

# Cover sheet for response to an Ofcom consultation

## BASIC DETAILS

Consultation title:

To (Ofcom contact): Sara Winter

Name of respondent: Channel 4

Representing (self or organisation/s):

Address (if not received by email):

## CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why:

- **Nothing**
- Name/contact details/job title
- Whole response Organisation
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Name Signed (if hard copy)

Neil Pepin, Deputy Head of Legal & Compliance, Channel 4.

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## Consultation questions Sexual Material Rules (Code Section One)

### Question 1

a) *Do you consider that the rule in relation to 'adult-sex' material needs to be clarified?*

Channel 4 does not think it is necessary for the rule to be clarified but does not oppose any clarification.

b) *Do you agree with our proposed amendments to the rule on 'adult-sex' material (Proposed Rule 1.18 to replace Rule 1.24)?*

Channel 4 agrees with the proposed amendments.

c) *If you do not agree with our proposed amendments, please explain why and suggest alternative wording where appropriate.*

N/A

### Question 2

a) *Do you consider that the introduction of a new rule in relation to material of a strong sexual nature is appropriate?*

Channel 4 does not consider that a rule about "strong sexual material" is appropriate or desirable.

b) *Do you agree with our proposed rule on material of a strong sexual nature (proposed Rule 1.19)?*

Channel 4 does not agree with the proposed Rule 1.19.

c) *If you do not agree with our proposed new rule, please explain why and suggest alternative wording where appropriate.*

Channel 4 takes the view that if the amendments as proposed are implemented, the effect of the Code will have been *changed* and not just clarified.

The key considerations are that there is no definition proposed for "images and/or language of a strong sexual nature" (nor at present any intention to provide accompanying guidance) and the proposed Rule 1.19 envisages that such material can **only** be broadcast after the watershed.

That is a key and significant difference from the position under the present Code and one which Channel 4 believes will have unintended consequences for programming which features such material but whose primary purpose is not sexual arousal or stimulation but rather educational or other legitimate editorial justification.

By introducing the concept of "strong sexual nature" without defining it, the proposed amendment creates doubt and uncertainty where previously none existed. It invites argument and misunderstanding and will lead to lack of clarity rather than greater clarity.

There would be many people who regarded content in programming that helps to meet Channel 4's statutory public service remit, such as *The Sex Education Show Series One* and *KNTV: Sex*, as being of a "strong sexual nature". Equally, storylines in *Hollyoaks*, *Eastenders* and *Coronation Street* often involve strong sexual themes. Likewise, schools programming which provides sex education as part of the curriculum may arguably also be considered to contain material of a strong sexual nature.

Channel 4 does understand that the purpose of the revisions is not to change the effect of the existing rules, but if Rule 1.19 is implemented as proposed then that will be its effect. If Rule 1.19 had been in place, it is doubtful that Channel 4 would have been able to broadcast either *The Sex Education Series One* and *KNTV: Sex* in their pre-watershed slots. In the case of *The Sex Education Show* Ofcom concluded in its standards adjudication that "it would be an inappropriate and a disproportionate limitation on the freedom of speech and editorial freedom of the broadcaster to prohibit programmes of this nature before the watershed"... We believe that the potential loss of such programming, which plays a valuable part of Channel 4's public service remit, would be an unintended consequence of the proposed new rule.

The best way to consider the mischief inherent in the proposed amendments is this: the proposed amendments create four classes of material which are the subject of specific attention – adult-sex; strong sexual nature; representations of sexual intercourse; and sexual behaviour.

The proposed amendments are entirely silent about material of a sexual nature. It may be that "sexual behaviour" is meant to cover the field regarding material of a sexual nature, but that is not clear. That that is a possible interpretation follows from the fact that proposed Rule 1.19 specifies only post-watershed broadcasts for material of a strong sexual nature while Rule 1.20 contemplates material about sexual behaviour being broadcast pre-watershed. But, equally clearly, it is possible to consider treatment of sexual behaviour that would be commensurate with material of a strong sexual nature.

This difficulty would be solved in one of two ways:

- (1) Provide a definition of strong sexual nature; or
- (2) Recast the proposed rules 1.19 and 1.20.

Channel 4 does not advocate a definition of "strong sexual material". Rather, Channel 4 prefers a streamlining of the proposed amendments as follows:

Rule 1.19 : Programmes or trailers which contain images and/or language of a sexual nature but which are not broadcast for the primary purpose of sexual arousal or stimulation can be broadcast provided there is appropriate and, where necessary, strong contextual justification. Any use of images and/or language of a sexual nature included before the watershed (in the case of television), or when children are particularly likely to be listening (in the case of radio), must be appropriately limited. When considering the strength of the material, and therefore the contextual justification, broadcasters should take account of all relevant factors, which might include (but are not limited to):

- the expectations of the audience;
- appropriate sign-posting of the nature of the relevant programme and its content;
- whether there is an educational or other perspective to justify the inclusion of the sexual material;
- whether any plot or narrative device provides appropriate editorial context for the inclusion of the sexual material;
- the purpose of the sexual material, i.e. whether it is directly connected with the editorial purpose of the programme; and

- the amount and explicitness of the sexual material, taking into account especially the timeslot of the programme.

Rule 1.20 : Actual 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.

Channel 4 takes the view that these proposed amendments would clarify existing rules and would ensure that appropriate protection for under-eighteens is provided .

Additionally, Channel 4's proposals do not alter the *status quo*.

The result is that:

- (a) Sexual material which is not adult-sex material can be broadcast so long as it has appropriate editorial/contextual justification;
- (b) Sexual material which is not adult-sex material can be broadcast pre-watershed so long as it has an appropriate editorial/contextual justification *and* it is appropriately limited.

Accordingly, Channel 4's proposed amendments conform exactly with the present position under the Code and provide for greater clarity and transparency.

### **Question 3**

***a) Do you consider that the rule in relation to material equivalent to the BBFC R-18 rating needs to be separated from the rule in relation to R-18 rated works?***

Channel 4 does not think the separation is critical but is not opposed to the separation.

***b) Do you agree with our proposed rule on material equivalent to the BBFC R-18 rating (proposed Rule 1.17)?***

Channel 4 does not object to proposed Rule 1.17.

***c) If you do not agree with our proposed new rule, please explain why and suggest alternative wording where appropriate.***

N/A

### **Question 4**

***a) Do you consider that the rule in relation to pre-watershed material needs to be clarified?***

Channel 4 does not object to the clarification.

***b) Do you agree with our proposed amendments to the rule on pre-watershed material (proposed Rule 1.20 to replace Rule 1.17)?***

Channel 4 agrees with the proposed amendments to Rule 1.20 to replace Rule 1.17.

However, please note our objections to Rule 1.19 above and our proposed drafting solution which would impact on proposed Rule 1.20.

***c) If you do not agree with our proposed amendments, please explain why and suggest alternative wording where appropriate.***

Channel 4 does not think it is necessary that there be more than three categories of "sexual" material dealt with by the Code, leaving aside R18- rated material or their equivalent.

The three categories Channel 4 accepts require express provision in the Code are: adult-sex material; images and discussion of sexual material; and actual representations of sexual intercourse.

Channel 4 has set out in its answer to Question 2 (c) above its proposed formulation of Rules 1.19 and 1.20.

Rule 1.20 should be confined to *actual* representations of sexual intercourse. For instance, a rocking car or caravan would constitute a representation of sexual intercourse, but it seems unlikely that such a representation was meant to be covered by Rule 1.20.

If the Rule is limited to actual representations of sexual intercourse, its purpose and function will be clear. It will also dovetail precisely with Channel 4's proposed Rule 1.19. It is appropriate that there be a special specific rule about pre-watershed actual representations of sexual intercourse. As Channel 4 proposes it, Rule 1.20 would provide that specific rule. Channel 4's proposed Rule 1.19 would apply to pre-watershed representations of sexual intercourse, with Rule 1.20 coming into play only after there had been compliance with Rule 1.19. Where a programme contained a depiction of sexual intercourse that was not an *actual* representation, it would be covered by Rule 1.19.

In Channel 4's view, this approach provides clarity, transparency and guidance without altering the *status quo* or otherwise restricting the freedoms broadcasters presently enjoy under the Code and Article 10 (ECHR).

#### **Question 5**

***a) Do you consider that the associated revisions are appropriate following the other rule revisions outlined above?***

Channel 4 considers the associated revisions to be appropriate and desirable.

***b) Do you agree with our proposed associated revisions in Section One?***

Channel 4 agrees with the proposed associated revisions in Section One.

***c) If you do not agree with our proposed revisions, please explain why and suggest alternative wording where appropriate.***

N/A

#### **Question 6**

***a) Do you wish to suggest an alternative approach to the proposed set of rules in relation to sexual material? If so, please outline your proposals, which should comply with relevant legislation (including the Communications Act 2003 and the European Convention on Human Rights).***

Channel 4 does not wish to suggest an alternative approach but has suggested modifications to the proposed Rules 1.19 and 1.20 and these are set out in the answers to Questions 2 (c) above.

### **Competition and Voting Rules (Code Section Two)**

#### **Question 7**

- a) *Do you consider that the introduction of new rules in relation to competitions and voting is appropriate?*

Yes.

- b) *Do you agree with our proposed new rules in relation to competitions and voting (proposed Rules 2.11 to 2.13 to replace Rule 2.11)?*

Yes.

- c) *If you do not agree with our proposed new rules, please explain why and suggest alternative wording where appropriate.*

N/A

#### **Question 8**

- a) *Do you consider that the introduction of new meanings in relation to competitions and voting are appropriate?*

Yes.

- b) *Do you agree with our proposed new meaning in relation to competitions and voting?*

Yes, subject to the suggested alternative wording proposed below.

- c) *If you do not agree with our proposed new rules, please explain why and suggest alternative wording where appropriate.*

Channel 4 would suggest that both definitions should also reflect the definition of "programming" as set out in the new section 9 in order to provide further clarity.

Meaning of "broadcast competitions" – suggested alternative wording

From:

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

To:

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)

Meaning of “voting” – suggested alternative wording

From:

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).

To:

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)

Channel 4 considers the above amended wording to the competition and voting definitions would provide clarity that these relate to all methods of entry.

### **Question 9**

- a) *Do you wish to suggest an alternative approach to the proposed set of rules in relation to competitions and voting? If so, please outline your proposals, which should comply with relevant legislation (including 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).*

No.

### **Commercial References in Television Programming Rules (Code Section Nine)**

#### **Question 10**

- a) *Do you consider that the rules on commercial television would benefit from being separated from those for radio?*

Yes, provided that the separation is simply in respect of those matters previously the subject of Sections 9 and 10. The fact that the AVMS Directive does not apply at the present time to radio does indeed mean that there is a fundamental difference in the regulatory framework applying to television and radio.

- b) *Do you agree with the introduction of the proposed new Section Nine on commercial references in television programming?*

Yes.

- c) *If you do not agree with the proposed new Section Nine, please explain why and suggest alternative wording where appropriate.*

Please refer to the specific suggestions in response to later questions.

#### **Question 11**

**a) Do you consider that it is appropriate for Ofcom to include the enforceable provisions relating to product and prop placement, replicated from the AVMS Directive (Implementation) Regulations, as rules in the revised Code?**

Yes, as it is important that all relevant enforceable provisions should be in the one Code.

**b) If you do not consider this to be appropriate, please explain why.**

N/A

### **Questions 12**

**a) Would you consider that it is appropriate for Ofcom to introduce rules that would allow Public Information Programming (as described above)? If so please explain why. If not, please explain why not.**

In principle, yes. However, there are considerable potential problems with developing workable definitions of "non-commercial, not-for-profit entities" and "an individual who operates without seeking to make a profit" that would ensure that only appropriate bodies funded the programmes. Furthermore, there may be considerable problems with determining what programming did "not cover matters relating to political, industrial or public controversy." However, Channel 4 is supportive of the principle of introducing the regulatory potential for funding of this nature, and we are happy to work cooperatively with Ofcom in establishing guidance on specific issues that this area of activity gives rise to. We recognise that it will not be possible to anticipate every permutation of funder, programme content and context, and public sensitivities from the outset, in advance of introducing this new provision; but we appreciate the sentiment behind the proposal and would like to make it work to the advantage of all parties involved, be they the funders, the broadcasters and/or the audience.

**b) If Ofcom were to introduce rules in relation to Public Information Programming:**

**i. Are there any potential programmes that you believe could comply with the potential rules but that you consider would be undesirable or arguably not in the public interest? If so, please give details.**

See response to iii below.

**ii. What impact (e.g. social, economic, equality) do you think the potential rules would have on viewers, the television industry and any other parties?**

The proposed rules have the potential for releasing funds for programming not currently available to broadcasters and programme makers. The proposed rules may make it easier to finance public service programming.

**iii. Do you consider that the potential rules would maintain the editorial independence of the broadcaster and provide adequate consumer protection? If not, please explain why.**

On their face, the rules would help to maintain the editorial independence of the broadcaster, though there is a danger that in reality funding would only be made available for programmes which generally approached the subject matter in a manner consistent with the perspective of the funder e.g. a proposed programme on the treatment of drug addiction may only be funded by a not-for-profit entity if the programme adopted a similar approach to the treatment of drug addiction as that entity; and even if initially preferred, funding would presumably be sought to be withdrawn if there were any indications at a later stage of production that

the programme would run counter to that entity's ethos. These are matters for those involved in such programming to be aware of and have processes to deal with, rather than matters which should prevent the principle of such funding being facilitated by the proposed rules.

***iv. Do you consider that additional or alternative safeguards to those included in the draft potential rules are necessary? If so, please provide details.***

As noted above, greater safeguards may be required to ensure, as the proposed rules require, that "*Public Information Programming must not influence the content and/or scheduling of the programming in such a way as to impair the responsibility and editorial independence of the broadcaster.*"

***v. Specifically, should there be any restriction on the type of non-commercial, not-for-profit entities permitted to fund Public Information Programming, and if so, what restrictions?***

Channel 4 would specifically question whether it was appropriate for political and religious organisations to be programme funders, even if the part of the organisation involved as a funder seems otherwise to meet the required definition of non-commercial, not-for-profit entities. We would advocate that registered charities generally should be eligible, even if they undertake some commercial activity in order to increase revenue,; and that charitable arms of commercial organisations and companies be able to fund such programming. This would all be subject to other considerations regarding the content of programmes and editorial independence.

***vi. Do you consider it would be appropriate for Ofcom to review these rules two years after their introduction? If not, please explain why.***

Yes, because, for the reasons set out above, this proposal is very likely to give rise to many difficult and fine judgements.

### **Question 13**

***a) Do you consider that the proposed new Section Nine would benefit from the introduction of new meanings?***

Yes.

***b) Do you agree with our proposed new meanings for Section Nine?***

Yes, subject to the suggested alternative wording proposed below.

***c) If you do not agree with our proposed new meanings, please explain why and suggest alternative wording where appropriate.***

As a general note throughout the whole of new Section 9 we would recommend when ever "programming" is referred to it should contain a capital "P" to make it clear where the definition provided applies. Channel 4 has no objections to the definition itself.

"Commercial references" – suggested alternative wording

From:

"Means any reference to products or services."

To:

"Means any verbal or visual reference to products or services."

**Question 14**

**a) Do you consider that the introduction of new Principles in relation to Section Nine is appropriate?**

Yes.

**b) Do you agree with the proposed new Principles for Section Nine?**

Yes, subject to the suggested alternative wording proposed below.

**c) If you do not agree with our proposed new Principles, please explain why and suggest alternative wording where appropriate.**

Channel 4 suggests that the fifth principle is amended as set out below to a positive statement thereby bringing it in line with the other four positive principles.

From:

"To ensure that unsuitable sponsorship is prevented (unsuitable sponsorship)."

To:

"To ensure sponsorship is suitable (suitable sponsorship)."

**Question 15**

**a) Do you consider that the proposed Rules 9.1 to 9.5 are broadly the same, in terms of both scope and intent, of current Rules 10.1, 10.2, 10.3, 10.4 and 10.12?**

Yes.

**b) If you do not consider the proposed rules are broadly the same as the current rules in this area, please explain why and suggest alternative wording where appropriate.**

N/A

**c) Do you agree with the introduction of the proposed new Rule 9.6?**

In principle, Channel 4 does not disagree with the statement or the drafting of the rule. However, we do not see how it relates to commercial references and may be more appropriate elsewhere in the Code.

**d) If you do not agree with the proposed new Rule 9.6, please explain why and suggest alternative wording where appropriate.**

As above.

**Question 16**

**a) Do you consider it appropriate to introduce the proposed new Rule 9.9?**

Yes. However, paragraph 6.73 of the Ofcom consultation seems to suggest that not all PRS services are presently subject to a PhonepayPlus Code requirement for call costs to be included in promotions of PRS numbers. We do not believe that to be correct, and our understanding is that *all* PRS services are already subject to that requirement.

**b) If you do not consider it appropriate to introduce the proposed new Rule 9.9, please explain why and suggest alternative wording where appropriate.**

"listeners" needs to be changed to "viewers"

**Question 17**

**a) Do you consider that the introduction of a new competition and voting section is appropriate?**

Yes.

**b) Do you agree with the proposed new competition and voting section for Section Nine?**

Yes.

**c) If you do not agree with our proposed new competition and voting section, please explain why and suggest alternative wording where appropriate.**

insert "/draws" after the word "competitions" in title and first bullet point, and subsequently where "competitions" is referred to.

**d) Do you agree that it is appropriate to apply these rules to BBC services funded by the licence fee?**

Yes.

**e) If you do not agree that it is appropriate to apply these rules to BBC services funded by the licence fee, please explain why.**

N/A

**Question 18**

**a) Do you consider that the rules in relation to programme-related material would benefit from clarification?**

Yes.

**b) Do you agree with the introduction of the proposed programme-related material section for Section Nine?**

No, suggested proposal below.

**c) If you do not agree with the proposed programme-related material section, please explain why and suggest alternative wording where appropriate.**  
Channel 4 considers the second italicised paragraph commencing with “*The following rules reflect the potential for the promotion of programme related material ...*” serves no purpose and creates confusion rather than clarity. Therefore, we would recommend this paragraph is removed.

Rule 9.12 - suggested alternative wording

From:

Programme-related material may be promoted in the programme from which it is directly derived and only where it is editorially justified.

To:

Programme-related material may be promoted in Programming from which it is directly derived and only where it is editorially justified.

For the reasons as set out above in response to questions 8 (c) and 13 (c).

### **Question 19**

**a) Do you consider that the proposed cross reference to the Cross-promotion Code would assist stakeholders?**

Yes, subject to the suggested alternative wording proposed below.

**b) If you do not consider that the proposed cross reference to the Cross-promotion Code would assist stakeholders, please explain why and suggest alternative wording where appropriate.**

From:

Broadcasters should note Cross-promotions should also comply with all relevant requirements of the Broadcasting Code and, in particular, Rules 9.1 to 9.6.

To:

The broadcast of Cross-promotions should also comply with all relevant requirements of the Broadcasting Code and, in particular, Rules 9.1 to 9.6.

Channel 4 is of the view this change will clarify that the rule is about the Cross-promotion itself, rather than the service/programme to which it relates.

### **Question 20**

**a) Do you consider that the meanings in relation to sponsorship of television would benefit from revision?**

Yes.

**b) Do you agree that the revised meanings are consistent with those currently used, but more accurately reflect the definition of sponsorship as set out in the AVMS Directive?**

Yes, subject to the suggested alternative wording proposed below.

**c) If not please explain why, suggesting drafting changes where appropriate.**

Suggested alternative wording for the definition of sponsor to reflect constructive and helpful wording in current Code.

From:

A sponsor is any public or private undertaking or natural person (other than the broadcaster or programme producer) who is funding the programme with a view to promoting its products, services, logos, images, name, trade marks and/or its activities.

To:

A sponsor is any public or private undertaking or person (other than the broadcaster or programme producer) who is funding the programme with a view to promoting products, services, logos, images, names, trade marks and/or activities.

Add the following to the end of the penultimate paragraph ending in "within the sponsored content":

(other than where the sponsor credit is part of an integrated programme title sequence).

Delete – "The rules enable references to the sponsor within a sponsor credit, not within the sponsored content."

The reason for the recommended deletion of the above line is that this is already made clear in sections 9.18 and 9.19.

In addition, given that this is a section exclusively relating to television, it is not necessary to refer to "on television" in the underlined sub headings.

### **Question 21**

**a) Do you consider that the rules in relation to the content of sponsored output would benefit from clarification?**

Yes.

**b) Do you agree with the introduction of the proposed new rules on the content of sponsored output in Section Nine?**

Yes, subject to the suggested alternative wording proposed below.

**c) If you do not agree with the proposed new rules on the content of sponsored output, please explain why and suggest alternative wording where appropriate.**

Suggested alternative wording to the last sentence of Rule 9.19

From:

This requirement extends to generic references.

To:

This requirement also extends to generic references.

### **Question 22**

**a) Do you consider that the rules in relation to sponsorship credits would benefit from clarification?**

Yes.

**b) Do you agree with the introduction of the proposed rule?**

Yes, subject to the suggested alternative wording proposed below.

**c) If you do not agree with the proposed rule, please explain why and suggest alternative wording where appropriate.**

We feel it is important not to refer here to "undue prominence", as that is a concept which is widely and readily understood in the context of editorial content, and its use here in a sponsor credit context will potentially confuse people and dilute the efficacy of it as a concept generally. We hope that our suggested form of words will be an acceptable alternative, and one which avoids this problem. The suggested alternative wording to Rule 9.23 also accurately reflects the current Rule, the current Guidance and the additional Guidance published in the Ofcom Bulletin dated 23 March 2009 following Ofcom's review of existing sponsorship credits on licensed services.

From:

Sponsorship credits must be distinct from advertising. Sponsor credits can include reference to the sponsor's products and services for the purpose of helping to identify the sponsor and the sponsorship arrangement. However, any such references must not be given undue prominence. Credits must not contain advertising messages or calls to action. In particular, credits must not encourage the purchase or rental of the products or services of the sponsor or a third party.

To:

Sponsorship credits must be distinct from advertising. Sponsor credits can include a brief description of the sponsor's products and services for the purpose of helping to identify the sponsor. However, the primary focus of the credit must be on the sponsorship arrangement. Credits must not contain advertising messages or calls to action. In particular, credits must not encourage the purchase or rental of the products or services of the sponsor or a third party.

In addition, in order to assist broadcasters with the interpretation of the above rule Channel 4 urges Ofcom to incorporate the additional Guidance published in the Ofcom Bulletin dated 23 March 2009 within the Sponsorship Guidance dated 17 July 2008 on Ofcom's website.

### **Question 23**

***a) Do you consider that the rules in relation to appeals for funds would benefit from clarification?***

Yes.

***b) Do you agree with the introduction of the proposed Rule 9.29 and the section on appeals for funds for programming or services?***

Yes, subject to the suggested alternative wording proposed above.

***c) If you do not agree with the proposals, please explain why and suggest alternative wording where appropriate.***

Suggested alternative wording to Rule 9.40 is made because appeals for funds for programming or services is a different concept to commercial references, and although we are happy with what Ofcom intends to achieve by this rule, we think it would help distinguish it more clearly from commercial references to change the wording in the way suggested.

From

9.40 Appeals for funds for programming or services must not be given undue prominence.

To

9.40 Appeals for funds for programming or services must not be given undue presence in relation to the overall output of the service.

### **Question 24**

***a) Do you consider that the proposed rule revisions are appropriate and would remain consistent with current rule requirements?***

The proposed rule revisions are minor and would remain consistent with current rule requirements.

***b) If you not, please explain why and suggest alternative wording where appropriate.***

N/A

Question 25

a) *Do you wish to suggest an alternative approach to the proposed revisions in relation to the regulation of commercial references on television?*

No.

b) *If so, please outline your proposals, which should comply with relevant legislation (including 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.*

N/A