

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title: Broadcasting Code Review

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Name John C Beyer

Signed (if hard copy) John Beyer

Broadcasting Code Review

mediawatch-uk welcomes the opportunity to respond to the current consultation reviewing some aspects of Ofcom's Broadcasting Code.

mediawatch-uk believes it is absolutely essential that Ofcom makes it known, either in the Broadcasting Code or on its website or on in the monthly analysis of complaints received, the criteria it uses to assess complaints and its application of "generally accepted standards" and "offensive and harmful material" as set out in the Clause 319 of the Communications Act 2003. This would certainly be in the public interest and would assist everyone in understanding and judging Ofcom's effectiveness in content regulation.

It is evident from this consultation that in the four years since the Code was devised and introduced some clarification of existing rules has become necessary but we are disappointed with the limited scope of these clarifications. We set out below where we believe revision is also necessary.

Standards now worse

The Code, as it is currently drafted, reflects the "*light touch*" approach to regulation advocated some years ago by the then Secretary of State for Culture, Media and Sport, the Rt Hon Chris Smith MP. In practice this "*light touch*" approach has done nothing to improve overall standards of broadcast content. Indeed, mediawatch-uk would argue that in some respects standards are now very much worse because of the ill-defined Code and the way broadcasters have been able to interpret it in their own interests. Far too much emphasis has been placed on 'freedom of expression' with little or no emphasis on the corresponding responsibilities that should flow from these freedoms.

We sympathise with Ofcom whose endeavours to enforce their Code have been made more difficult by broadcasters who have little or no regard for it. In particular we criticise the pornography industry for constantly seeking to undermine the Code and to thwart efforts to effectively regulate them. We certainly welcome and applaud the sanctions that have been made by Ofcom against pornography channels for breaches of the Code and we hope that by clarifying it with regard to 'R18' and 'R18-standard' material these attempts will cease, proving that the Code is indeed "*fit for purpose*" in this respect. (1.5) We repeat here our belief that the Obscene Publications Act 1959 has proved to be unworkable in today's environment and is also in need of clarification and strengthening.

Business Practice

However, in our experience it is not just the pornography channels that seem to us to have little regard for the Broadcasting Code. In reply to a complaint from a member of the public about the content of *Sexcetera*, shown by Virgin Media in April 2009, the Customer Complaints department at Virgin Media acknowledged that the complainant had a point about the "*continuous unravelling of moral fibre these programs appear to promote*" but went on to say that the "*world today is becoming a far more permissive place*". Virgin Media acknowledged that they have to "*adhere to strict guidelines, set down by regulatory bodies*" but said in order to "*stay competitive in such a volatile market, (it) has become a necessary business practice*" to show such material. mediawatch-uk can verify that some of the content in the *Sexcetera* programmes is, to say the least, grossly indecent and certainly offensive. The attitude of Virgin Media in placing its "*business practice*" above any other consideration is astounding.

Protecting citizens

mediawatch-uk welcomes the Ministerial Statement, made on 11 March 2009 by the Rt Hon Andy Burnham MP, maintaining the prohibition on product placement advertising. We agree entirely with the underlying rationale for this prohibition and we are glad that the Audio Visual Media Services (AVMS) directive allowed member states this option. We note the reference to Article 10 of the European Convention on Human Rights but we are disappointed that yet again the provisions of Article 22 of the AVMS directive are not given due prominence. These, too, further the interests of citizens and consumers and should at least be acknowledged as should broadcaster's responsibilities which again are absent. (1.16)

Protection of minors in television broadcasting

Article 22

1. Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include any programmes which might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence.
2. The measures provided for in paragraph 1 shall also extend to other programmes which are likely to impair the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts.
3. Furthermore, when such programmes are broadcast in unencoded form Member States shall ensure that they are preceded by an acoustic warning or are identified by the presence of a visual symbol throughout their duration.

It is not entirely clear from the foregoing how *"protection for citizens and consumers and a consistent and a robust regulatory framework for broadcasters"* is compatible with *"freedom of expression"*. What is the purpose of a *"robust regulatory framework"* if *"freedom of expression"* is the priority? (2.6) It would be helpful if *"unnecessary or unnecessarily restrictive"* rules could be indicated and exactly when these become *"burdens"*. (2.6) Are we to assume that if a broadcaster finds it inconvenient or against *"business practice"* to bear these *"burdens"* Ofcom will regard them as *"unnecessarily restrictive"* and relax them according to broadcasters' demands?

mediawatch-uk seeks to *"educate and inform the audience"* about regulation and as a *"not-for-profit"* entity we hereby apply for funding so as to avail ourselves of the opportunities indicated in clause (2.10)

Clarification and explanation

If the purpose of this consultation is to clarify the Code, phrases like *"the degree of harm or offence"* (2.14) really must be explained. And where is the evidence of *"the likely expectation of the audience"*? In an important Code such as this, such ambiguous phrases can mean what anyone wants them to mean! It is a great pity that clarification is not also being made with regard to the rights of audiences.

It is not enough to guarantee *"freedom of expression"* for broadcasters, and their so-called *"right to offend"*, which contradicts the intention of the Communications

Act 2003 on “offensive and harmful material” without also guaranteeing the rights of audiences. (2.15) Whilst we recognise that these rights are “at times competing” surely the first priority for a regulator is to safeguard the rights of audiences? (2.16)

It is difficult not to conclude that the purpose of clarifying the Code with regard to sexual material is to make it more difficult to breach the Code and more difficult to sanction those channels that transmit sexual material so that they avoid being fined. This suspicion is supported by the assertion: “*We are not proposing to change the regulatory effect*” which currently permits sexual material so long as it meets scheduling and other criteria. (2.20)

This will surely be a disappointment to many people who have hopes that regulation of broadcasting will be more robust in dealing with “*offensive and harmful material*”. It is not enough to suggest that “*strong sexual material must be strongly justified*” without defining what “*strong*” actually means and who is to determine its meaning according to what criteria. Equally, “*Pre Watershed sexual material must be appropriately limited*” really must be defined. (2.24)

We welcome the intention to “provide stakeholders with a clear model to follow” but in order for this intention to be fulfilled proper definition is essential. We also welcome the intention to “benefit viewers by reducing the risk of material being broadcast that is in breach of the Code” but since the Code does not define what breaches the Code it is difficult to envisage how “risk” is to be reduced or, more properly, removed. (2.25)

Offensive language rules

With regard to “*rules relating to offensive language*” it is evident that the existing rules simply do not work. It is not enough to say that “*the most offensive language must not be broadcast before the watershed*” if there is no definition of “*the most offensive language*”. Ofcom’s own research published in the Communications Market reports has established that the majority of people believe there is too much swearing on TV.

In 2008 and 2009 a number of polls on this subject were conducted by, among others, *The Radio Times* (24-30 May 2008), *The Sunday Telegraph* 26/10/2008 and 9/11/2008), *The Sunday Times* (16/11/2008), *Channel 5* (28/11/2008), BBC1 TV Panorama: ‘*Have I Got Bad Language For You?*’ transmitted in February 2009 and a **ComRes** poll commissioned by mediawatch-uk published in May 2009. All found that the majority said there is too much swearing on TV.

The present Code does not reflect this public concern and is so poorly defined that few people have any confidence that this part of the Code is of any real significance.

Only when there was mounting public and Parliamentary dismay about obscene language could Ofcom bring itself to actually uphold complaints about a record number of obscenities used by Gordon Ramsay in *British Kitchen Nightmares* shown in January 2009. Although welcome, this finding is in stark contrast to Ofcom’s previous findings, such as, one published in April 2008, concerning similar obscene language used in the *Catherine Tate Christmas special*. Curiously, Ofcom ruled that the language in this programme “*did not go beyond the expectations of its usual audience*”. **It is no wonder that there is confusion and little public confidence in Ofcom’s application of the Code given these inconsistencies.** To suggest that there is an effective mechanism “*to ensure offensive language complies with the Code*” attaches a meaning to the Code that it

simply does not bear. It is astonishing therefore, that Ofcom does not now propose revisions to clarify and strengthen these rules given the high level of public unease! (2.55)

We note that Channel 4 recently transmitted another programme, *Jimmy Carr In Concert*, 22/8/2009 at 10.00pm, in which Mr Carr used the F- word 36 times and the C-word 4 times in the first hour of the show. Apart from the fact that the show is available to children via 4 On Demand, it would suggest that Channel 4 has little regard for the findings of the regulator.

In order to improve the situation there is no alternative but to add a schedule of “*the most offensive language*”. A good starting point is the research conducted by the Broadcasting Standards Commission entitled ‘*A Matter of Manners? The Limits of Broadcasting Language*’ a Monograph published in 1991.

We entirely agree with the proposition that “*Broadcast standards are maintained by means of codes*” (3.4) however, it is not enough to “*maintain*” standards. The evidence of complaints, not just to Ofcom, surely points to a need to improve standards. Plainly the Code as presently constructed is failing in this respect much to the dismay of the many people who continue to complain to Ofcom in vain. In our experience people have no confidence in Ofcom and believe that complaining about offensive and harmful material is a waste of time and effort.

Sexual material

The rules on Sexual Material certainly need clarification especially with regard to defining the word “*strong*” both in terms of the material itself and in the “*contextual justification*”. It would be helpful if there was some indication as to who is to decide this and according to what criteria. Although we believe it sensible to group “*existing rules relating to material of a sexual nature*” together this should not in any way be construed as a relaxation of those rules.

We acknowledge and applaud the continuing prohibition of ‘R18’ classified material, conforming to the criminal law, but it is not clear from the proposals how ‘R18-standard’ material is to be determined or by whom. This also presupposes that Ofcom will preview “*strong sexual material*” to determine that it is or is not ‘R18-standard’. It is difficult to see how this can be achieved since Ofcom has no powers to preview programmes - a power which incidentally, mediawatch-uk said should be restored. (4.12) (*A Fair Deal for Stakeholders*, published January 2001)

Since Ofcom’s role is also to represent the public interest we wonder why it is only broadcasters who have “*factors*” to consider. Surely the viewing public ought to have a way of having their interests served too. (4.15)

With regard to rules on sexual material, mediawatch-uk has serious doubts about the effectiveness of “*measures*” to ensure that the subscriber is an adult. (4.21) In some cases all that is required is a tick in a box to say that the person seeking access is over 18 years of age.

Age verification for access to “*adult*” Video on Demand programming is an issue that has still to be properly resolved. It is an obvious shortcoming that these clarifications to the Code do not even recognise this as a problem let alone propose any solutions to it.

We further wish to ask who is to determine whether the amount of sexual material is excessive, too explicit, too prolonged or too prominent. And who is to determine whether its purpose is or is not *“sexual arousal or stimulation”*. Who is to decide whether there is a *“serious educational purpose”* and according to what criteria?

We note that the British Board of Film Classification (BBFC) used precisely this phrase in its *“extended classification information”* justifying the general release of the film *Antichrist* on 24/7/2009. According to the Board this film included *“strong real sex, bloody violence and self mutilation”* and *“two scenes showing violence towards genitals or genital mutilation”*. It is a very alarming prospect that once the TV rights for this film are bought, Ofcom will be unable to stop the showing of it and will, no doubt, adopt the BBFC’s stance that they will *“not normally override the wish that adults should be free to choose their own entertainment, within the law”*.

The use of common language by two very different ‘regulators’ with two very different constitutions and purposes is a matter of great concern and is another area where clarification by Ofcom has become very urgent indeed.

Since Ofcom has special responsibilities to protect under-18s from *“offensive and harmful material”*, who is to determine whether the imagery being presented is *“offensive or harmful”* or has a *“serious educational purpose”*? We would suggest that there is only one sure way of effectively protecting the under-18s and that is not permit ‘adult sex’ material on television at all. (4.30) It is no justification to argue that such material is shown at the Cinema and is easily accessible on the Internet and should, therefore, be permitted on TV!

We would also observe that if the Obscene Publications Act 1959 were to have fulfilled Parliament’s intention to *“strengthen the law”* much of the material in this category would be illegal and the numerous regulatory and other problems associated with it would not arise. It is not enough to hope that *“potential harm and/or offence for all viewers would be lessened”*. It is simply astonishing, given that Video on Demand facilities have become so well established, that Ofcom continues to rely on ‘the Watershed’ as a primary means of protecting people from *“images and/or language of a strong sexual nature”*.

Video-on-Demand

The practice of viewing ‘what you want when you want’ means that regulatory methods from an age that is long past are hardly appropriate in today’s broadcasting environment (4.32) where there are not only DVD recorders but personal video recorders, capable of recording hundreds of hours of TV programming, and Video-on-Demand services soon to be accessible on the latest generation of mobile telephones.

We are aware that the Government, in a ministerial statement, published in March 2009, said: *“Ofcom will be given powers to regulate UK Video-on-Demand services so that Ofcom can then designate, and delegate powers to, an industry-led co-regulatory body to regulate programme content in these services.”* This is a matter requiring urgent attention.

We agree with the proposal (4.43) to add a new rule to prohibit *“material equivalent to the British Board of Film Classification R18-rating”*. However, it must be borne in mind that the BBFC, in recent years, has classified at ‘18’ material, such as in the film ‘9 Songs’ and ‘Antichrist’ that, according to its own guidelines, really ought to have been classified ‘R18’. This means that Ofcom should not rely entirely on the BBFC decisions when determining if *“strong sexual material”* is appropriate for showing on any television channel. We believe

that a schedule of “*strong sexual material*” to be excluded from showing on television would remove doubt and uncertainty. (4.46)

Finally, mediawatch-uk would like to comment upon and urge clarification of a number of other parts of the Code, as the consultation invites:

Violence on TV

Ofcom’s own research, carried out over a number of years and published in the Communications Market reports, has found that the majority of people believe there is too much violence on TV. It is evident that the existing Code is failing to constrain unnecessary violence despite requiring that “*programmes must not include material, which, taking into account the context, condones or glamorises violent, dangerous or seriously antisocial behaviour...*” (2.4)

We believe the interpretation of this Rule is far too narrow and focuses solely on incitement. It is also based upon the false assumption that viewing violence and anti-social behaviour has no influence. This section of the Code should be reviewed urgently and the above assumption reversed. We also believe it is essential, in order to promote public understanding, that “antisocial behaviour” ought to be defined in the Code. A good starting point would be the Home Office paper ‘Defining and measuring antisocial behaviour’ (Development and Practice Report No 26) (Crime and Disorder Act 1998)

We note that portrayals of smoking tobacco are now being actively discouraged by not being presented in programmes. The clear assumption is that portraying smoking encourages viewers to take up the practice. Accordingly, we believe that antisocial behaviour, as portrayed on television, should also be discouraged in the same way. The Code should, therefore, clearly define what constitutes antisocial behaviour for the purposes of the Code.

A member of mediawatch-uk contacted Ofcom about an episode of *The Doctors*, An Englishman’s Home, shown on 8 July 2009 at 1.45pm. In this episode Dr Lily Hassan is called to the home of a wealthy local businessman whose housekeeper found a severed hand in the garden. Prior to this a man had been shown about to strike with a meat cleaver. Ofcom did not consider such a brutal incident to be in breach of the Code arguing that “*relationships and exaggerated situations are central to the storylines*” of all soaps. Optimistically, Ofcom said that “*children tend not to be drawn to this type of series whose characters and lives have little relevance to them.*” Curiously, this episode was not available on the BBC iPlayer.

Due care?

We also believe that the Section concerning involvement of people under eighteen in programmes (1.26 and 1.27) should be reviewed in the light of programmes such as *Boys and Girls Alone* and *The Sex Education Show v Pornography*. The Code requires “*due care*” to be taken over “*the emotional welfare and the dignity of people under eighteen who take part*”. In both these series some of the young people were clearly emotionally disturbed by the experience and yet protests from numerous eminent child welfare experts about the former series were certainly not given due weight.

Ofcom’s response to complaints about *The Sex Education Show v Pornography* series, which left little to the imagination, were broadly defended because they were presented in a “*detached, educational manner*”. In explaining the significance of “*due*” in “*due care*”

Ofcom said the “*level of care must be appropriate to the particular circumstances*” and “*it is for the broadcaster to judge what is appropriate in each case to ensure compliance with the Code.*”

mediawatch-uk believes that this part of the Code should be reviewed so that the opinions of properly qualified and independent experts, other than those engaged by broadcasters, should be taken into account and at an early stage in commissioning rather than after such programmes have been aired. A substantial number of children perform in TV programmes and advertising productions and so clarification on this matter is an urgent priority.

Due impartiality?

Finally, we wish to express concern that the interpretation of the existing Broadcasting Code’s “*due impartiality*” section (5.1) is too narrow and seems to focus only on “*matters of political or industrial controversy*”. There are many other issues that fall within “*matters relating to current public policy*”, which are moral and ethical and should be treated impartially. It should not be the function of broadcasters, charged with being impartial, to give publicity to one view of moral and ethical issues, such as, assisted suicide which has been in the news recently.

In recent months there have been a number of programmes that have presented a one sided approach to these so-called “end of life” issues. We note that the scenes of terminally ill Craig Ewart taking his own life in front of TV cameras, shown in *Right to Die?*, Sky TV 10/12/2008, were heralded by supporters of Euthanasia as “*the first step in the demise of one of the most controversial statutes in criminal law*” (*Sunday Express*, 19/7/2009). To deny that this programme was not intended to change public attitudes on this issue at a time when it was being debated in Parliament is naïve, to say the least!

Additionally, in 2008 the BBC screened a very moving and brilliantly acted drama starring Dame Julie Walters entitled *A Short Stay in Switzerland*. It was the story of a woman who became terminally ill and went to the Dignitas clinic in Switzerland to end her life. The BBC’s Annual Report 2009 singles out this drama for praise. Writing in the *Daily Mail* 27/7/2009 Melanie Phillips observed: “*People’s deepest fears are being manipulated to make a change in the law to permit assisted suicide appear virtually inevitable.*” It is not surprising, therefore, that an opinion poll conducted by Populus for *The Times*, 25/7/2009, found “*overwhelming public support for a change in the law to allow medically assisted suicide*”.

We do wonder how far these programmes, and all the publicity on this subject when other people have done this, can be said to affect public attitudes. The observation that “*people’s deepest fears are being manipulated*” seems to gain force especially when the case for palliative care to relieve pain and suffering is not being presented by broadcasters with equal force as is the case for assisted suicide.

“*Due impartiality*” really must apply to such matters, especially at times when there is intense lobbying and parliamentary debate, in the same way as the handling of political and industrial controversies so that the viewing public is not given the impression that there is only one solution open to anyone with a terminal condition. In the UK there is a well developed Hospice movement offering excellent palliative treatment and we can see no reason why a good and engaging drama or documentary cannot be made about people who need and, according to their conscience, would opt for this kind of care.

mediawatch-uk members say

The Code should definitely be strengthened. Everywhere I go these days, especially within the youth community, swearing has got much worse. Practically all use bad language with the use of very strong and offensive words. Our young need to be set a good example on the use of good language. What on earth will the next generation be like?

Mrs B Collar

My opinion is that OFCOM is clearly a dismal failure as a regulator, still less an effective one. However as we believe we know full well, OFCOM was intended to be ineffective, that was its major 'political' remit.

Mr R Chamberlain

In brief - it could be surprising - but it certainly is discouraging that if there is a Broadcasting Code it does not appear to be effective. Channel Four is at the forefront of misrepresentation in that they pose as being educational when in fact they are being outrageous. Their recent programme under the heading 'Sex Education' was a case in point. The woman presenting it was most unsuitable in that she regarded it sometimes as a joke and at other as something to be avoided if the result was a natural outcome i.e. the birth of a child. That cut-off hour simply does not work. The fact is that if it is not suitable before 9 then it is not suitable at all. Small wonder our young people have lessened respect for their elders if adult viewing means portrayal of what is fit for adults.

Mr K Dransfield

I'm appalled at the TV output at almost any time of the day. The 'soaps' are warping our children's minds and robbing them of innocence - I have direct experience of this with a 4 year old granddaughter who, we believe, is allowed to watch soaps using mispronounced sexual language to her 3 year old male cousin behind the settee! And just 3 days ago the prime-time 'Today' radio programme gave over prime air time to a supposed fun discussion of a new erotic publication! So much for the Charter!

Mrs & Mrs K Prendergast

No effective monitoring seems to be in place - or standards have been lowered so much that almost anything goes. I did complain some time ago about trailers of violence before the watershed - for films to be shown after the watershed. Nothing has yet changed e.g. in the *Robin Hood* trailer there are frightening bits for children and men yelling "I'm going to kill you!" is unsuitable. There are of course many others - *Ashes to Ashes* in another bad trailer than comes to mind. Once seen these images cannot be eradicated from the mind.

Mrs E Boyd

We are particularly concerned about the obsessive and unnecessary use of the 'f' word on programmes such as Gordon Ramsey and Jamie Oliver as well as expletives such as taking the name of the Lord in vain; gratuitous violence and explicit sexual scenes.

Mr & Mrs D Hearne