



# Statement on the fairness and privacy complaints handling guidelines consultation

Statement

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## Section 1

# Introduction

- 1.1 Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment in programmes and from unwarrantable infringement of privacy in both the making and broadcast of programmes.
- 1.2 Specifically, the Broadcasting Act 1996, as amended ("the 1996 Act"), gives Ofcom a duty to consider and adjudicate on complaints raised in relation to unjust or unfair treatment in programmes and in relation to the unwarranted infringement of privacy in, or in connection with the obtaining of material included in such programmes; and the Communications Act 2003 ("the Act") requires Ofcom to establish procedures for the consideration and adjudication of such complaints.
- 1.3 Subject to certain matters expressly required by statute, Ofcom must determine an appropriate structure and process for handling complaints. Ofcom considers it important that this includes ensuring that parties to a complaint are clear about what they will be expected to provide at each stage of the process and by when they will be expected to provide it.
- 1.4 Ofcom procedures have been determined in accordance with the regulatory principles to which it must have regard under the Act. According to these principles, Ofcom's regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed. Consequently, Ofcom has sought under the procedures to establish a process by which it considers and adjudicates on complaints in a manner which is evidence-based and transparent in both deliberation and outcome. In the interests of the parties, the process has been designed to be quick and effective as possible with procedures that are easy to use and understand.
- 1.5 The procedures take account of the requirements of the Television Without Frontiers Directive (89/552/EEC, as amended by EC Directive 97/36/EC) and the guidelines have also been drafted in the light of the Human Rights Act 1998 and the European Convention on Human Rights to ensure the procedures are in keeping with the rules of natural justice and applied in a way that best guarantees an appropriate level of freedom of expression.

## The Statement

- 1.6 This statement summarises the substantive responses to Ofcom's consultation on the "Proposed Guidelines for handling Fairness and Privacy complaints" and gives Ofcom's responses to the points that were raised and explains any changes that have been made. The final guidelines are titled "Outline Procedures for handling Fairness and Privacy complaints" and are referred to in this document as "the Outline Procedures".
- 1.7 Respondents have in some cases commented on every proposed paragraph of the guidelines and many have suggested changes to the wording. In some cases respondents had opposing views on what should be done reflecting the different perspectives involved.

- 1.8 This statement could not cover every point that has been raised by respondents to the consultation; instead it summarises the most significant issues and Ofcom's response to them.
- 1.9 However, it should be made clear that, in considering the final wording of the Outline Procedures, Ofcom has considered each and every response received in its full form.
- 1.10 Changes have been made to the Outline Procedures in the light of the responses and also in order to ensure clarity and, where relevant, consistency, as well as to ensure appropriate statutory requirements are met.
- 1.11 Below is a summary of the *substantial* changes.
- 1.12 **Appropriate Resolution.** In keeping with Ofcom's duty to intervene only where necessary, the consultation proposed a process of "Appropriate Resolution". This approach could see some complaints being resolved before a formal Ofcom investigation takes place. There are occasions when complainants may prefer quick and appropriate action taken by the broadcaster (e.g. a letter of apology, a promise to edit future programmes, an on-air correction) instead of Ofcom conducting an investigation.
- 1.13 The procedures allow for a complainant, who would be prepared to consider an offer of "Appropriate Resolution", to indicate this (on the complaint form). Ofcom would then allow the broadcaster, if the broadcaster felt it was appropriate, to propose an acceptable remedy (within a defined timescale). However, Ofcom recognises that there will be occasions when a broadcaster will not consider a proposal for a resolution to be appropriate. For example, the broadcaster may believe that there has not been any unfair treatment or that there was no infringement of privacy or they may consider that the infringement was warranted. After taking account of all respondents' feedback, we consider that the only practicable way that such a resolution process can work is if both parties agree to the resolution. This ensures that the process's voluntary nature is preserved.
- 1.14 **Reviews of Fairness Committee Decisions.** At present, when the Fairness Committee reaches its decision on a complaint between two parties that decision is final. Some respondents requested that the Fairness Committee decisions be open to appeal (as are those decision made by the Executive). This was an issue that was clearly important to a number of respondents and one that Ofcom considered extremely seriously.
- 1.15 However, to create another body, as was suggested by some respondents, that could review Fairness Committee decisions would not be consistent with Ofcom's constitution and governance since the Fairness Committee is a committee of Ofcom, with delegated powers from the Ofcom Board. As such it is the most senior decision-making body in terms of adjudicating on fairness and privacy complaints.
- 1.16 Ofcom's predecessor, the Broadcasting Standards Commission, obtained legal advice that stated that it could be unlawful for any *final* adjudication made by an authority such as Ofcom to be internally reviewed since, having finally decided the submitted issues, Ofcom's authority over those questions is ended at that point (it is *functus officio* at that point). Ofcom's statutory requirement with respect to fairness and privacy complaints is to adjudicate (it is a quasi-judicial process in which Ofcom acts as a decision maker between two opposing parties). In these circumstances, it is generally established that there is no right of review of a final adjudication unless expressly provided by statute (other than by way of judicial review by the courts).

- 1.17 It should also be noted that an internal review within Ofcom is not a process that is required by the Act. It was established, at the time the Act was passed, that since stakeholders could challenge Ofcom's decisions by means of Judicial Review this was sufficient, in terms of human rights compliance i.e. the right to a fair hearing. Parliament did not therefore legislate for an internal review process to be part of Ofcom's procedures.
- 1.18 Nevertheless, we recognise that the regulator's decisions in these areas can be crucially important in terms of the courts' interpretation of these matters, broadcasting policy and freedom of expression. As such, we acknowledge that it is essential that Ofcom's judgments are as sound as possible and made after thorough scrutiny. In addressing these issues we have noted the apparent inconsistency whereby the simpler cases are reviewable but the more complex cases are not.
- 1.19 Taking this into account, and given the legal parameters we must work within, we have revised our new Outline Procedures, to incorporate a two stage process for Fairness Committee decisions, involving a provisional decision and, if necessary, a re-consideration. A two stage process will only exist for those cases which go directly to the Fairness Committee and not those cases which the Fairness Committee are considering on review.
- 1.20 Therefore, the Outline Procedures now state that the Fairness Committee in the first instance will reach a **provisional** decision which may be reconsidered following final representations from the parties (this does not apply to cases referred to the Fairness Committee for review, since these decisions are final). If either party makes *material* representations (see final procedures for those issues which are considered to be material), which may change part or all of a decision, then the Fairness Committee will re-consider the relevant part of its provisional decision. The other party would always be offered an opportunity to comment on any final representations before the Fairness Committee makes its final adjudication. It should be noted that this extra stage will mean that the Fairness Committee adjudications will take longer to finalise in some cases.
- 1.21 **Deadlines.** The responses argued that the current deadlines are unrealistic and almost impossible to fulfil given the amount of work and research that is sometimes required (such as obtaining and viewing rushes; interviewing producers who have since gone on to work on new projects; etc). It has frequently been the case that broadcasters have not been able to respond within the current time limits.
- 1.22 Ofcom considers that it is pointless having deadlines which parties find almost impossible to adhere to. We consider it would be more appropriate to have realistic deadlines and aim to ensure that all parties comply with them. This would also help stop parties from having unrealistic expectations of our procedures. It is therefore proposed that first round statements should be lodged with Ofcom within 20 working days (as opposed to 10) and second round statements within 10 working days (as opposed to 5).
- 1.23 **Authorisation.** Authorisation is an essential element of the complaint process where someone is complaining on behalf of the complainant. We are revising the complaint form to ensure that those who complain on behalf of "the person affected" obtain the necessary authorisation. Complaints cannot be entertained without the appropriate authority.
- 1.24 Below is a summary of other less significant, but important, changes to the procedures from the current guidelines:

- The procedures now include definitions in grey boxes (e.g. “affected person”).
- The number of days in which a complaint should be lodged with Ofcom has been reduced (since using the current deadlines set by statute for recording retention as the deadline for lodging a complaint may not guarantee that relevant recordings are available).
- The procedures now require that, when a complainant contacts the broadcaster in the first instance, broadcasters should keep recordings for longer.
- The complaint form will now be forwarded to broadcaster immediately – therefore putting the onus on broadcaster to retain relevant information and complainant to frame his/her complaint correctly.
- The procedures formalise the current practice of providing a copy of the Entertainment Decision to both parties.
- Greater guidance on Ofcom’s confidentiality requirement and compliance with our published procedures is included.
- The procedures now give emphasis on Ofcom giving adequate reasoning and explanations to our actions.
- Greater indication of when we might require a summary of an adjudication to be broadcast is included in the procedures.

#### What we consulted on:

- 1.25 On 1 November 2005, Ofcom published its new “Proposed Guidelines for handling Fairness and Privacy complaints” for public consultation. The current guidelines for the handling of fairness and privacy complaints were adopted in March 2004 on an interim basis, following a short consultation. This was on the understanding that Ofcom would return to the matter and conduct a full consultation at a later stage having had the benefit of experiencing how the procedures work in practice.
- 1.26 The proposed guidelines were broken into 24 separate paragraphs for ease of reference.
- 1.27 In addition Ofcom asked 10 specific questions. These questions related to those areas of the proposed guidelines that Ofcom felt required additional consideration.
- 1.28 For full details on the consultation process please see:  
<http://www.ofcom.org.uk/consult/condocs/fandp>

#### Who responded:

- 1.29 Ofcom received 16 responses in total.
- 1.30 We received substantive responses from The BBC, Channel 4 and Five (Channel 4 and Five provided a joint response), Chrysalis, CMS Cameron McKenna, ITN, ITV plc, MediaWise, S4C, Scottish Media Group (SMG), UKRD and UKTV.
- 1.31 In addition to these responses Ofcom received responses from three individuals. Ofcom received written letters from Mr John Ritchings and another member of the

public, both of who have made a Fairness and Privacy complaint to Ofcom within the last three years. Ofcom received a response from media lawyer, Jennifer Epworth who submitted her published article entitled “Protecting your private life: The future of Ofcom Privacy complaints”.

- 1.32 Three respondents requested that their response to the consultation remain confidential, or did not send a cover sheet giving Ofcom permission to publish private information although one was sent to them. For this reason, these responses have not been referred to in this statement. However, their comments have been taken into account.

### Guide to reading this statement

- 1.33 For ease of reading, this statement is divided into paragraph sections (24 paragraphs), each of which is set out as follows:
- i) The paragraph proposed in draft guidelines in the consultation. This appears in bold underneath a red heading.
  - ii) If Ofcom also asked a direct question in relation to the subject matter of a proposed paragraph, this question is shown directly below the proposed paragraph.
  - iii) Following this is a summary of the responses we received. If there were a number of issues raised by respondents, each new issue has an underlined heading.
  - iv) Finally, below the summary of responses, is Ofcom’s response which includes our reasons for making changes to the proposed paragraph. Ofcom’s response will be clearly titled with a bold black heading.

### Example paragraph

- 1.34 The following text shows how each paragraph will be formatted:

## **Proposed Guidelines as consulted upon Paragraph 3.3**

**Due to their complexity, Ofcom will normally only consider fairness and privacy complaints that are in writing and on the appropriate form. The details of the complainant and complaint (including time; channel; programme; nature of the complaint etc) will be needed. Each complaint will be logged and the complainant will be given a reference number.**

*Question1: Should complaints always be in writing and on a standard form?  
(Provision will be made for anyone who is unable to submit their complaint in this format)*



## **Responses to consultation**

### **Complaints in writing**

The BBC, Channel 4 and Five, Chrysalis, CMS Cameron McKenna, ITN, ITV, S4C, SMG, UKRD, UKTV all believed complaints should *a/ways* be received in writing subject to provisions being made for anyone unable to submit their complaint in writing.

### **Ofcom's response**

We consider that complaints should always be in writing, subject to making provision for those who are unable to submit the complaint in this format. Having the complaint set out in writing assists in ensuring that all those involved understand what the complainant's concerns are about the programme.

## Section 2

# Responses to Draft Proposed Guidelines

## Making Complaints

### Proposed Guidelines as consulted upon Paragraph 3.2

This document outlines the procedures that Ofcom will normally follow when handling fairness and privacy complaints about programmes (“programme” includes an advertisement, teletext and any item included in television and radio services). Separate guidelines exist for the handling of standards complaints. These guidelines have been prepared in the light of the Human Rights Act 1998 and the European Convention on Human Rights (which refers to the right to a fair trial) and are effective from [date to be confirmed following completion of consultation]. The Communications Act 2003 requires Ofcom to consider, and where appropriate adjudicate, on fairness complaints.

### Responses to consultation

No publishable responses received

### Ofcom’s response

We received no publishable response in relation to this proposed guideline; however we have made changes to the wording for the sake of clarity.

### Proposed Guidelines as consulted upon Paragraph 3.3

Due to their complexity, Ofcom will normally only consider fairness and privacy complaints that are in writing and on the appropriate form. The details of the complainant and complaint (including time; channel; programme; nature of the complaint etc) will be needed. Each complaint will be logged and the complainant will be given a reference number.

#### *Question 1*

*Should complaints always be in writing and on a standard form? (Provision will be made for anyone who is unable to submit their complaint in this format)*

#### *Question 2*

*Should Ofcom be able to seek to clarify the terms of a complaint where it is unclear?*

### Responses to consultation

#### Complaints in writing

The BBC, Channel 4 and Five, Chrysalis, CMS Cameron McKenna, ITN, ITV, S4C, SMG, UKRD, UKTV all believed complaints should *always* be received in writing subject to provisions being made for anyone unable to submit their complaint in writing.

CMS Cameron McKenna and MediaWise believed complaints should *normally* be in writing.

### On a standard form

The BBC, Channel 4 and Five, Chrysalis Radio, ITV, ITV, S4C, UKRD and SMG believed the complaint should be made on a standard form. The reasons given for this were that the form provided structure, clarity and ensured the complainant provided all the necessary information (such as time and date of broadcast).

CMS Cameron McKenna wished to amend the draft guidelines to require a complaint to submit their basic information on the standard form but allow them to set their complaint out either in writing, or on the standard form.

### Clarification of complaint

All respondents who addressed this issue believed Ofcom should be able to seek to clarify the terms of the complaint.

The BBC, Channel 4 and Five and ITV noted that such clarifications should not seek to expand a complaint to cover areas not raised in the complaint. The BBC and ITV wanted, in the interest of transparency, the notes from such correspondence between Ofcom and the complainant to be provided to the broadcaster.

Chrysalis and CMS Cameron McKenna both noted that Ofcom should not only offer to seek to clarify the complaint where required but also provide the complainant with assistance and explanation where necessary. CMS Cameron McKenna believed a complaint should not be refused consideration just because the complainant was unable to express themselves sufficiently clearly.

SMG asked that broadcasters be permitted to seek clarification where the complaint is unclear. And that any such clarifications from both parties should not be considered part of the formal rounds.

### Other

MediaWise referred to the possible introduction of a 'hearing' or 'good offices' meeting between complainants and broadcasters. MediaWise believed this would be a more suitable method of resolving some complaints. MediaWise also enquired whether or not there was any need for the wording "Due to their complexity" in paragraph 3.3.

## **Ofcom's response**

### In writing

We agree that complaints should always be in writing, subject to making provision for those who are unable to submit the complaint in this format. Having the complaint set out in writing assists in ensuring that all those involved understand what the complainant's concerns about the programme are.

### On a standard form

We consider that all complaints should be submitted on our standard form. This helps to ensure that all details required by Ofcom are provided, for example the necessary details to identify the relevant programme, reasons for any delay in submitting the complaint or whether there are any legal proceedings that might affect our consideration of the complaint.

However, the details of the actual complaint itself may be set out on a separate sheet. We will aim to ensure that the matters complained of are as clear as possible. We are therefore revising the current complaint form.

### Clarification of complaint

We agree that there are occasions when it may be necessary for Ofcom to seek to clarify complaints. In doing this, our aim will be to clarify precisely what the complainant's concerns are and, for example, to clarify whether the issues raised relate to unfairness or to infringement of privacy. However, Ofcom would not seek to expand or alter complaints to cover areas not raised by the complainant. In line with current practice, and in the interest of transparency all relevant notes from conversations concerning clarification of a complaint will be given to the broadcaster concerned.

Ofcom will provide clarification, explanation and assistance to both parties where necessary to ensure that the process is fully understood and efficient. It should be noted that Ofcom will act throughout as a neutral arbiter as it is required to do by statute.

### Other

We have retained the phrase “due to their complexity”, as we consider it is important that all potential parties/stakeholders can understand the distinction between fairness and privacy complaints and other matters dealt with by Ofcom, some of which can be dealt with over the telephone.

Ofcom appreciates the importance of resolving complaints before they become investigations and this is dealt with by way of “appropriate resolution” (see 3.12 below).

## **Proposed Guidelines as consulted upon Paragraph 3.4**

**Normally, the complaint should be made by “the person affected” by the programme (see text box below). For the purposes of these guidelines “a person” means an individual, association or corporate body. However, another person can make the complaint on behalf of the person affected, provided he/she is authorised to do so. In exceptional circumstances, a member of the family of the person affected or someone closely connected to that person may make a complaint on their behalf if the person affected is unable to do so, for example, because they are under the age of 16.**

### **The Person Affected**

**“The person affected” is a person who:**

**a) was a participant in the programme and may have been the subject of unfair treatment; or**

**b) whether a participant or not, had a sufficiently direct interest in the subject-matter of that treatment; and/or,**

**c) was a person whose privacy may have been unwarrantably infringed in a programme or in the making of a programme.**

## Responses to consultation

### Preamble/ definition

Media wise suggested it would be useful if Ofcom specified that it would not consider complaints from third parties (members of the public not directly involved in a programme). However, MediaWise noted it may be useful to monitor such complaints.

UKRD raised concerns that the complaint procedure was restricted to the “person affected”. UKRD believed there may be situations or circumstances where an invasion of privacy has wider implications for the general public at large. UKRD wanted the guidelines to be changed to allow a member of the public to complain if they believe a third party’s privacy has been invaded or if something appears unfair or unjust, even if the person themselves declines or has failed to complain. UKRD maintained that this approach could be more appropriate in some cases than referring the complaint to the Standards committee.

The BBC and Channel 4 and Five wanted the definition of “the person affected” to reflect/ mirror the wording of Section 111 of the Broadcasting Act (as amended):

The BBC requested the following wording:

*“The person affected” is a person:  
who was a participant in the programme and who must have been the subject of the unfair treatment complained of; or  
whether a participant or not, who had a sufficiently direct interest in the subject matter of the unfair treatment to justify the making of a complaint with him or her as the person affected;  
and/or  
whose privacy may have been unwarrantably infringed in the broadcasting of, and/or in connection with the obtaining of material included in the transmitted programme.*

Channel 4 and Five requested the following wording:

*“The person affected” is an individual or a body of persons (whether incorporated or not) who:  
was himself the subject of the unjust or unfair treatment complained of; or  
had a sufficiently direct interest in the subject-matter of the unjust or unfair treatment complained of to justify the making of a complaint with him as the person affected; and/or  
was a person whose privacy may have been unwarrantably infringed in or in the making of a programme.*

Channel 4 and Five suggested that in the event that a complaint is made by an individual authorised by the affected person, then appropriate authorisation should be obtained before any complaint is made.

### Other

The BBC requested clarification about:

a) the circumstances in which a person’s privacy could be infringed posthumously. In particular whether Ofcom would only consider complaints regarding infringement in the making of a programme during the deceased’s lifetime or infringement by actions after death; and

b) the circumstances and nature of the authorisation Ofcom would accept for another person to make a fairness or privacy complaint on behalf of “the person affected”.

Channel 4 and Five suggested that complainants should be required to obtain the necessary authorisation before making a complaint.

## **Ofcom's response**

### Preamble/ definition

We have not made the changes suggested to the definition of “the person affected”, because we believe that the summary in the Outline Procedures is consistent with the 1996 Act. We have made minor changes to clarify the definition. We believe that this definition of “person affected” makes it sufficiently clear that Ofcom cannot consider third party complaints. As this is a statutory definition, it is not open to Ofcom to extend it in the way UKRD suggests.

### Other

Authorisation is an essential element of the complaint process where someone is complaining on behalf of the complainant. We are revising the complaint form to ensure that those who complain on behalf of “the person affected” understand the need to obtain the necessary authorisation. Complaints cannot be entertained without the appropriate authority.

### Posthumously

The legislation permits complaints to be made on behalf of the deceased (where the deceased satisfies the statutory definition of “the person affected”). Ofcom retains discretion to refuse to entertain such a complaint where the programme was broadcast more than 5 years after the death of “the person affected”.

In response to the BBC's request for clarification, Ofcom would consider complaints regarding an infringement of privacy which was alleged to have occurred in the making of a programme during the deceased's lifetime. Ofcom would also consider complaints regarding the infringement of privacy for actions which occurred after the death of the “person affected”.

However such decisions would be taken on a case by case basis, and will be subject to legal advice. Therefore we do not consider that it is appropriate to deal with this matter in the guidelines.

## **Proposed Guidelines as consulted upon Paragraph 3.5**

**Ofcom will normally only consider fairness and privacy complaints that are made within a reasonable time. There are restrictions on the period for which broadcasters have to retain recordings of their output. Recordings of radio programmes have to be kept for 42 calendar days after the relevant broadcast, and recordings of television programmes for 90 days except satellite and cable programmes which have to be kept for 60 days. Ofcom will normally only consider complaints up to these time limits. It is therefore advised that complaints should be submitted as soon as possible after the most recent broadcast of the programme, and no later than a week before the relevant time limit.**

## Responses to consultation

The BBC and Channel 4 and Five noted that the time limits provided in the current guidelines for making a complaint are the same as the broadcaster's tape retention periods. Both suggested that the guidelines' time limits be shortened by 5 working days to enable Ofcom to request tapes before they could theoretically be deleted.

The BBC also suggested referring to time limits in a common way, e.g. complete weeks or working days.

CMS Cameron McKenna noted that if a complaint first seeks to approach the broadcaster to address their complaint, this could effectively hinder their ability to then make a complaint to Ofcom within the time limits set out in the current guidelines. CMS Cameron McKenna suggested that: "Ofcom might deal with complaints received up to 60 days after the end of the complainant's effective correspondence with the broadcaster. If a broadcaster receives correspondence from a complainant promptly after broadcast, it must then be on notice that it should retain its tapes and rushes of interviews, as a complaint to Ofcom by the complainant will then be in prospect."

## Ofcom's response

We agree that having the same time limit for submission of complaints as the retention period for recordings led to a risk of complaints being received just within the time limit, but too late to obtain the recording. In view of this, we have amended the Outline Procedures so as to require complaints to be submitted prior to the end of the statutory retention period.

We also believe that it would be useful to refer to time limits in a consistent way. We have chosen to use working days wherever possible – however there are some cases where this is not possible e.g. the Act provides that recordings should be kept in calendar days. Therefore when timelines are referred to in the Outline Procedures, we make clear whether they are working days or calendar days.

Ofcom has, as provided for by the 1996 Act, retained its discretion to entertain a complaint outside these time limits where there are good grounds for doing so.

We recognise CMS McKenna's point that if a complainant approaches a broadcaster in the first instance, without Ofcom's involvement, then the onus is on the broadcaster to retain the relevant recordings for an appropriate period. This point has now been reflected in the Outline Procedures.

## Complaint assessment

### Proposed Guidelines as consulted upon Paragraph 3.6

**The first step Ofcom takes upon receipt of a complaint is to forward details of the complaint to the broadcaster. Ofcom then decides whether or not to take the complaint forward for consideration. This decision is called the Entertainment Decision (see text box below) and is normally made by the Programme Executive who will be the complainant's main point of contact throughout the complaint process. Parties to the complaint will be provided with a copy of Ofcom's Entertainment Decision.**

*Question 3*

*Should Ofcom include a provision in its new guidelines to provide parties to a complaint with copies of Entertainment Decisions?*

## **Responses to consultation**

### **Informing the broadcaster of the complaint**

The BBC, Channel 4 and Five, ITN and ITV all requested that Ofcom advise the broadcaster about the nature of the complaint as soon as it is received. Channel 4 and Five, ITN and ITV would like to be informed of the complainant's identity. Channel 4 and Five suggested Ofcom edit the complaint form to advise the complainant of this process.

The BBC requested this occur within 5 days of receipt of the complaint by Ofcom.

### **Entertainment Decision**

All respondents who addressed this issue wanted a provision to provide parties to a complaint with copies of Entertainment Decisions. Respondents noted that the Entertainment Decision was useful to clarify the complaint, explain the reasons why a complaint was/ was not taken forward and necessary in the interest of transparency.

S4C wanted the Entertainment Decision to evolve into a more useful tool as it gave an opportunity for the Executive to sift out those elements of the complaint which fall outside of Ofcom's remit.

MediaWise believed the term, 'Entertainment Decision', was highly insensitive and inappropriate when dealing with broadcasting complaints. MediaWise requested that the Entertainment Decision be described as the 'Initial Compliance Decision'.

## **Ofcom's response**

### **Informing the broadcaster of the complaint**

Many of the broadcasters have requested that Ofcom pass on information concerning a complaint as soon as one is lodged. In our view, it would be helpful if broadcasters were aware of complaints at an early stage, for example to ensure that relevant material is retained, early resolution of complaints can be considered, and programmes are not re-broadcast without the broadcaster being aware there is a complaint. This would help not only the broadcasters, but also complainants. We have therefore decided that Ofcom will forward all complaint forms, with relevant supporting material, to broadcasters on receipt.

We endeavour to inform the complainant as soon as possible whether we are deciding to take the complaint forward, but cannot guarantee to do so within five working days. Some complaints raise complex legal issues concerning entertainment. Similarly, we will endeavour to inform the broadcaster as soon as possible about the existence of a Fairness and Privacy complaint, but cannot guarantee to do so within five working days. We believe that forwarding a complaint to the broadcaster before entertainment, as described above, will help broadcasters and complainants alike.

### **Entertainment Decision**

Ofcom currently provides each party to a complaint with a copy of its Entertainment Decision. This process will now be formalised in our Outline Procedures.



The Entertainment Decision sets out which elements of the complaint have been entertained and which have not, and the reasons why. We agree that this is a useful tool in identifying, for the benefit of all involved, precisely what elements of a complaint have been entertained (the “heads”) and what will not be considered by Ofcom. Ofcom’s adjudication will set out its findings based on those heads of the complaint that were entertained, as set out in the Entertainment Decision.

We have retained the use of the word “Entertainment”, as this is a statutory term. However we recognise MediaWise’s concern and that it would be helpful to explain more fully what the term means and we have therefore inserted a box into this section explaining what we mean by the Entertainment Decision.

### **Proposed Guidelines as consulted upon Paragraph 3.7**

**The legislation sets out a number of criteria that must be satisfied before a fairness and privacy complaint can be entertained by Ofcom. The criteria are detailed below:**

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

### **Responses to consultation**

No publishable responses

### **Ofcom’s response**

We received no publishable response in relation to this proposed guideline; however we have made changes to the wording for the sake of clarity.

### **Proposed Guidelines as consulted upon Paragraph 3.8**

**Not all complaints received will fall into Ofcom’s fairness and privacy remit. If the complaint falls outside that remit, then the complainant will be notified and provided with a copy of Ofcom’s Entertainment Decision which explains why the complaint will not be taken forward for consideration (please also see “Reviewing a decision” below). However, where the complaint raises other matters which are within Ofcom’s remit, the complaint will be passed to an appropriate member of the Executive to investigate (if it is a standards matter the *Guidelines for the Handling of Standards Complaints and Cases* will apply).**

### **Responses to consultation**

No publishable responses

## **Ofcom's response**

We received no publishable response in relation to this proposed guideline; however we have made changes to the wording for the sake of clarity.

### **Proposed Guidelines as consulted upon Paragraph 3.9**

**In appropriate circumstances (for example, more complex cases), the Executive may refer the complaint to the Fairness Committee for a decision whether or not to entertain the complaint. The Fairness Committee is Ofcom's most senior decision making body in respect of fairness and privacy complaints. (See text box following paragraph 14 for information on the Fairness Committee.)**

## **Responses to consultation**

Channel 4 and Five noted that there is not a review process for a Fairness Committee decision to entertain a complaint. They considered this was a flaw in the system. Also see 3.14 for related response by Channel 4 and Five.

## **Ofcom's response**

We have addressed Channel 4 and Five's concern in the Ofcom response to paragraph 3.14 below.

### **Entertained Complaints**

### **Proposed Guidelines as consulted upon Paragraph 3.10**

**It is essential to the integrity of the process and Ofcom's ability to adjudicate fairly that the parties concerned, both complainant and broadcaster, abide by our published rules and procedures. For example, parties to a complaint should treat all correspondence, documents and other material concerning the complaint as confidential, except material already in the public domain. Failure to abide by Ofcom's published rules and procedures by complainants may result in Ofcom terminating its consideration of the complaint. Failure by broadcasters may result in Ofcom taking appropriate regulatory action.**

## **Responses to consultation**

### **'confidential'**

The BBC, Channel 4 and Five, ITN and MediaWise sought clarification about 'confidential' as referred to in 3.10. ITN suggested that rather than say everything is confidential, it may be more appropriate that no reference is made as to whether documents are confidential or not.

The BBC understood 'confidential' in this context, was not intended to prevent parties from disclosing the fact that: a) a complaint had been made, b) providing an overview of the complaint, or c) using information which was obtained by either parties from elsewhere (though it may feature in either party's submission).

### ‘appropriate regulatory action’

The BBC, Channel 4 and Five and MediaWise asked for clarification of what is meant by Ofcom taking ‘appropriate regulatory action’. In addition Channel 4 and Five requested details of the statutory basis which would give Ofcom powers to apply regulatory action when a procedural (rather than a code) breach occurs.

### Other

MediaWise noted there may be times when the parties may feel obliged to offer a public statement about their position. In these cases, MediaWise suggested that Ofcom’s public affairs department could assist either party with the presentation of their position.

### **Ofcom’s response:**

### ‘confidential’

We note the representations on the issue of ‘confidentiality’ and have given greater clarification on this in the Outline Procedures.

### ‘appropriate regulatory action’

Ofcom recognises that failure to comply with our Outline Procedures would not result in a breach of our statutory code. However under the terms of their licence, or in the case of the BBC, the BBC Agreement, broadcasters are required to cooperate with Ofcom. This includes the requirement to provide information in such manner and at such times as Ofcom may require. If broadcasters fail to cooperate appropriately with Ofcom in the complaints handling process then Ofcom would be within its powers to act accordingly.

### Other

We do not consider that it would be appropriate for Ofcom, which is required by statute to act as neutral arbiter, to provide assistance in preparing a press statement for complainants as suggested by MediaWise. Ofcom will, however, provide clarification, explanation and assistance to both parties where necessary and appropriate to ensure that the process is fully understood and efficient.

## **Proposed Guidelines as consulted upon Paragraph 3.11**

**If the complaint is ‘entertained’, the broadcaster will be sent a copy of the Entertainment Decision, the complaint and any supporting documentation which relates directly to the complaint.**

### **Responses to consultation**

Channel 4 and Five would like Ofcom to send the complaint and any supporting documentation to the broadcaster regardless of whether the complaint is entertained or not. Channel 4 and Five noted that this would be helpful if the broadcaster wished to remedy a concern as an act of good will.

## **Ofcom's response:**

As explained in the Ofcom response to paragraph 3.6 above, we will provide copies of all complaint forms and supporting material to the relevant broadcaster on receipt. Broadcasters will now, therefore, receive copies of complaints that are not entertained and will be able to take action to remedy the complainant's concerns, should they feel that it is appropriate and possible for them to do so.

## **Proposed Guidelines as consulted upon Paragraph 3.12 (a-e)**

### **3.12a)**

The broadcaster will be asked to provide, normally within ten working days, either a proposal for 'appropriate resolution' (see text box below) or a statement in response (where a fairness or privacy case is particularly detailed or complex and the broadcaster is to submit a statement in response, rather than propose redress, a longer period may be necessary).

### **3.12b)**

#### ***Appropriate resolution***

***At this stage, the complaint may be resolved without the need for adjudication by Ofcom. This is provided the complainant is willing to consider an immediate proposal for redress and the broadcaster considers that it is appropriate to propose a remedy or redress. Examples of such redress might include, but are not restricted to, the editing of a programme for future broadcasts or an undertaking not to repeat the programme, an apology or correction in writing and/or broadcast.***

If the redress that is proposed is accepted by the complainant then Ofcom will discontinue consideration of the complaint.

If redress that is proposed is not accepted by the complainant, but is nonetheless considered reasonable by Ofcom, then Ofcom will normally discontinue consideration of the complaint.

If redress is proposed that is neither accepted by the complainant nor considered reasonable by Ofcom then Ofcom will proceed with consideration of the complaint as set out in these guidelines. The broadcaster will be asked to provide a statement in response within ten working days.

### **3.12c,d,e)**

On receipt of the broadcaster's statement, Ofcom will copy it to the complainant. Ofcom will then consider whether a second round of statements and/or specific information is required. A week will normally be allowed for a response, though the complainant/broadcaster will be given longer if necessary. After this point, Ofcom will only allow further written submissions in circumstances which it judges to be exceptional. Subject to legal privilege, the complainant and the broadcaster will see

**all the documentation relied on by the parties in relation to the matters in issue and which the Executive or Fairness Committee will consider, or have sight of, as part of its adjudication.**

*Question 4 (3.12b) Should Ofcom incorporate a mechanism for appropriate resolution of complaints? How should this operate?*

*Question 5 (3.12c) Should Ofcom limit the written stages of the complaints consideration process to a maximum of two exchanges of written submissions (i.e. Two rounds) – unless there are exceptional circumstances?*

*Question 6 (3.12d) Should Ofcom consider late material whether in writing or at a hearing? Should Ofcom publish criteria for the admission of such material (and if so, what?) or should the decision be a matter for Ofcom's discretion?*

*Question 7(3.12e) In what circumstances should Ofcom hold hearings? Should Ofcom publish criteria for holding hearings or should the decision be a matter for Ofcom's discretion?*

## **Responses to consultation**

### **3.12a) Time limits**

The BBC, Channel 4 and Five, ITV, ITN and S4C all requested a longer time limit for the broadcaster's first response. The BBC, Channel 4 and Five and ITV requested 20 working days. ITN requested 21 days as a minimum but 28 days as an ideal.

The BBC and UKTV questioned the 10 working day limit for appropriate resolution. The BBC requested that 20 working days be the limit for broadcaster to make an offer of appropriate resolution. The BBC requested that second round responses for appropriate resolution be lengthened to ten working days.

ITN and S4C believed the second round time limit was too short. ITN requested that second round responses be lengthened to 10 days.

BBC noted that even then a longer period may be necessary and Ofcom should be willing to extend these periods at the reasonable request of either party.

### **3.12b & Q4) Appropriate resolution**

All respondents who addressed this issue would like an option for appropriate resolution to be available.

CMS Cameron McKenna suggested the best mechanism for this process would be one similar to that employed by the Press Complaints Commission (PCC), where the PCC "brokers" resolutions of complaints between the press and complainants. CMS Cameron McKenna did not believe that broadcaster were likely in most cases to offer appropriate redress of their own accord. In addition, CMS Cameron McKenna requested that Ofcom should publish those fairness and privacy complaints that have been informally resolved.

Chrysalis Radio was in favour of Ofcom's proposed mechanism.

MediaWise did not object to a mechanism for appropriate resolution however requested further information about how it would work and were mindful that broadcasters should abide by confidentiality requirements.

The BBC enquired what would occur if the complainant wished to continue to pursue their complaint after declining a redress proposal for the broadcaster, which Ofcom considered reasonable. The BBC also sought clarification about the kind of circumstances in which Ofcom would continue consideration of a complaint where the complainant had unreasonably rejected the offer of redress.

Channel 4 and Five were concerned about the basis on which Ofcom will be able to consider whether a broadcaster's proposal for redress is reasonable. They did not want the merits of the case prejudged.

MediaWise suggested that if Ofcom decided not to proceed with a complaint because it considered the offer made by the broadcaster was reasonable, it should make clear to the complainant the reasons for the decisions. MediaWise requested that the outlined procedure be explained as an Ofcom "aspiration", which, in reality, would allow for extended correspondence if necessary.

ITV approved of the Ofcom model with the following caveats: a) The mechanism must ensure that no prejudice falls to the broadcaster if the broadcaster decides it wishes to advance no proposals for redress; or if such proposals are not accepted and the issue proceeds to adjudication; b) Ofcom include their objective parameters when deciding whether a broadcaster's proposal for redress is reasonable.

S4C believed it should always be a matter for the broadcaster alone to decide whether or not to make a proposal for 'appropriate resolution'. Ofcom should not be entitled to oblige the broadcaster to make such a proposal.

UKRD proposed the complainant could suggest what he or she required in the form of redress, and if the broadcaster believed that to be fair and reasonable, the matter could be closed at this stage. Noting that in such cases Ofcom would then only have to arbitrate where redress was at issue, rather than consideration of the complaint itself.

Channel 4 and Five and CMS Cameron McKenna suggested that the paragraph starting "on receipt of the broadcaster's statement..." should not be positioned in the "Appropriate Resolution" box, but rather should be placed outside of the box in a separate paragraph. In relation to this paragraph, Channel 4 and Five also requested that all parties should have access to any legal advice relied on by the Executive or Fairness Committee as part of its adjudication.

### 3.12c & Q5) Number of rounds

The BBC, Channel 4 and Five, CMS Cameron McKenna, ITN, ITV, S4C, SMG and UKTV agreed the written stages should be limited to two rounds unless there are exceptional circumstances.

Chrysalis Radio and UKRD did not believe there should be a limit of two rounds. Chrysalis Radio believed written exchanges should continue until Ofcom is satisfied all appropriate information has been gathered. Chrysalis Radio said this would enable Ofcom to adjudicate without the need for a hearing, which was more favourable to both parties. UKRD believed by limiting the process to just two rounds, the broadcasters were given an unfair advantage as they were the last person to provide information. UKRD said this situation would encourage the broadcaster to reserve their most important information until the last round, thereby preventing the complainant from responding.

CMS Cameron McKenna, SMG and UKTV requested further clarification of the term 'exceptional circumstances'.

MediaWise suggested a more suitable form of resolution would be a 'good offices' meeting between the complainant and producers.

### 3.12d & Q6) Late material

In general all respondents believed Ofcom should consider late material. However CMS Cameron McKenna, S4C and SMG noted that the acceptance of new material should not normally be considered.

The BBC and UKTV were in favour of published criteria. Both suggested the criteria should include that the complainant or broadcaster must demonstrate that the material could not be submitted earlier.

Channel 4 and Five, Chrysalis Radio, CMS Cameron McKenna, S4C, ITV and UKRD all believed the decision to accept late material should be at Ofcom's discretion. However most noted this decision by Ofcom should be based on whether or not the material could have reasonably been made available earlier. CMS Cameron McKenna requested that the other party should be allowed to respond and requested

examples in the guidelines for when Ofcom would accept late material. ITV requested that the other party be notified of the existence of the content of the new material as soon as it becomes available. UKRD requested that the decision to admit late material be taken by a Fairness Committee member.

### 3.12e & Q7) Hearings

All respondents provided circumstances where a hearing could be necessary. However, Chrysalis and SMG felt that hearings should only be needed on the rarest of occasions.

UKTV and CMS asked for 'general criteria' to be published, outlining when a hearing would be necessary.

The BBC said there should be a blend of criteria and Ofcom discretion.

Below is a summary of circumstances in which various respondents felt a hearing should be held:

- Where there is conflict of information/ evidence (The BBC, ITN, CMS Cameron McKenna, MediaWise);
- In complex, controversial cases – 4 respondents (ITN, CMS Cameron McKenna, MediaWise, UKRD);
- When a complaint is referred to the Fairness Committee – 3 respondents (The BBC, Channel 4 and Five and Chrysalis Radio);
- When a complaint cannot be resolved by remote communication – 2 respondents (Chrysalis Radio and S4C);
- There should be a presumption in favour of hearings – 1 respondent (ITV).
- When a complaint cannot be resolved by the Executive Fairness Committee and Fairness Committee – 1 respondent (S4C);
- Subject to request – 1 respondent (SMG);

- When the Executive Fairness Committee decision is appealed – 1 respondent (UKRD).

## **Ofcom's response**

### **3.12a) Time limits**

The responses argued that the current deadlines are unrealistic and almost impossible to fulfil given the amount of work and research that is sometimes required (such as obtaining and viewing rushes; interviewing producers who have since gone on to work on new projects; etc). It has frequently been the case that broadcasters have not been able to respond within the current time limits.

Ofcom considers that it is pointless having deadlines which parties find almost impossible to adhere to. We consider it would be more appropriate to have realistic deadlines and aim to ensure that all parties comply with them. This would also help stop parties from having unrealistic expectations of our procedures. It is therefore proposed that first round statements should be lodged with Ofcom within 20 working days and second round statements within 10 working days.

We have previously allowed extensions to deadlines in many cases. In future it would be expected that such extensions are the exception and not the norm, given the longer deadlines.

It should be noted that while Ofcom's current procedures allow for extensions of deadlines, under certain circumstances, during the investigation itself, it does not formally permit extensions for representations for requests for reviews. We consider that to allow an extension in these circumstances would be a sensible and fair addition to our procedures and have incorporated this into our Outline Procedures.

### **3.12b & Q4) Appropriate resolution**

In keeping with the principle to target intervention only where it is needed, the consultation proposed a process of "Appropriate Resolution". This approach could see some complaints being resolved before a formal Ofcom investigation takes place. There are occasions when complainants may prefer quick and appropriate action taken by the broadcaster (e.g. a letter of apology, a promise to edit future programmes, an on-air correction) instead of Ofcom conducting an investigation.

The proposed procedures suggest that if a complainant would be prepared to consider an offer of "Appropriate Resolution", then they should indicate this (on the complaint form). Ofcom would then allow the broadcaster, if the broadcaster felt it was appropriate, to propose an acceptable remedy (within a defined timescale). However, Ofcom recognises that there will be occasions when a broadcaster will not consider a proposal for a resolution to be appropriate. For example, the broadcaster may believe that there has not been any unfair treatment or that there was no infringement of privacy or they may consider that the infringement was warranted.

After taking account of all respondents' feedback, we consider that the only practicable way that such a resolution process can work is if both parties agree to the resolution. This ensures that the process's voluntary nature is preserved. Ofcom does not believe it would be appropriate to require for complainants to define what would constitute an offer of appropriate resolution in the first instance. However Ofcom notes that if a broadcaster wishes to ask a complainant what form of appropriate resolution would be acceptable to them before making an offer, then it would be a matter for the broadcaster to decide. In any



subsequent consideration and adjudication of the complaint by Ofcom, we can confirm that no prejudice will be attached to the broadcaster for any offer, or lack of offer, made to the complainant during Appropriate Resolution. Likewise the complainant will not be prejudiced for not accepting an offer made by the broadcaster.

We will normally publish brief details of those complaints that have been resolved in Ofcom's broadcast bulletin.

As noted above 'Confidentiality' has been addressed in the new procedures.

It appears that the last paragraph in the "Appropriate Resolution" box was placed there in error – this has been corrected

The legal advice provided by Ofcom's lawyers and by external lawyers to Ofcom is confidential to Ofcom and protected by legal professional privilege and will not be provided to either party.

### 3.12c & Q5) Number of rounds

In accordance with good administrative practice and to ensure that parties focus on the issues of the complaint and that complaints are dealt with as efficiently as possible, Ofcom intends to restrict the parties to two rounds of statements in fairness and privacy investigations. This has usually proved to be sufficient for Ofcom to be able to make a finding or conclude that a hearing would be of assistance. However, Ofcom recognises that there may be exceptional circumstances where further rounds are necessary. Therefore, if appropriate, in the particular circumstances of a complaint, Ofcom may consider allowing each party an additional round of statements.

Only in exceptional circumstances will we accept additional statements and if we accept an additional statement from the complainant we will also offer the other party an opportunity to comment.

It would not be possible or appropriate to attempt to exhaustively pre-empt every type of exceptional circumstance that could arise. However, one example which might be helpful could be where a broadcaster raises an issue for the first time in the second statement, to which the complainant should be allowed to respond.

We note UKRD's concerns about the broadcaster having the last word. However, Ofcom takes the view that a complaint begins with the complaint itself, rather than with the broadcast of the programme. Therefore, in the interests of natural justice, we consider that the broadcaster and the complainant should have the same number of opportunities to put their case to Ofcom.

Where complaints could be resolved in an informal way, this will be dealt with by way of "Appropriate Resolution" (see Ofcom's response for 3.12b and Q4).

### 3.12d & Q6) Late material

We note that most respondents agree that Ofcom should consider accepting late material, but on limited grounds only. We will accept late material in the following circumstances:

The admission of new material will only be considered if it is:

- relevant to the complaint; and
- significant in advancing Ofcom's understanding of the complaint; and,
- could not reasonably have been produced earlier.

Whether such material is admitted will be at the discretion of Ofcom.

These circumstances are explained in the Outline Procedures.

As soon as such material has been admitted into the process the other party will be informed and provided with an opportunity to respond to such material.

### 3.12e & Q7) Hearings

Ofcom does not propose to publish criteria for the holding of hearings. The legislation provides for hearings to be at Ofcom's discretion and we would not wish to fetter this by setting down potentially restrictive criteria which, we believe, would not be helpful to stakeholders. However we have taken into account the comments that have been made on this point and the procedures have been adjusted accordingly to try to give an indication of the sorts of circumstances in which Ofcom may decide that it is appropriate to hold a hearing.

## **Executive Fairness Group Adjudications**

### **Proposed Guidelines as consulted upon Paragraph 3.13**

If Ofcom considers the case straightforward, then it is passed to the Executive Fairness Group (see text below for information on the Executive Fairness Group). The Executive Fairness Group will make a provisional decision (i.e. upheld, not upheld, upheld in part), with reasons, to both parties. If within ten working days of Ofcom's notification to the parties of the provisional decision neither party requests a review of that decision (see 'Reviewing a decision' below), the provisional decision becomes final.

#### ***Executive Fairness Group***

***The Ofcom Board has given the Executive Fairness Group authority to discharge functions in relation to fairness and privacy complaints.***

***The duties of the Executive Fairness Group are:***

- a) considering and adjudicating on fairness and privacy complaints referred to it by the Executive;***
- b) settling and approving adjudications of complaints it has adjudicated upon; and,***
- c) deciding whether to make directions for publication of summaries of fairness and privacy complaints and Ofcom's findings where it has itself adjudicated.***

***All decisions of the Executive Fairness Group are subject to internal review and, where appropriate, reconsideration by the Fairness Committee.***

***The Group shall normally consist of three members, all of whom shall be drawn from the Executive. The Group shall normally consist of two senior members of the Executive and the Programme Executive with responsibility for managing the case. The Group may be attended by a legal adviser, and, as appropriate, any other Ofcom colleagues.***

***For a fuller explanation of the Executive Fairness Group's role please refer to Ofcom's website***

## **Responses to consultation**

CMS Cameron McKenna suggested the guidelines state that Ofcom will notify the parties to a complaint of its decision and circulate its adjudication within a specified time period following the making of its decision.

Channel 4 and Five response noted in 3.14.

S4C noted that parties appeared to wait a long time for adjudications.

## **Ofcom's response**

We aim to send adjudications to parties as soon as possible, bearing in mind the need to ensure they are properly drafted and signed off by each member of the group (if it was the Executive Fairness Group) or Committee (if it was the Fairness Committee) that was responsible for making the decision. We have added a reference to our Key Performance Indicators (KPIs) in the Outline Procedures. These KPI's give the best practice average time for conducting a Fairness and Privacy complaint. Our performance against these KPIs is published in Ofcom's Annual Report. Ofcom will aim to manage the complaint handling process as efficiently as possible and in line with these KPIs.

## **Fairness Committee Adjudications**

### **Proposed Guidelines as consulted upon Paragraph 3.14**

**The Fairness Committee will consider cases referred to it by the Executive for adjudication, for example, because they are complex. (See text box below for information on the Fairness Committee).**

#### ***The Fairness Committee***

***The Ofcom Board has delegated the discharge of Ofcom's functions in relation to fairness and privacy complaints to a committee known as the Fairness Committee. The Committee shall consist of a maximum of four members, all of whom shall be drawn from the Content Board.***

***All decisions of the Fairness Committee are final and not subject to internal review, reconsideration or appeal.***

***The duties of the Fairness Committee include:***

***a) deciding whether to entertain or proceed with the consideration of fairness and privacy complaints where such decisions have been referred to it by the Executive as appropriate;***

***b) considering and adjudicating on fairness and privacy complaints referred to it by the Executive as appropriate (for example, due to their complexity); and,***

***c) reviewing Entertainment Decisions or provisional adjudications where either one or both of the parties have made out a case for the Executive's decision to be reviewed.***

***For a fuller explanation of the Fairness Committee's role please refer to Ofcom's website.***

## **Responses to consultation**

The BBC, Channel 4 and Five and ITN believe the decisions made by the Fairness Committee should not be final.

The BBC requested that the Fairness Committee decisions be subject to internal review and reconsideration be based on the same guidelines used for the EFG. The BBC noted this would bring the procedures in line with those of the Standards team. The BBC also requested that any referral to the Fairness Committee be a trigger for the holding of a hearing.

Channel 4 and Five had serious concerns over the lack of procedures for appeal of the Fairness Committee decisions. Channel 4 and Five noted those cases adjudicated by the Fairness Committee are the most complex cases handled. As a result it is those types of cases which will have a greater possibility of a party wishing to request a review of the decision.

ITN cited reasons of fairness to parties and natural justice for making the Fairness Committee decisions open to appeal.

## **Ofcom's response:**

Some of the broadcasters that responded to this section requested that the Fairness Committee decisions be open to appeal (as are those decision made by the Executive). This was an issue that was clearly important to a number of respondents and one that Ofcom considered extremely seriously.

To create another body, as was suggested by some respondents, that could review Fairness Committee decisions would not be consistent with Ofcom's constitution and governance since the Fairness Committee is a committee of Ofcom, with delegated powers from the Ofcom Board. As such it is the most senior decision-making body in terms of adjudicating on fairness and privacy complaints.

At present, when the Fairness Committee reaches its decision on a complaint between two parties that decision is final. Ofcom's predecessor, the Broadcasting Standards Commission, obtained legal advice that stated that it could be unlawful for any final adjudication made by an authority such as Ofcom to be internally reviewed since, having finally decided the submitted issues, Ofcom's authority over those questions is ended at that point (it is functus

officio at that point). Ofcom's statutory requirement with respect to fairness and privacy complaints is to adjudicate (it is a quasi-judicial process in which Ofcom acts as a decision maker between two opposing parties). In these circumstances, it is generally established that there is no right of review of a final adjudication unless expressly provided by statute (other than by way of judicial review by the courts).

It should also be noted that an internal review within Ofcom is not a process that is required by the Act. It was established, at the time the Act was passed, that since stakeholders could challenge Ofcom's decisions by means of Judicial Review this was sufficient, in terms of human rights compliance i.e. the right to a fair hearing. Parliament did not therefore legislate for an internal review process to be part of Ofcom's procedures.

Nevertheless, we recognise that the regulator's decisions in these areas can be crucially important in terms of the courts' interpretation of these matters, broadcasting policy and freedom of expression. As such, we acknowledge that it is essential that Ofcom's judgments are as sound as possible and made after thorough scrutiny. In addressing these issues we have noted the apparent inconsistency whereby the simpler cases are reviewable but the more complex cases are not.

Taking this into account, and given the legal parameters we must work within, we have revised our new Outline Procedures, to incorporate a two stage process for Fairness Committee decisions, involving a provisional decision and, if necessary, a re-consideration (this does not apply to cases referred to the Fairness Committee for review, since these decisions are final). A two stage process will only exist for those cases which go directly to the Fairness Committee and not those cases which the Fairness Committee are considering on review.

Therefore, the Outline Procedures now state that the Fairness Committee in the first instance will reach a provisional decision which may be reconsidered following final representations from the parties). If either party makes material representations (see final procedures for those issues which are considered to be material), which may change part or all of a decision, then the Fairness Committee will re-consider the relevant part of its provisional decision. The other party would always be offered an opportunity to comment on any final representations before the Fairness Committee makes its final adjudication. It should be noted that this extra stage will mean that the Fairness Committee adjudications will take longer to finalise in some cases.

## **Proposed Guidelines as consulted upon Paragraph 3.15**

**The Fairness Committee may decide to hold a hearing to which the parties will be invited to make oral representations at the hearing. Normally three weeks notice of the hearing date will be given to the parties. If appropriate, hearings may take place in Scotland, Wales or Northern Ireland as well as in London.**

### **Responses to consultation**

#### When to hold hearings

The BBC believed there should be an opportunity for hearings and noted that under the BSC there was an importance placed on them. The BBC suggested hearings should be held when: the Executive Fairness Committee referred a complaint to the Fairness Committee (unless a reason was provided for not holding one); significant conflict of material; and in all other cases at Ofcom's discretion.

Channel 4 and Five said the Broadcasting Act appeared to create an assumption in favour of a hearing. However this was not the case in the current draft guidelines. Channel 4 and Five believed hearings should be held when: complaints were referred to the Fairness Committee (unless compelling reasons were provided against a hearing); conflict of evidence; complex cases; both parties don't want it.

### 3 weeks notice

The BBC considered the 3 weeks notice for a hearing to be too short and suggested it should normally be 4 weeks. However the BBC also noted that in the interest of fairness to all parties, the hearings should be set as soon as "reasonably practicable for the convenience of all parties".

Channel 4 and Five sought to clarify the notice period by changing the guidelines to "3 weeks notice of hearings will be given once the parties have been consulted as to their availability".

### **Ofcom's response:**

#### When to hold hearings

Section 115 of the Act states that:

"...every fairness complaint made to Ofcom shall be considered by them either at a hearing or, if they think fit, without a hearing."

We consider that it is clear from the legislation that whether or not to hold a hearing is at Ofcom's discretion. Ofcom will therefore hold a hearing based on the merits of the individual case. As discussed above in response to issues raised under paragraph 3.12e & Q7 of the consultation, the Outline Procedures now give a few examples of the sorts of situations in which Ofcom may consider it helpful to hold a hearing.

Where we decide to hold a hearing, we will give reasons, explaining why we consider it appropriate in the circumstances of the particular complaint to proceed in this way.

#### Three weeks notice

We say that we will normally give three weeks' notice of a hearing date. We have not changed this, as it is the minimum period of notice we would give. In practice, we will continue to endeavour to accommodate both parties when fixing a date for a hearing.

### **Proposed Guidelines as consulted upon Paragraph 3.16**

**Hearings are held in private. A representative from Ofcom will make notes, but the hearings will not normally be recorded. Each of the parties may bring to the hearing any other person (normally up to a maximum of three other people). Their names, connection to the case and a description of the role they intend to play at the hearing, should be given to Ofcom at least seven working days before the hearing.**

### **Responses to consultation**

The BBC and Channel 4 and Five felt the maximum number of people allowed by each party to be too small.

The BBC said the number should depend on individual facts and circumstances of each case. As a minimum limit The BBC requested that the number should be increased to 5 each side (as a minimum) as was the practice at the BSC.

Channel 4 and Five suggested the norm should be 4 each side. Where appropriate this limit could be increased to allow for persons able to provide additional evidence.

The BBC also said that the 7 working day notice should be flexible.

### **Ofcom's response:**

In limiting the number of people at a hearing, we are trying to achieve a balance between ensuring that all parties are properly represented and ensuring that complainants, particularly those who are not represented, are not overwhelmed by the proceedings. We have therefore kept unchanged the maximum number of attendees that each party may bring (i.e. "normally" three). However, it should be noted that the use of the word "normally" is intended to ensure Ofcom has discretion to allow more people to attend if we consider this would be appropriate in the particular circumstances.

### **Proposed Guidelines as consulted upon Paragraph 3.17**

**The procedure at the hearing will be at the discretion of the chair, but will normally be as follows:**

- **the chair explains the proceedings;**
- **the complainant briefly summarises his/her case;**
- **the broadcaster briefly answers the case;**
- **questions may be put on behalf of Ofcom to the broadcaster and/or the complainant;**
- **at the chair's discretion the two parties may ask each other questions; the broadcaster then makes a brief final statement; and,**
- **the complainant then concludes with a brief final statement.**

### **Responses to consultation**

#### Conflict of interests

The BBC and Channel 4 and Five requested that any conflicts of interest be revealed at the outset of any hearing. The BBC requested this take place following the explanation of proceedings by the chair.

#### Opening and closing remarks

Channel 4 and Five requested the time limits normally adhere to for opening and closing summaries should be provided in the guidelines (these were 10 and 5 minutes respectively).

## Tone

MediaWise noted that hearings should be friendly and as informal as possible. This included the giving of latitude and encouragement when complainants provide responses.

### **Ofcom's response:**

## Conflict of interests

In line with Ofcom's governance procedures, the possibility of any conflict of interest affecting a member of the Fairness Committee will have been considered in advance of either the decision meeting (i.e. where a decision is taken without a hearing) or the hearing. In the event of such a conflict, a member would either not sit on the Committee or would disclose the potential conflict before the hearing commences.

## Opening and closing remarks

We agree that it is helpful to specify what we mean by "brief" statements by the parties at a hearing. We have therefore restored the 10 and 5 minute limits for these, with discretion for the Chair to allow parties to make longer statements where necessary.

## Tone

We agree with MediaWise that hearings should be as friendly as possible and we will continue to encourage this.

## **Proposed Guidelines as consulted upon Paragraph 3.18**

**New material is not normally accepted at the hearing.**

### **Responses to consultation**

Channel 4 and Five maintained that new material should always be accepted provided: an explanation can be given about why the material was not available before; the party notified Ofcom as soon as the new material was available.

### **Ofcom's response:**

We believe the guidelines in this area allow sufficient and proper preparation by the Fairness Committee and both parties to a complaint to ensure the process is expedited efficiently. However we have retained the word "normally" to allow for those exceptional circumstances when it is necessary to admit new material. We have also added an explanation of the circumstances in which we might be prepared to accept late material at a hearing:

New material is not normally accepted at the hearing. The admission of new material will only be considered if it is:

- considered relevant to the complaint; and,
- significant in advancing Ofcom's understanding of the complaint; and,
- could not reasonably have been produced earlier.



Whether such material is admitted at the hearing will be at the discretion of the Chair.

### **Proposed Guidelines as consulted upon Paragraph 3.19**

**The Fairness Committee will decide if the complaint is upheld, upheld in part or not upheld. The decision of the Fairness Committee will be final.**

#### **Responses to consultation**

##### **Ofcom's response:**

Please see Ofcom response under paragraph 3.14 for related information.

### **Adjudications Generally**

### **Proposed Guidelines as consulted upon Paragraph 3.20**

**Prior to publication, both parties will have the opportunity to comment on the summary of the adjudication and on factual errors in the adjudication itself.**

#### **Responses to consultation**

The BBC suggested the order of 3.21 and 3.20 be reversed. With the wording of the new 3.20 be changed to:

*"Ofcom will send out a provisional decision (i.e. upheld, not upheld, upheld in part), with reasons, to both parties. The parties then have ten working days from the receipt of Ofcom's notification of the provision decision to request a review of that decision, to comment on the summary of the adjudication and on factual errors in the adjudication itself otherwise the decision becomes final."*

The BBC also requested that parties receive notification that the decision has become final as soon as practicable after the 10 working days deadline.

##### **Ofcom's response:**

We agree that these paragraphs should be reversed and therefore have reversed them.

We have changed the wording of this paragraph to reflect the BBC's suggestions as this more appropriately reflects the process in practice.

We will endeavour to send out the final adjudication as soon as possible after the 10 day deadline for comments. We appreciate that it is useful to all parties to receive confirmation that a complaint has been finalised.

## Proposed Guidelines as consulted upon Paragraph 3.21

**Ofcom will publish on its website, and in the Ofcom Broadcast Bulletin, a copy of its adjudication on each complaint. If a complaint is upheld, or partly upheld, then Ofcom may also direct the broadcaster to transmit and/or publish a summary of its adjudication.**

*Question 9 In what circumstances should Ofcom direct the broadcast or publication of a summary of its findings?*

### Responses to consultation

#### When to direct

In general most respondents felt the broadcast or publication of a summary should only be directed for serious breaches of the code. The exception to this was CMS

Cameron McKenna who believed the summary of findings should be broadcast or published when a complaint has been upheld or upheld in part (and where the complainant is in favour of broadcast and/ or publication).

Chrysalis believed Ofcom should use its discretion in this regard to ensure a fair and effective remedy to the complaint.

ITN believed Ofcom should take into consideration all other alternatives to broadcast or publication of findings and the broadcaster's track record before making such directions. ITV believed there should not be a presumption in favour of broadcast.

SMG believed broadcast or publication should never be considered by Ofcom; upheld complaints should be published on Ofcom's website. SMG said that an apology may be a different matter.

MediaWise suggested Ofcom should allow for the possibility that its adjudications be published in an appropriate newspaper or magazine of the complainant's choice, especially in cases which have given rise to press comment or speculation.

Channel 4 and Five said the broadcast of an adjudication must be proportionate. Channel 4 and 5 believed there should not be a presumption to broadcast adjudications in every case where a complaint is upheld or upheld in part. Rather other alternatives should always be considered and should not be treated as a sanction or punishment for the broadcaster.

#### Privacy concerns

UKRD and the BBC both noted that privacy concerns of the complainant should be taken into consideration before giving directions to publish or broadcast. MediaWise suggested, in the interest of protecting the complainant's privacy, that the complainant should decide whether a full adjudication be made public.

#### Suggested changes to paragraph 3.21

The BBC and Channel 4 and Five both made the following requests:

a) The broadcast should be in Ofcom format and limited to the fact that a particular programme has been the subject of an upheld adjudication. The broadcast should include

directions to Ofcom's and the broadcaster's websites where the full adjudication can be found.

b) Ofcom should provide clarification of when and where Ofcom believe it may be appropriate to publish a summary of its adjudication. The BBC suggested that there should be a presumption against double publication. Publication should only be considered when warranted by the particular facts of the case.

The BBC made 3 additional suggestions:

1) In the interest of accuracy, change Programme Complaints Bulletin to Ofcom Broadcast Bulletin.

2) Refer to a test of proportionality indicating that Ofcom does not automatically direct a broadcast of a summary adjudication when a complaint is upheld or upheld in part.

3) Ofcom should not direct a broadcast of an adjudication summary where the complainant has requested anonymity.

## **Ofcom's response**

### When to direct

We do not propose to publish restrictive criteria for the broadcast or publication of a summary of Ofcom's findings. However we have taken into account the comments that have been made and the Outline Procedures now explain the sort of circumstances that may merit a direction to transmit Ofcom's finding on air as follows:

Ofcom will normally make such a direction where there has been a breach of the fairness and/or privacy sections of the Ofcom Broadcasting Code which has resulted in a complainant's legitimate interests being seriously damaged and requires a remedy over and above publication in the Ofcom Broadcast Bulletin. Any decision to direct will be in keeping with Ofcom's duties to be proportionate, consistent and targeted only at cases on which, in Ofcom's view, action is needed.

Ofcom considers each complaint on its own merits, and as such we do not think it appropriate for the adjudication of fairness and privacy complaints to take into consideration a broadcaster's track record when deciding whether or not to make a direction for broadcast or publication. (However, such considerations are taken into account when there is a consideration of a statutory sanction). When making this decision Ofcom has no presumption either in favour or against a direction and decisions are made on a case by case basis.

We agree with the respondents that proportionality is important when deciding to make directions for the broadcast of our findings, and we have reflected this view in our revised Outline Procedures.

### Privacy concerns

We are conscious of the risk of compounding unfairness or infringement of privacy through an on-air direction. In a case where we think this might be an issue, we will continue to give the complainant the opportunity to be made anonymous in any publication. However, Ofcom reserves the right to broadcast a summary, when the complainant has requested anonymity, if we consider in the circumstances that a broadcast summary is warranted.

The respondents' points relating to publication of findings in newspapers or magazines have been taken into account. Ofcom agrees that publication should be considered only when warranted by the particular facts of the case. As the 1996 Act requires, Ofcom will retain its discretion in these cases. It should be noted that to date, Ofcom has not found it necessary to make a direction for such a publication.

### Suggested changes to paragraph 3.21

We have corrected the Outline Procedures so they refer to the Ofcom Broadcast Bulletin.

Our aim is to ensure that complainants receive redress where a complaint has been upheld and that directions are proportionate.

We agree with the BBC and Channel 4 and Five that summaries should be broadcast in a branded Ofcom format. This format is currently provided to all broadcasters and Ofcom will continue to do this.

We do not believe that it would be appropriate to broadcast only a link to Ofcom's and the broadcaster's website for full details of the adjudication. This method of redress might not reach viewers or listeners of the original programme who do not have internet access. Furthermore, in terms of natural justice, a simple reference to the fact that a complaint has been upheld against a programme (and reference to a web-link) is not sufficient to appropriately provide redress or correct a significant issue (after a person has been unfairly treated or had their privacy unwarrantably infringed), which may have been broadcast to many people. If appropriate and proportionate just as the item was broadcast, we believe it is fair that the finding should also be broadcast.

Nevertheless, Ofcom will continue to exercise its discretion in this area having regard to the principles under which its regulatory activities should be transparent, proportionate, consistent and targeted only at cases in which, in Ofcom's view, action is needed.

## **Sanctions**

### **Proposed Guidelines as consulted upon Paragraph 3.22**

**If Ofcom considers there has been a serious breach of the Fairness and Privacy sections of the Broadcasting Code, it will refer the case back to the Executive to investigate whether the breach is serious enough to warrant consideration of a statutory sanction. The Outline Procedure for Statutory Sanctions in Content Cases will then apply.**

*Question 10 In what circumstances should Ofcom consider applying a statutory sanction?*

### **Responses to consultation**

#### When to consider applying a statutory sanction

In general all respondents believed a sanction should be reserved for exceptional code breaches. Reasons provided by respondents as to when a sanction would be appropriate were if the code breach was: serious, repeated, or deliberate or indicated a flagrant disregard for the code.

The BBC said it would be totally inappropriate to apply financial sanctions in fairness and privacy cases, unless the infringements were: evidentially malicious or gravely irresponsible or there had been a systematic failure of compliance procedures.

### 'serious'

Channel 4 and Five wished to propose changes to the current criteria for applying sanctions. Channel 4 and Five questioned the appropriateness of the wording of this guideline, in particular, the use of the word "serious". Channel 4 and Five requested Ofcom clearly define what it considers a 'serious' breach given the very fact that a complaint has been upheld in an area is in itself serious to the broadcaster and the complainant. Channel 4 and Five believed sanctions should only be applied in cases when there have been deliberate, repeated breaches of the code.

CMS Cameron McKenna requested an example of what may be regarded as a 'serious' breach of the code to warrant financial penalty. CMS Cameron McKenna noted that to date Ofcom had not imposed a financial sanction in a Fairness and Privacy complaint.

### Suggested changes to paragraph 3.22

Channel 4 and Five suggested the guideline be changed to reflect paragraph 3 of the Outline Procedure for Statutory Sanctions in Content Cases:

"If Ofcom believes that a broadcaster has deliberately or repeatedly breached the Fairness and Privacy sections of the Ofcom Broadcasting Code, in a manner which demonstrates an unacceptable pattern of behaviour that warrants consideration of a statutory sanction the Outline Procedure for Statutory Sanctions in Content Cases will then apply."

### **Ofcom's response**

We have re-worded this paragraph for clarity. We have also removed the word 'serious' from the guideline, since there is now a reference to Ofcom's published criteria for the consideration of the imposition of a statutory sanction.

The Outline Procedures for Statutory Sanctions will be the subject of a consultation later in 2006.

## **Reviewing a decision**

### **Proposed Guidelines as consulted upon Paragraph 3.23**

**If the complainant or broadcaster is dissatisfied with a decision made by the Ofcom Executive (Entertainment Decision or provisional adjudication) then they may request a review within ten working days of notification of the decision. A review will normally only be granted if the dissatisfied party puts forward an arguable case that the decision is flawed on, for example, any of the following grounds:**

- a material mistake of fact has been made in reaching the decision;
- the decision is unlawful (Ofcom has acted outside its powers or otherwise applied the law wrongly, including the Human Rights Act 1998);

- **the decision includes insufficient reasoning (the reasons given for the decision are inadequate);**
- **undue or insufficient weight has been given to a piece or pieces of evidence; there was a material failure to follow published guidelines or Ofcom has otherwise not conducted a fair process;**
- **the decision is irrational or perverse (no rational person could have reached the decision).**

## **Responses to consultation**

The BBC, Channel 4 and Five, ITN and ITV reiterated their concern that the ability to appeal a decision did not apply to the decisions of the Fairness Committee.

UKRD believed the grounds for review should include the method and degree of sanction or redress. The guideline should also include that Ofcom will provide reasons where a request for a review is rejected,.

### Suggested changes to paragraph 3.23

The BBC made the following suggestions for changes to this guideline:

- 1) Broadening of the third ground for review to: “The decision includes insufficient reasoning (the reasons given for the decision are inadequate or unclear)”
- 2) Addition of new ground for review: “the decision raises issues of significant public interest.”
- 3) Clarification about how quickly Ofcom would undertake to entertain and conduct the review.

Channel 4 and Five made the following suggestions for changes to this guideline:

- 1) Expansion of the third ground to: “the decision includes insufficient reasoning, explanation, or clarity (the reasons given for the decision are inadequate) or guidance is needed because the decision raises an important matter of principle of wider significance to broadcasters;”
- 2) The fourth example ground for review should be expanded to include evidence that appears to have, or has, been disregarded: “undue or insufficient weight has been given to a piece or pieces of evidence or evidence has been ignored;”
- 3) The word “rational” be amended to reflect the *Wednesbury unreasonableness* principle as follows: the decision is unreasonable or perverse (no reasonable person could have reached the decision).”
- 4) As these are examples of grounds for review the words “and” and “and/or” should be deleted from the end of fourth and fifth example grounds respectively.

## **Ofcom’s response:**

We have taken account of the BBC, Channel 4 and Five, ITN and ITV’s concerns that the Fairness Committee decisions are not open to review. Please refer to section 3.14 above for our response.

In relation to UKRD's suggestion, Ofcom will be consulting on the separate procedures for Sanctions later this year. Further information about The Outline Procedures for Statutory Sanctions can be found at: <http://www.ofcom.org.uk/tv/ifi/guidance/sanctions/>

Ofcom will endeavour to expedite reviews in the interest of all parties. However as reviews raise complex issues which may be subject to legal advice it is not feasible to create a timeframe for them without risking unfairness to either party.

We agree that it is important to provide reasoning to both parties when a decision has been taken on a request for a review decision and Ofcom will continue to do so. Our Outline Procedures have been updated to include this practice formally.

### Suggested changes to paragraph 3.23

We have taken account of the suggestions made by the BBC and Channel 4 and Five with regards to the third ground for review. We have broadened this ground for review to include inadequacy of reasoning. We believe this new wording covers a number of the respondents' suggestions such as "insufficient or unclear reasoning" and "insufficient reasoning, explanation or clarity".

We agree with Channel 4 and Five's suggestion to delete "and" and "and/or" from the examples contained in this paragraph.

We believe the grounds set out in the Outline Procedure are already adequate. Furthermore, we do not believe it would be appropriate to allow a ground for review that was inconsistent with the grounds on which an application may be made to the Administrative Court for leave to apply for judicial review.

As noted above in relation to Fairness Committee adjudications, although Parliament did not legislate for an internal review process to be part of Ofcom's procedures, Ofcom has allowed for such a process. However, once Ofcom has finally decided whether or not to uphold a complaint, its authority over the issues is ended but, as the Act established, stakeholders may nevertheless further challenge a decision in this area by means of Judicial Review. Taking this into account, Ofcom does not consider that it would be appropriate to allow for either party to request a review of an entertainment decision or a provisional decision on grounds other than grounds that are consistent with judicial review grounds. This is because these are the grounds on which a party may request leave to apply for a Judicial Review and on which, if leave is granted, the Court will review Ofcom's decision. Ofcom further believes that by allowing a ground for review that was not consistent with judicial review grounds, Ofcom could risk a potential finding of procedural irregularity.

### **Proposed Guidelines as consulted upon Paragraph 3.24**

**The decision whether or not to grant a request for a review, will be taken by a more senior member of the Executive not previously involved in the complaint and will normally be made by reference only to the grounds for review put forward by the person who has requested it. Advice may be sought from an Ofcom lawyer not previously involved in the complaint. Any review granted will be undertaken by the Fairness Committee (all of whom will be Ofcom Content Board members). The Fairness Committee will normally only reconsider those elements of the decision under review, on the basis of the relevant grounds.**

**There may be certain exceptional circumstances where the Executive refer other elements of the decision for review by the Fairness Committee. The decision of the Fairness Committee is final.**

## **Responses to consultation**

Channel 4 and Five requested the wording of this guideline be changed to provide for the instance when a review of the Fairness Committee decision is requested.

### **Ofcom's response:**

We have taken account of Channel 4 and Five's suggestion. Please refer to section 3.14 above for our response.

## **General Comments**

### **BBC**

The BBC suggested that in the interests of fairness and transparency Ofcom should publish a timetable for its handling of fairness and privacy complaints against which it may be judged. This could be limited, for example, to an undertaking that Ofcom will normally acknowledge receipt of a complaint within five working days and normally inform both the complainant and the broadcaster of its entertainment decision within twenty working days of the receipt of a complaint or alternatively keep both parties informed of progress.

The BBC also suggested that if a complaint is not entertained then all parties are notified that the case is closed. Once a complaint has been entertained Ofcom should seek to agree a timetable with all parties setting deadlines appropriate to the specific circumstances of the case. Any departure from the agreed timetable should be notified in writing to all parties.

The BBC also considered that it would not be unreasonable for Ofcom to aim to publish its finding in the case of an uncontested decision within six months of receiving a complaint.

### **Ofcom's Response**

We will inform all parties if a complaint has not been entertained. We do not think that, in the case of Entertained Complaints, it would be helpful to agree a time table for the progress of a case. The actual complexity of the issues may not become apparent until all the submissions have been received and we believe such a time table would heighten the risk of unfairness to both parties. Having said this, we do have discretion to extend the deadlines when a reasonable case has been made out by a party and we believe it would be appropriate in the circumstances to do so.

### **Chrysalis**

Chrysalis stated that its principle concern with Ofcom's proposals for Fairness & Privacy Complaints Handling, while appreciate that this is largely unavoidable, relates to their legalistic nature. However, whilst larger broadcasters, such as television companies, have access to experienced regulatory staff and legal support, Ofcom needs to recognise this is often not the case for many smaller radio broadcasters, nor for the vast majority of individual complainants.



## **Ofcom's Response**

We recognise that the legalistic nature of Fairness & Privacy complaints can be daunting for both complainants and smaller broadcasters. In some respects we are constrained by the legislation and we believe that, given the seriousness of the types of complaint we are dealing with, it is essential that we have a clear and consistent process. However, we are always willing to assist parties with our process where necessary.

## Section 3

# List of respondents

- The BBC – A public service broadcaster
- Channels 4 and Five – Channel 4 and Five made a joint response to the consultation. Both Channel 4 and Five are public service broadcasters
- Chrysalis Radio - A commercial radio group
- CMS Cameron McKenna LLP - International law firm
- ITN – News provider
- ITV – A public service broadcaster
- Jennifer Epworth - Solicitor
- MediaWise Trust – organisation that offers advice and training to members of the public affected by the media and professionals of the media industry.
- Mr John Ritchings – a member of the public who has made a complaint within the last three years
- S4C - The Welsh language public service broadcaster
- SMG - A media business. SMG owns the ITV regional licences for central and northern Scotland, Scottish TV and Grampian TV, as well as independent national and local radio licences broadcasting as Virgin Radio.
- UKRD Group - a limited company that specialises in local commercial radio broadcasting operations
- UKTV - A digital TV company
- Member of the public who has made a complaint within the last three years and wished to remain anonymous
- Two stakeholder organisations who wished to remain anonymous