- 4.11 Channel 4 also suggested alternative wording for the proposed meanings:
- Broadcast competition – "A competition or draw featured in Programming in which viewers or listeners are invited to enter by any means for the opportunity to win a prize (see Programming definition in Section 9)"; and
 - Voting – "Features in Programming in which viewers or listeners are invited to register a vote by any means to decide or influence the outcome of a contest (at any stage) (see Programming definition in Section 9)."
- 4.12 Five believed guidance to the proposed rules should clarify that, as outlined in Ofcom's consultation document, broadcast competitions and voting involve viewer or

listener participation, the competitions generally exclude contests and gameshows, and voting excludes opinion polls.

- 4.13 Viacom Group noted that the proposed meaning of “voting” included only votes held to decide the outcome of a contest and argued that any other scheme that broadcasters therefore devised to elicit preferences from viewers would have to be described as something other than a “vote” or “voting”. Similarly, it believed that guidance should be provided to clarify what test(s) broadcasters should use in deciding whether a scheme was a “contest” and how to describe outcomes of viewer communications that did not amount to a contest.
- 4.14 RadioCentre and another organisation noted that “not all competitions have a prize...and not all voting is undertaken to decide or influence the outcome of a contest.” They therefore believed that “the meanings should be amended accordingly”.
- 4.15 VLV argued that competitions without prizes should be subject to the proposed rules and therefore recommended the deletion of “win a prize” from the meaning of “broadcast competition”.
- 4.16 Two organisations considered that opinion polls should be subject to the requirement within proposed Rule 2.11 for fair conduct.
- 4.17 Two organisations did not consider the proposed meanings appropriate. While one, however, did not object to their adoption, the other queried whether Ofcom intended to cover any non-broadcast competitions or voting (e.g. those held on a broadcaster’s website) and believed the exclusion of opinion polls from “voting” should be made explicit.

Ofcom’s response

- 4.18 Ofcom’s statutory duties include issuing and revising a Code that reflects standards objectives concerning television and radio services. As such, the Code contains rules aimed to ensure these standards are maintained in broadcast editorial (programming) including broadcast competitions and voting.
- 4.19 Ofcom notes that some respondents referred to the meaning of the term, “competition”, as opposed to the proposed meaning of the term, “broadcast competition”. Ofcom recognises that the title given to proposed Rules 2.11 to 2.13 (see paragraph 4.30, below) was “Competitions and Voting”, as opposed to the title, “Broadcast competitions and voting”, used in proposed Sections Nine and Ten of the Code. However, no differentiation was intended by Ofcom, as reflected in the substance of proposed Rules 2.11 to 2.13, and we therefore intend to re-title the rules in Section Two of the Code as, “Broadcast competitions and voting”.
- 4.20 Ofcom also notes that a number of respondents believe the proposed meanings should refer to “programming”, as defined in proposed Sections Nine and Ten of the Code, as opposed to “programmes”. However, proposed Sections Nine and Ten of the Code are now being reconsidered (see paragraph 4.33 and 5.3, below). In addition, throughout the current Code (including Section Two – with or without proposed amendment), the majority of which will remain unchanged, the term “programmes” refers to broadcast material other than advertising (which is subject to the requirements of the Broadcast Committee of Advertising Practice (“BCAP”))

Television and Radio Advertising Standards Codes⁴⁵, not the Ofcom Broadcasting Code). It therefore remains Ofcom's intention to refer to "programmes" in the meanings of "broadcast competition" and "voting".

- 4.21 Ofcom has always intended the current Rule 2.11 to apply to all broadcast competitions, whether they challenge participants or merely require registration and whether entry is paid for (by premium rate telephony, for example) or free. Ofcom can see no reason why free prize draws should be exempt from a requirement to be conducted fairly (note: prize draws with paid entry would be illegal lotteries under the Gambling Act 2005). We do not therefore intend to change the scope of the competitions covered by the rules concerning broadcast competitions. However, having considered the points raised by respondents, we intend to clarify the full scope of our new rules concerning "broadcast competitions" by revising the meaning of "broadcast competition" to include a "free prize draw" and entry "by any means".
- 4.22 Likewise, Ofcom now intends the meaning of "voting" to include clarification as being a "vote by any means".
- 4.23 The purpose of the proposed rules concerning broadcast competitions and voting is to protect those who wish to participate from material harm, which can occur as a result of the unfair conduct and/or misleading nature of a broadcast competition or vote. To this end, Ofcom has recognised that Rule 2.2 of the Code⁴⁶ remains and will apply to, amongst other things, participation in which viewers or listeners may not necessarily have a strong personal interest in the outcome, but which could, nevertheless, result in a breach of audience trust. As Rule 2.2 of the Code will continue to capture such occurrences with regard to contests, gameshows and opinion polls, Ofcom intends to maintain its current policy of generally excluding contests and gameshows from the scope of broadcast competitions and opinion polls from the scope of voting. This is clarified in associated guidance⁴⁷. Similarly, participation in a competition that has no prize, and in which viewers or listeners are therefore unlikely to have a strong personal interest in the outcome, could result in a breach of audience trust. In such circumstances Rule 2.2 would apply.
- 4.24 Ofcom notes concern raised about on air references to "vote" and "voting" and what tests should be applied to assess whether a scheme is a contest.
- 4.25 However, the Code is intended for stakeholders to understand the parameters in which broadcasters must operate to remain compliant with regulation that reflects current legislation (including decisions Ofcom is empowered to make under the Communications Act 2003). On air references to a "vote" or "voting" need not therefore reflect only the meanings contained within the Code, if a broadcaster believes the audience will understand what is referred to.
- 4.26 Similarly, and also given the associated guidance Ofcom is providing concerning the general exclusion of contests and gameshows from "broadcast competitions", we consider it unnecessary to clarify what tests would be necessary to assess whether a scheme is a contest and therefore subject to the scope of what is meant by "voting".

⁴⁵ BCAP's advertising standards codes/guidance can be found at: <http://www.asa.org.uk/asa/codes/>

⁴⁶ Rule 2.2 of the Code states: "Factual programmes or items or portrayals of factual matters must not materially mislead the audience"

⁴⁷ <http://www.ofcom.org.uk/tv/ifi/guidance/bguidance/guidance2.pdf>

- 4.27 Ofcom notes one respondent's query on whether Ofcom intends to cover any non-broadcast competitions or voting (e.g. those held on a broadcaster's website). As the Code's rules relate to programming (see paragraph 4.19 above), those rules concerning the conduct of broadcast competitions/votes do not therefore concern competitions/votes which are not featured in a television or radio programme.
- 4.28 Following stakeholder responses Ofcom has amended the meanings of "broadcast competition" and "voting", with reference to its rules concerning broadcast competitions and voting, to state in the 2009 Code:

Meaning of "broadcast competition":

A competition or free prize draw featured in a programme in which viewers or listeners are invited to enter by any means for the opportunity to win a prize.

Meaning of "voting":

Features in a programme in which viewers or listeners are invited to register a vote by any means to decide or influence, at any stage, the outcome of a contest.

Proposed new Rules 2.11 to 2.13

- 4.29 Ofcom's Consultation proposed new Rules 2.11 to 2.13, which stated:

Competitions and Voting

- 2.11 Broadcast competitions and voting must be fairly promoted and conducted and broadcasters must not materially mislead viewers or listeners.
- 2.12 Broadcast competition rules must be clear and appropriately made known.
- 2.13 Broadcast competition prizes must be described accurately. (See also [current Rule 1.28] in Section One: Protecting the Under-Eighteens.)

- 4.30 These proposed rules were to replace the current Rule 2.11, which states:

Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known.

- 4.31 The proposed rules were to complement Rule 2.2, which will continue to state:

Factual programmes or items or portrayals of factual matters must not materially mislead the audience.

- 4.32 The proposed rules were also intended to complement other proposed rules that formed part of a comprehensive revision of Sections Nine/Ten of the Code (Commercial references in television/radio programming). These rules were:

Broadcast competitions and voting

- 9.10/10.11 Broadcast competitions and voting must be fairly promoted and conducted and broadcasters must not materially mislead viewers so as to cause financial harm.
- 9.11/10.12 Terms and conditions of entry or participation must be drawn up by broadcasters and be appropriately brought to the attention of viewers/listeners. In particular, significant conditions that may affect a

viewer's decision to participate must be made clear at the time an invitation to participate is broadcast.

- 4.33 However, in the light of the government's announcement on 16 September 2009 that it is minded, subject to consultation, to permit product placement in UK produced commercial television, Ofcom has recently announced an extension to its review of Sections Nine and Ten of the Code (please see paragraph 5.3 below). Ofcom's statement can be found at:
<http://www.ofcom.org.uk/consult/condocs/bcode09/extension/>.

Responses to the Consultation

- 4.34 The BBC believed proposed Rules 9.11 and 10.12 should be added (as one rule) to the proposed rules in Section Two of the Code. It also suggested that the term "fairly promoted" in proposed Rule 2.11 may need defining, questioning whether the test for this was actually whether a promotion was not "materially misleading" and was therefore covered under the second part of the proposed rule (i.e. "...and broadcasters must not materially mislead viewers or listeners").
- 4.35 S4C welcomed Ofcom's promise of additional guidance to help clarify the scope of the proposed rules in relation to the associated rules in proposed Sections Nine and Ten of the Code.
- 4.36 Five questioned the difference between the proposed rules in Section Two and proposed Rules 9.10 and 9.11. It suggested that proposed Rule 2.11 should be redrafted to require that "broadcasters must not materially mislead viewers or listeners as to the result of a viewer competition or vote." It also suggested deleting proposed Rule 2.12, which it believed risked duplicating proposed Rule 9.11.
- 4.37 Viacom Group noted that "the proposed rules have been distilled from the more extensive versions contained in the Licence Variation" issued to commercial television broadcasters by Ofcom in May 2008. It believed it was therefore "appropriate that these obligations are explained in the Code for a wider audience", adding that clarity would be afforded "if the original versions from the Licence Variation were included in guidance to the proposed rules."
- 4.38 UTV Television believed there was "already a regulatory framework in place to ensure fair competitions and voting outside the Code" but, "for the sake of clarity and a uniform approach", agreed with the proposed rules.
- 4.39 Viasat Broadcasting Limited believed the proposed rules were clearer than current Rule 2.11 but suggested that the term, "fairly promoted" required clarification or replacement by "presented fairly", as "the term promoted can be interpreted in a number of ways."
- 4.40 Two organisations believed that all proposed rules concerning broadcast competitions and voting should appear in one Section of the Code, one stated that they should be in Section Two. The other organisation also believed that "current guidance notes in this area" were inadequate.
- 4.41 One organisation believed that all proposed rules concerning audience communications and broadcast competitions and voting should appear in one Section of the Code.

- 4.42 One organisation considered that the “current rules in relation to competitions and voting” were sufficiently clear but recognised that the proposed rules reflected best practice.
- 4.43 One organisation was concerned about potential “double jeopardy” in the event of a breach of any rule also reflected as a licence condition and therefore saw “no reason for the rules regarding off-air behaviour to form part of the Broadcasting Code.”
- 4.44 One organisation believed the revision of current Rule 2.11 (by replacing it with the proposed rules) was unnecessary but did not object to their introduction.
- 4.45 Four individuals did not support the introduction of the proposed rules. Of these, one individual was unsure how appropriate they were, while another had no interest in competitions or voting. The other two individuals believed the proposed rules were inappropriate, one also believed that competitions with simple answers exploited the vulnerable and should be prohibited.

Ofcom’s response

- 4.46 Note: For ease of reference the set of new rules in relation to Broadcast competitions and voting has been placed at the end of Section Two of the 2009 Code. The rule numbers therefore run from Rule 2.13 to Rule 2.16.
- 4.47 Ofcom recognises the broadcaster’s right to freedom of expression. However, we have a responsibility to ensure that this is balanced with an appropriate degree of consumer protection. It is not for Ofcom to make editorial decisions about the content of competitions or the nature of voting in editorial. Nevertheless, we are determined to ensure that broadcast competitions (of whatever difficulty) and voting are conducted fairly, from when they are first mentioned/promoted on air to when a winner (where appropriate) is finally announced. We regulate the conduct of broadcast competitions and voting throughout the process. We do not therefore intend our requirement that an audience is not materially misled to be restricted to the result of a broadcast competition or vote.
- 4.48 However, Ofcom has reflected on the clarity of the reference to “fairly promoted” broadcast competitions and voting in proposed Rule 2.11. We are satisfied that any potential unfairness in the promotion of broadcast competitions and voting is most likely to result from an audience being misled. Ofcom therefore no longer intends to refer to “fairly promoted” in this context. However, we believe it is appropriate to ensure that broadcasters are aware of the full scope of the requirement not to mislead viewers or listeners materially with regard to broadcast competitions and voting. We therefore intend to divide the proposed Rule 2.11 into two separate rules – one will require the conduct of broadcast competitions and voting to be fair (a new Rule 2.13 – see paragraph 4.54) and the other will require that the audience is not materially misled “about broadcast competitions or voting” (a new Rule 2.14 – see paragraph 4.54)
- 4.49 Ofcom notes the various concerns raised by respondents with regard to proposed rules relating to broadcast competitions and voting appearing in more than one section of the Code (i.e. Sections Two, Nine and Ten). As noted above (paragraph 4.21), in light of the government’s public consultation⁴⁸ on permitting product placement on commercial television, Ofcom has recently announced an extension to

⁴⁸ http://www.culture.gov.uk/reference_library/consultations/6421.aspx

its review of Sections Nine and Ten of the Code. In addition, we have now reflected on:

- the broadcast content to which Ofcom had intended Sections Nine and Ten of the Code to refer (i.e. commercial references in programming);
- the principal purpose of most of the rules contained within Section Two of the Code (i.e. to protect the audience from harm);
- the general preference of many respondents for rules relating to broadcast competitions and voting to be consolidated in one section of the Code; and
- the apparent general support for the range of matters Ofcom had considered appropriate for inclusion in the proposed rules concerning broadcast competitions and voting in Sections Two, Nine and Ten of the Code.⁴⁹

- 4.50 Ofcom has concluded that it is appropriate to consolidate its rules concerning broadcast competitions and voting in Section Two of the Code. We will therefore combine proposed Rules 2.12, 9.11 and 10.12, into a new Rule 2.15 (see paragraph 4.54).
- 4.51 While Ofcom will refer in associated guidance to broadcasters' licence variation concerning communications with viewers publicised in programmes, we do not intend to reflect in such guidance anything other than matters that directly relate to the relevant Code requirements.
- 4.52 Ofcom notes the concern over potential "double jeopardy", where Code rules reflect a broadcaster's licence condition. However, Ofcom's intended approach is to treat any broadcaster's compliance failure with regard to broadcast competitions and voting as a breach of the Code. For an Ofcom licensee, this would not generally lead to the automatic recording of a breach of its licence. The Ofcom licence condition that holds (or, in the case of radio, will hold) the licensee responsible for all communications solicited in programming reflects a broader requirement than the fair conduct of broadcast competitions and voting. However, Ofcom is not precluded from finding a broadcaster in breach of both the Code and its licence, where appropriate. Generally, such breaches would be for different reasons.
- 4.53 Ofcom has therefore replaced Rule 2.11 with the following new rules in the 2009 Code:

Broadcast competitions and voting

- 2.13 Broadcast competitions and voting must be conducted fairly.
- 2.14 Broadcasters must ensure that viewers and listeners are not materially misled about any broadcast competition or voting.
- 2.15 Broadcasters must draw up rules for a broadcast competition or vote. These rules must be clear and appropriately made known. In particular, significant

⁴⁹ No respondents to questions 17 and 36 of the Consultation (concerning the associated proposed broadcast competitions and voting rules in Sections Nine and Ten of the Code) raised significant observations or objections that have not been considered by Ofcom in the responses discussed in this part of the Statement.

conditions that may affect a viewer's or listener's decision to participate must be stated at the time an invitation to participate is broadcast.

2.16 Broadcast competition prizes must be described accurately.

(See also Rule 1.30 in Section One: Protecting the Under-Eighteens, which concerns the provision of appropriate prizes for children.)

Note:

For broadcast competitions and voting that involve the use of premium rate services (PRS), broadcasters should also refer to Rules 10.9 and 10.10.

Equality Impact Assessment and Alternative approaches

- 4.54 As part of the Consultation document, stakeholders were invited to comment on the impact of Ofcom's proposed rules. This included impact in relation to equality (whether in Northern Ireland or the rest of the UK) including gender, disability, or ethnicity).
- 4.55 We also invited stakeholders to offer any alternative approaches to the proposed set of rules in relation to competitions and voting. Stakeholders were reminded that any alternative approaches must secure Ofcom's regulatory objectives under the Communications Act 2003, the Audiovisual Media Services Directive, the Audiovisual Media Services Regulations 2009 and Article 10 of the European Convention on Human Rights.

Responses to the Consultation

- 4.56 Stakeholders' responses to Ofcom's proposed rules are summarised above. No respondents commented separately on the impact of the proposed rules in relation to equality (whether in Northern Ireland or the rest of the UK) including gender, disability, or ethnicity. Respondents did not explicitly challenge our assessment that, as we were simply clarifying and restating current requirements, there would be no adverse impact on stakeholders.
- 4.57 No respondents offered an alternative approach to the proposed set of rules concerning broadcast competitions and voting in Section Two of the Code.

Part 5

Sections Nine and Ten of the Code

Introduction

Ofcom's extension of the Code Review

- 5.1 In Ofcom's Consultation on the Code review, we proposed revised rules relating to commercial references in television and radio programming (Sections Nine and Ten of the Code). These had been drafted in light of the current public policy, maintaining the prohibition on product placement. To date, product placement has been prohibited in programming broadcast on Ofcom licensed television and radio services, with some exemptions⁵⁰.
- 5.2 On 16 September 2009, the Government announced⁵¹ its intention, subject to consultation⁵², to permit product placement in UK produced television programmes.
- 5.3 In light of this announcement, Ofcom has evaluated its proposals to revise Sections Nine and Ten⁵³, and has concluded as follows:
- Changes to Sections Nine and Ten of the Code will not be announced by the end of the year.
 - An extended review will allow us to take into account not only the outcome of the Government's consultation on product placement, but also the potential wider implications of any change in this area on other rules relating to commercial references in television and radio programming, including the rules relating to sponsorship.
 - Following the outcome of the Government's consultation on product placement, Ofcom will then consult as appropriate on new proposals for amendments to Sections Nine and Ten.
 - In considering the responses to our further consultation on these sections we will also take account of responses to the proposals we have received to date where these relate to rules which, in Ofcom's view, are unaffected by the Government's eventual decision on product placement.
- 5.4 All Ofcom licensees should note that, until further notice, they must continue to comply with all of the existing rules in Sections Nine and Ten of the Broadcasting Code.

⁵⁰ For further details of these exemptions, see Rule 10.5 of the 2005 Code.

⁵¹ http://www.culture.gov.uk/reference_library/minister_speeches/6194.aspx

⁵² This consultation closes on 8 January 2010 and can be found at: http://www.culture.gov.uk/reference_library/consultations/6421.aspx

⁵³ <http://www.ofcom.org.uk/consult/condocs/bcode09/extension/>

Acquired children's programmes

- 5.5 Ofcom's announcement on the extension to the Code Review⁵⁴ advised that the Audiovisual Media Services Directive, which must be transposed into UK law by 19 December 2009, specifically prohibits product placement in "children's programmes" (whether produced in, or acquired from outside, the UK).
- 5.6 Product placement is currently prohibited under the Broadcasting Code. However arrangements covering the inclusion of products or services in a programme acquired from outside the UK and films made for cinema are not covered by this prohibition, provided no broadcaster regulated by Ofcom and involved in the broadcast of the programme directly benefits from the arrangement.
- 5.7 Under the AVMS Directive, as of 19 December 2009, product placement is prohibited in all children's programmes⁵⁵ that are produced after this date and transmitted on Ofcom's licensed services (whether produced in, or acquired from outside, the UK). Ofcom has therefore amended the meaning of product placement which follows Rule 10.5 of the Code in order to reflect this position, and has provided guidance for broadcasters on how to comply with the new requirement.
- 5.8 The meaning of "product placement" which follows Rule 10.5 in Section Ten of the Code now states:

10.5 Product placement is prohibited

Meaning of "product placement":

Product placement is the inclusion of, or a reference to, a product or service within a programme in return for payment or other valuable consideration to the programme maker or broadcaster (or any representative or associate of either).

- Prop placement: For the purpose of this rule, references to products or services acquired at no, or less than full, cost, where their inclusion within the programme is justified editorially, will not be considered to be product placement. On television, a brief, basic text acknowledgement of the provider of these products or services may be included within the end credits of the programme. This is permitted only where the identity of the product is not otherwise apparent from the programme itself.
- Acquired programmes: With the exception of children's programmes produced after 19 December 2009, Rule 10.5 does not apply to arrangements covering the inclusion of products or services in a programme acquired from outside the UK and films made for cinema provided that no broadcaster regulated by Ofcom and involved in the broadcast of that programme or film directly benefits from the arrangement.

Children's programmes in this context are programmes commissioned for, or specifically directed at, audiences below the age of 16.

⁵⁴ <http://www.ofcom.org.uk/consult/condocs/bcode09/extension/>

⁵⁵ Children's programmes in this context are programmes commissioned for, or specifically directed at, audiences below the age of 16.

Broadcasters should note that all acquired programmes or films must nevertheless comply with all other relevant rules in this Code. In relation to references to products and services in acquired programmes that may have resulted from commercial arrangements, broadcasters should pay particular attention to the requirements of Sections One, Two and Ten of the Code.

- 5.9 The position regarding other acquired programmes and films made for cinema remains unchanged for the time being.

Premium rate numbers

- 5.10 On 3 November 2009 Ofcom published its regulatory statement and further consultation entitled Participation Television: Rules on the promotion of premium rate services⁵⁶. Section 4 of the Participation Television (“PTV”) statement and consultation document provides the wording of the new Broadcasting Code rules in relation to premium rate numbers and revised guidance is also provided. The effect of the new rules will be to make clear that the promotion of certain premium rate services (“PRS”) based content will no longer be considered as acceptable under the Broadcasting Code as editorial content. Such services wishing to continue with their current formats will be considered as advertising and regulated as teleshopping, under the Television Advertising Standards Code (“the Advertising Code”).
- 5.11 The current rules in the Advertising Code in respect of PRS would not permit the majority of content on Adult Chat PTV and Psychic PTV to be broadcast as advertising. Ofcom is therefore considering changes to the Advertising Code to ensure that the regulation of those services remains proportionate to the aim of protecting the viewing public from harm and offence. The Participation Television consultation is seeking views on this approach and on specific proposed changes to the Advertising Code.
- 5.12 Given the need to consider the appropriate means of regulation of such services through the Advertising Code, Ofcom does not intend to bring into effect the changes to the Broadcasting Code in respect of PRS until the conclusion of the Participation Television Consultation process. The new Code rules discussed above at paragraph 5.10 will therefore come into force at the same time as any changes which may be necessary to the Advertising Code.
- 5.13 As discussed above in paragraph 3.97, the Participation Television consultation will close on 15 January 2010. After this period, Ofcom will publish a statement bringing into force the changes to the Broadcasting Code rules and concluding on the appropriate changes to the Advertising Code.
- 5.14 Until then all Ofcom licensees must continue to comply with the existing rules on premium rate numbers in Section Ten of the Broadcasting Code.

⁵⁶ <http://www.ofcom.org.uk/consult/condocs/participationtv3/ptv3.pdf>

Part 6

Sections of the Code where no revisions were proposed

Introduction

- 6.1 In the Consultation, we explained that Ofcom had reviewed the entire Code and decided that only certain areas require changes at present. This part of the Statement should be read in conjunction with Part 8 of Ofcom's Broadcasting Code Review Consultation Paper which sets out the rationale for our proposals and approach to impact assessment and can be found at <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf>.
- 6.2 We invited stakeholders to suggest any other sections of the Code which, in their view, should also be reviewed.
- 6.3 In addition to this targeted approach to reviewing the Code, the Consultation explained that guidance to all sections will be reviewed to provide up-to-date amendments or clarification on an on-going basis. This is to provide broadcasters, viewers and listeners with a continuing opportunity to seek improvements to the guidance, in particular in relation to those sections where the rules were not identified, during this review of the Code, as requiring change. We therefore also invited stakeholders to suggest any areas where updating of Code guidance would be helpful.

Summary of responses

Code Preface

- 6.4 The BBC argued that the legislative background section which prefaces the Code needs amending to make clear that no part of the Code applies to the BBC World Service funded by grant in aid.

Sections One (Protecting the Under-Eighteens) and Two (Harm and Offence)

General

- 6.5 The BBFC noted that its recent Classification Guideline Review Consultation found that while public attitudes to harm, offence and protection of children have not, in general, shifted dramatically in the past four to five years, public concern about such issues in films and DVDs was running higher than at any time in the past.
- 6.6 Mediawatch argued that Ofcom places too much emphasis on freedom of expression and urged Ofcom to "improve" rather than "maintain" standards. It requested greater clarity in the meaning of "context" in Section Two of the Code for example in relation to "audience expectation". It requested clarity over Ofcom's duty to reduce regulatory burden and also believed transparency over the criteria Ofcom uses in applying the Code in relation to complaints is essential. It further raised issues in relation to the regulation of Video on Demand programming.

- 6.7 One respondent suggested a new rule in which Ofcom and broadcasters take full responsibility for the protection of Under Eighteens in relation to broadcasting, and also commented on Ofcom's complaints process.
- 6.8 Five noted the definition of children in the Code (people under the age of fifteen) and requested guidance on a definition of "younger children" who are also referred to.

Alcohol

- 6.9 Dorset County Council suggested that Ofcom reviews rules in relation to the misuse of alcohol. It stated that these rules should be strengthened to ensure that: programmes never leave teenage audiences with the impression that alcohol misuse is acceptable, nor reinforce the "bragging culture" around it; messages about alcohol are consistent across both programme content and public information campaigns; and, sponsorship of programmes by manufacturers of alcoholic drinks is not permitted for general family viewing before the watershed.

Offensive language

- 6.10 Five requested a clarification on whether "bleeping" before the watershed is acceptable and whether pixellation of the speaker's mouth is also required.
- 6.11 An individual respondent argued that viewers and listeners should not be confronted by, or have to avoid, offensive material and suggested a new rule prohibiting the broadcast of swearing, including obscene, offensive, sexual and strong language to cover both television and radio.
- 6.12 Two individuals expressed concerns about declining standards in relation to the use of "blasphemous/profane/irreverent language" used on the BBC.
- 6.13 Mediawatch noted opinion polls reflecting public concern in this area and requested a definition of "the most offensive language" in relation to Rule 1.14.

Exorcism, the occult and the paranormal

- 6.14 A respondent requested updated research and a review of the distinction between paranormal demonstrations which "purport to be real" and those included for entertainment purposes in relation to the protection of children (Rule 1.19).
- 6.15 Five said it would welcome clarification of what is meant by a "demonstration" in relation to the occult and paranormal for example in the context of a documentary.
- 6.16 CCFON, and individuals who share the views of CCFON, argued that there should be a complete prohibition on the inclusion in programmes of demonstrations of exorcism, the occult and the paranormal.

Films

- 6.17 Guidance on the definitions of "premium subscription services" and "pay per view/night services" particularly vis-a-vis "push-VOD" services was requested by Five.

Involvement of people under eighteen in programmes

- 6.18 The Children's Commissioner for Wales noted that the European Convention on Human Rights is referenced within the current Code and argued that the UN Convention on the Rights of the Child (UNCRC) should be similarly referenced. It also argued for a review of the rules on the participation of people under the age of eighteen in programmes (which it noted has been raised as a concern by the UNCRC). In its view such a review should include a consultation with children and young people to ascertain their views. It advocated a children's version of the complaints procedure and argued that Ofcom's meaning of "children" (people under the age of fifteen) should be consistent with the Children's Act 1989 and UNCRC's definition, which it said defines children as those up to their eighteenth birthday.
- 6.19 Mediawatch also requested a review of the rules in relation to the participation of under-eighteens in programmes.
- 6.20 Two respondents requested explicit confirmation that persons over 16 may generally consent to participate in programmes without separate parental consent.

Suicide and self-harm

- 6.21 CCFON, and individuals who share the views of CCFON, argued that there should be a complete prohibition on the inclusion in programmes of methods of suicide and self-harm.

Anti-social behaviour

- 6.22 Mediawatch requested a clear definition of "anti-social behaviour" (referred to in Rule 2.4 of the Code).
- 6.23 Mediamarch, and individuals who share its views, suggested a review of Section Two of the Code on Harm and Offence in relation to the portrayal of violent and anti-social behaviour, including bad language and drug taking.

Photosensitive epilepsy

- 6.24 In relation to photosensitive epilepsy and flashing lights and/or patterns Five did not believe that such broadcasts should require editorial justification as long as viewers are given adequate verbal and/or text warnings in advance.
- 6.25 MTV Networks Europe Ltd ("MTVNE") considered that Rule 2.13 which relates to precautions in relation to viewers who have photosensitive epilepsy ("PSE") should be reviewed with specific reference to music programming. MTVNE proposed that these viewers have a modified television or set top box that reduces or eliminates the effect of flashing or fast cutting. It argued that with almost 700 channels being broadcast in the UK, this is the only fail safe way for PSE sufferers to be properly protected. It further stated that this would allow all non-PSE sufferers to receive a better viewing experience as the content would not have to be 'dulled down'. Another suggestion was for a warning to appear on the EPG. MTVNE felt that Ofcom could help by publishing precautions which are known to reduce the risk to PSE sufferers. It also proposed that Ofcom issue guidance on particular types of programming in relation to Rule 2.13 (live performances; music videos; and, programmes featuring flashing as part of the editorial). It said it would welcome the opportunity to comment on guidance in order to ensure that the necessary clarity is given for broadcasters to help prevent breaches in the future.

Section Three (Crime)

- 6.26 Mediamarch, and individuals who share its views, recommended further clarification of Rule 3.1 in order to clearly define its reference to material likely to encourage or incite the commission of crime.
- 6.27 One respondent suggested the removal of the reference to “hijack or kidnapping” in Rule 3.6, arguing that this is already covered by the rest of the rule.

Section Five (Due Impartiality) and Six (Elections)

- 6.28 Radio Centre noted the wish of one of its members to revise Section Five of the Code in order to deliver greater clarity and consistency in the regulation of impartiality in radio programming across national and local radio. This broadcaster stated that local radio stations are currently subject to one rule (Rule 5.13) where national radio stations are subject to eight (Rules 5.5 to 5.12) and believed that changes in the broadcasting market made this discrepancy untenable. In addition it stated that Ofcom appeared to believe, in its view erroneously, that Rules 5.5 to 5.12 applied to local radio stations during election periods. It believed that Ofcom is empowered to conclude that the level of impartiality ‘due’ on national radio is closer to that which is due on local radio than on television.
- 6.29 Two respondents requested the redrafting of Section Five of the Code to increase ease of understanding.
- 6.30 Mediawatch was concerned that matters relating to due impartiality are interpreted too narrowly, and that moral and ethical matters should be presented with due impartiality.

Section Seven (Fairness) and Eight (Privacy)

- 6.31 One respondent queried the meaning given to “legitimate expectation of privacy” in Section Eight of the Code when the phrase does not appear in Rule 8.1 nor any of the Practices to be followed. It requested an explanation for why this meaning is included.
- 6.32 Another respondent was concerned that both Practice 7.9 and Practice 8.8 are unclear, in relation to opportunity to contribute and consent respectively.

General

- 6.33 Camelot Group Plc noted that Ofcom recognises the national and statutory status of the National Lottery and supported the continuance of the status quo.
- 6.34 One individual advocated a simplification of the whole Code which he found “far too police state and interfering” unlike the “more relaxed and easier to follow” approach in the rest of Europe.

Ofcom’s response

- 6.35 Ofcom has considered the wide range of contributions and suggestions in response to this section of the Code Review consultation document.
- 6.36 Ofcom notes the BBC’s response regarding the BBC World Service funded by grant in aid. The section of the Code entitled The Legislative Background to the Code will

be amended to state that: "Sections Five, Six, Nine and Ten of the Code do not apply to BBC services funded by the licence fee. No part of the Code applies to the BBC World Service funded by grant in aid."

- 6.37 Where guidance has been requested, Ofcom will consider revising, or adding to, current guidance in order to assist the interpretation and application of the Code. Any resulting revised guidance will be published in 2010. In addition, as discussed at paragraph 2.30, Ofcom has commissioned research on public attitudes towards offensive language which will be published in 2010.
- 6.38 Where re-drafting of, or wider changes to, the rules have been suggested Ofcom will consider these contributions as part of any future revisions to the relevant sections of the Code.