

Section Two

Harm and Offence

I General Summary of Responses

Responses to the Consultation

We have received substantive responses from the British Broadcasting Corporation (BBC), Independent Television (ITV), Channel 4 and Five, Independent Television News (ITN), Trustar, Kanal 5, Discovery Networks Europe, NTL, S4C, Chrysalis Radio, Capital Radio, Cross Rhythms City Radio, Commercial Radio Companies Association (CRCA), Scottish Media Group (SMG), Portman Group, Cambridge Research Systems, UK Film Council and the British Film Institute (BFI), Ofwatch, Commission for Racial Equality (CRE), Campaign against Censorship (CAC), Sexual Freedom Coalition, Centre for Justice and Liberty, Royal Society for the Prevention of Accidents (RoSPA), Royal National Institute of the Blind (RNIB), Emap, XplicitXXX, Adult Industry Trade Association, Cornwall Community Standards Association, mediawatch-uk, MediaWise, **mediamarch**, The Melon Farmers, British Naturism (Eastern Section), National Secular Society, Astrological Association of Great Britain (AA), Office of the Chief Rabbi (OCR), Christian Broadcasting Council (CBC), United Christian Broadcasters, Christian Institute, Catholic Bishops' Conference of England and Wales, Satellite and Cable Broadcasters (SCBG), British Humanist Association (BHA), British Board of Film Classification (BBFC), Ligali, Church of England, Church of Ireland Broadcasting Committee, Churches' Media Council, Evangelical Alliance, Libertarian Alliance and Libertarian International and Maranatha Community. We also received responses from individuals. There were six confidential respondents.

General Positive Responses

Four individuals and the CBC believe the principles, rules and meanings are consistent.

Two individuals, ITV and the Church of England do not believe there are further principles, rules or meaning required.

A priest is happy that Ofcom has decided to have separate rules for radio and TV.

General Comments

An individual believes the principles, rules and meanings are consistent except for Ofcom recommendations regarding R18 material. One individual believes, the principles, rules and meanings are acceptable, and notes that small but vocal minorities disproportionately affect a sizeable proportion of the viewing audience.

mediawatch-uk does not believe the principles, rules and meanings will lead to an improvement in programme standards or reduction in harmful content.

Two individuals complain that the draft rules are poorly defined.

Two respondents feel that the draft rules are too censorial.

A further individual also suggests that further clarification is needed on these draft rules, in terms of whether they affect satellite or terrestrial.

The CRE was concerned that the impact of the legacy codes would be lost if the

Broadcasting Code made no specific reference to race. They were also concerned that there were contradictions on a number of points relevant to racial offence or related issues such as religion.

One individual says, “As I understand it, under the proposed Broadcasting Code anything can be shown. Nothing can be done until after the programme has been shown and any harm has already been done. Are the proposed regulations laws of the land? If so, what are the penalties for breaking them?”

An individual notes that computers have far more explicit material and are less easily policed, so the viewer should decide what he or she wishes to pay to see. However, the Church of England does not believe the unregulated nature of the Internet should be used as an excuse for lowering broadcasting standards.

An individual believes the minimum standards relating to broadcasters complying with the law and respecting human dignity should be repeated explicitly in the rules. Another argues that the minimum standard relating to respecting human dignity should mean a complete prohibition of not only R18 material, but also of “adult” sex material. One individual is concerned about declining standards and says the proposals “seem bent on making the dehumanising and debasing of society even easier”. Another individual puts the ultimate responsibility on parents to ensure that their children do not access material they consider to be unsuitable.

Channel 4 and Five believe that measures to deal with the protection of under eighteens should be within the section on harm and offence.

The UK Film Council and BFI strongly believe that protecting audiences and users from harm is only one part of media literacy provision; equally important is both the citizen’s and the consumer’s ability to engage actively, creatively and critically with media content.

Maranatha suggests that there should never be a conflict between “the need to protect children and the wider needs of society”; thousands of children are suffering from broken families, sexual abuse and promiscuity. The rights of children should come first.

Sex, Violence and Offensive Language on TV

428 respondents to the consultation would like to see less violence on TV, whereas 53 respondents express a desire to see more violence on TV. 133 people ask that there be less sex shown on TV, while 93 respondents believe there should be more sex shown on TV. 118 respondents would like less swearing on TV and radio, whereas 34 wish there was more.

29 individuals voice concerns about the amount of violence and sex on TV. One individual is worried that there is now a more liberal attitude to foul language and explicit sex which will have an adverse effect on society. Another individual wishes to see the positive values of peace, decency, honesty and truth portrayed on TV and radio.

mediawatch-uk says that draft rules disallowing the showing of certain sexual activities should remain.

mediamarch says that there exists a large body of evidence to link violence in the media with violent behaviour, and also evidence suggests that pornography undermines social values.

Maranatha Community quote considerable research to support their view that the surfeit of violence and pornography on television is having a detrimental effect on the moral health of society in general, and children and young persons in particular.

Campaign group Sexual Freedom Coalition says it is essential that TV provides an honest and realistic portrayal of sex. Censoring sex on TV gives mixed messages and confuses people. This is particularly important for many people with disabilities, especially learning disabilities, who get most of their sex education from TV.

An individual believes that the Broadcasting Code previously said that nothing harmful or offensive should be broadcast, whereas now Ofcom justifies producing offensive material within certain contexts or with safeguards. This individual is convinced these lower standards lead to increased crime, damaged relationships and lack of respect for authority.

One individual wants news reports relating to court proceedings on murders, rapes and paedophiles kept to a minimum, if they have to be mentioned at all, especially before 2100.

Religious Offence

The campaign group Centre for Justice and Liberty asks Ofcom to take account of past situations where Christian programmes have proved to be offensive to some people; in some instances it is the very Christian status of the broadcaster (i.e. specialist channel) that causes offence. It would like to ask that Ofcom consider directing complaints to the channel concerned for a right of reply.

The Evangelical Alliance supports the definitions of harm and offence, balancing the two objectives of protecting the vulnerable and also educating and entertaining. It states the need to safeguard Christian and other faith groups' ability to talk freely about their faith. Freedom of expression must be protected. It fears that individuals or groups may use the pretext of harm and offence to curtail the expression of faith groups they oppose. It believes over-regulation can drive social tension unless tempered by common sense. It also emphasises that it perceives the preaching of the gospel and the "unique claims of Christ" to be a fundamental human right.

The OCR notes occasions where the platform provided by broadcasters has been used to foster religious and racial hatred. They believe it would be beneficial for the regulator to have a mechanism to monitor foreign language broadcasts.

A Member of the UN Association's Religious Advisory Committee asks Ofcom to define the terms "harm and offence" particularly in relation to incitement to religious hatred.

United Christian Broadcasters believes there is a big difference between what could be construed as "religious offence" on mainstream channels in comparison to independent religious channels.

Freedom of Expression

Four individuals point out that freedom of expression is limited by rights of others not to be subjugated to violence, sex, etc. One individual acknowledges the Broadcasting Code has to balance the element of freedom of expression against the sensitivities of others.

One individual feels there is more than enough freedom of expression in broadcasting under the current codes and does not wish to see any changes which could allow even more violence and explicit sexual content than there already is.

The OCR acknowledges there must be room for broadcasters to enjoy freedom of expression, which facilitates creativity and innovation, but notes that some images and language on TV and radio are unsuitable for children and at times for a wider audience. The regulator must ensure that such concerns are given proper consideration and that there are mechanisms in place for complaints to be raised about specific programming.

mediawatch-uk believes the new rules are vague and open to abuse, and that “freedom of expression should not come before what is healthy for society”. It refers to its own surveys indicating that the public are fed up with the decline in standards of taste and decency.

Chrysalis suggests that the move from “taste and decency” to “harm and offence” adds little to the regulatory functions.

Maranatha believes that the BBC has failed to comply with the legacy BSC rules made under the 1990 Broadcasting Act (“the 1990 Act”) concerning broadcasting “nothing...which offends good taste or decency”.

Ofcom response

Specific rules for the protection of under eighteens are now dealt with separately in Section One: Protecting the Under-Eighteens of the Broadcasting Code. This Section Two: Harm and Offence deals with material that may be harmful or offensive to members of the public (which includes those under-eighteen).

We recognise that there is a wide spectrum of opinion on the issue of how broadcast material should be regulated. What may be offensive to one person may be seen as entirely acceptable to another. Although there is general support for a section on harm and offence, there is some concern amongst certain respondents that the draft code lowers standards. Some individuals do not see the need to regulate broadcasts for adult viewing as they believe this audience is capable of deciding what they watch or listen to for themselves.

This section builds on the areas which have previously raised most concerns with the legacy regulators, and the guidance will expand on how Ofcom intends to interpret the complex issues of harm and offence, including the use of audience research to assist in understanding what are “generally accepted standards” in this area.

More detailed comments are addressed below.

II Preamble

(Section 319(2)(f) and (l) of the Act)

The rules in this section are to prevent harm and offence; however, they also have the additional effect of protecting people under the age of eighteen.

III Principles

- **To ensure that broadcasters provide adequate protection for viewers and listeners from the inclusion of harmful or offensive material, judged against generally accepted standards.**

Responses to the Consultation

Generally Accepted Standards

71 respondents to the consultation are against the shift in emphasis to “generally accepted standards”, whereas 194 support the change.

mediawatch-uk is concerned that “generally accepted standards” will be determined by the absence of complaints from the public. It believes that Ofcom ought to do more to involve the public in defining “generally accepted standards”. mediawatch-uk also believes that it is not enough to rely on broadcasters’ interpretation of “adequate protection”.

The Evangelical Alliance questions how the term “generally accepted standards” is arrived at and asks whether this is the same as “the common good” or “the good of society”. The Evangelical Alliance also suggests that the Broadcasting Code meets the Act’s stipulation of “generally accepted standards” but notes that such standards will always be open to subjective interpretation. It asks how objectivity and consistency will be achieved and notes that one group’s “offence” may be another’s “standard”. It argues that the standards espoused by the Judeo Christian heritage are representative, absolute standards to aspire to, with 72% of the population defining themselves as Christian in the 2001 Census. However, it notes the standards of the Ten Commandments might not be the same as “generally accepted standards” in the sense employed in the Communications Act 2003 (“the Act”) and the Broadcasting Code.

The CBC would like to know whether the definition of “generally accepted standards” would match those set out in the Bible and CBC seeks clarification around what is meant by “generally accepted standards”. ITV says that a number of different factors must inform any determination of “generally acceptable standards” and each example must be judged on its context. SMG points out that “generally accepted standards” may vary between different regions. SCBG suggests the Broadcasting Code must reflect evolving consumer expectations and not be overly restrictive in viewer choice, focusing on “generally accepted” TWF Directive standards.

The Churches’ Media Council accepts the concept of “generally accepted standards” but would like to know more about how these would be judged. The Church of Ireland Broadcasting Committee suggests that “generally acceptable standards” is not sufficient and wonders whether “harm and offence” is any less subjective than “taste and decency”. Furthermore, it believes the determination of “potential” harm to be excessively problematic.

The Church of England points out that little information is provided on the mechanism for determining “generally acceptable standards” and suggests a mechanism independent from a broadcasting organisation. The steady rise in complaints to the BSC suggests that broadcasters have been steadily pushing past the public’s perception of “generally accepted standards”.

British Naturism (Eastern Section) believes that many broadcasters use the complaints of vocal minorities to arrive at “generally accepted standards”; objective research is essential. Pressure groups Libertarian Alliance and Libertarian International add that generally accepted standards are nothing more than the opinions of some people. The idea that they should be imposed upon those who disagree with them is utterly at variance with the ideal and practice of free expression.

An individual does not like the phrase “generally accepted standards”, as it will be in a constant state of flux. Another wishes to know how the phrase “generally accepted standards” will be interpreted after the watershed. Seven other individuals ask how Ofcom

will determine generally accepted standards. One individual believes that for Ofcom to judge what are generally accepted standards of decency is another step towards the nanny state.

An individual suggests measuring offensiveness against generally accepted standards is at best misleading and says an “offence” caused by a particular broadcast could be disputed by any media company wishing to protect its interests. The individual fears some organisations may aim to push the boundaries of offensiveness for the sake of publicity.

The BBC suggests that “generally accepted standards” be used creatively, as there are many factors to be taken into consideration.

Ligali believes “generally accepted” is not acceptable as a standard, and suggests the wording: “to ensure that broadcasters provide adequate protection for viewers and listeners from the inclusion of harmful or offensive material, judged against values enshrined in human rights and current British legislation”.

An individual suggests Ofcom might launch a consultation on how the statutory test of “generally accepted standards” ought to be applied.

From “Taste and Decency” to “Harm and Offence”

33 individuals and mediawatch-uk oppose changing the requirement from “offending taste and decency” to a requirement of “protecting from harm and offence”. A further 50 individuals warn of the dangers of replacing “taste and decency” with “harm and offence”. Eighteen individuals believe the proposal to change from “taste and decency” to “harm and offence” will weaken the powers of the Broadcasting Code and lower standards on TV. One individual believes that the principle of “taste and decency” also protects from “harm and offence”, so there is no need for different terms to be used. Six are against “relaxing” the rules and one says the Broadcasting Code should be more prescriptive.

Chrysalis suggests that the move from “taste and decency” to “harm and offence” adds little to the regulatory functions. Two individuals and the Christian Institute believe that changing the definition to “harm and offence” from “taste and decency” will make it harder for people to complain about swearing, sexual content and violence. The Christian Institute also objects to replacing the standard of “taste and decency” with protections from “harm and offence”, saying the latter places a higher burden of proof on complainants and further lowers the standard of what is allowed on TV and radio. One individual claims that it is difficult to know how Ofcom will deal with the element of harm without a clearer definition. Maranatha finds replacing “taste and decency” with “generally accepted standards” totally unsatisfactory.

One individual points out that 115,000 people have now signed the mediamarch 2004 petition.

Ofcom response

We recognise the concern that many respondents express about the change in language in this area of regulation. However, this directly reflects the change in the law as drafted in the Act. The terminology of “harmful and offensive material” and “generally accepted standards” has replaced the previous wording which required that material should not offend against “good taste and decency”.

The term “generally accepted standards” is contained in s319(2)(f) of the Act and this is reflected in the rules. The phrase “harm and offence” is used in section 319(4)(a) of the Act.

We do not believe that a meaning of “generally accepted standards” should be contained within the Broadcasting Code, as it is an issue which is subject to change, and our understanding will be underpinned by on-going audience research.

We do not propose to include a note on the term “harm and offence” in our web-site guidance. The Ofcom complaints bulletins will state which matters have breached the codes in this area and include Ofcom’s reasoning.

IV Rules

Draft Rule 2.1 (now Rule 2.1)

Broadcasters must provide adequate protection for viewers and listeners from the inclusion of harmful or offensive material in television or radio programmes judged against generally accepted standards.

Responses to the Consultation

An individual believes too much tasteless and indecent material is being broadcast already. Another individual points out that the Broadcasting Code is replacing rules that determine that nothing harmful or offensive should be broadcast with rules that justify the broadcast of offensive material.

One individual opposed to changing the old rules states that the present “taste and decency” criteria provide a minimum level of protection. If this is further weakened, society will be flooded with yet further material that will undermine its moral basis. Another individual believes draft Rule 2.1 does not correctly reflect the requirements of section 319(2)(f) of the Act and does not make clear what “judged against generally accepted standards” relates to.

An individual is concerned about how “adequate protection” can be interpreted given that broadcasters are responsible for themselves. Another says that Sky Digital does not currently provide adequate protection and should do so via a PIN system.

Ofwatch says that the application of the draft rule should be considered in context.

Industry organisation Portman Group strongly supports draft Rule 2.1 and suggests that alcohol misuse should not be shown in isolation from its adverse consequences.

Channel 4 and Five have problems with draft Rule 2.1 which they say is just a repeat of an earlier principle (though they support draft Rule 2.3 which, they say, should include harm – see below).

One individual objects to the change from “taste and decency” to “generally accepted standards” because it is easier to count the number of people offended using the standard of taste and decency, but harm can only be measured statistically by looking at trends of behaviour over time: “It is folly to continue to liberalise laws in the name of a spurious right to “freedom of expression” if such “freedom” is, or even may be, detrimental to society as a whole”. Another individual believes the proposed standard is arbitrary and will be impossible to police.

An individual believes that PIN code access with a proper warning would be sufficient protection. Another individual believes that Ofcom should not allow broadcasters to show gratuitous scenes of violence.

ITV accepts this draft rule. S4C describes the draft rule as incontestable, sensible and

proportionate.

Kanal 5 notes that the expectations of audiences in the UK are significantly different from those in Scandinavia and a “one size fits all” approach to programme regulation is not appropriate.

The Melon Farmers do not believe the word “offensive” in draft Rule 2.1 should be coupled with “harmful”, as rules should govern only what is harmful and warnings should cover offence.

The AA believes this draft rule should be more explicit about what the protections should be; if not, the draft rule is unnecessary. The BBC suggests that this draft rule is already stated as a principle and should be deleted. The BBC believes that an amendment to draft Rule 2.3 would cover the intent.

Maranatha believes evidence shows that thousands of children in the UK are being regularly exposed to adult material.

Ofcom response

We have now changed the draft rule to reflect the wording used in the Act. We note the comments about the restatement of the Principle as a rule (this issue is dealt with earlier in the statement).

We will take audience expectation into account in looking at cases where listeners or viewers have complained about harm or offence, this is explained in the introduction to the Broadcasting Code. The meaning of context (see below) also acknowledges audience expectation as a factor when assessing generally accepted standards.

Draft Rule 2.2 (now Rule 2.2)

Factual programmes must respect the truth.

Responses to the Consultation

Two individuals note that factual programmes do not always respect the truth.

ITN recommends deletion of this draft rule, as the matter of accuracy is not appropriate to this section. Capital Radio believes this draft rule should be included in Section Eight: Privacy under “due accuracy”, if at all, asserting that there is no basis in law to require factual programmes to respect the truth. If the point is that untruthful factual programmes may be harmful or offensive, this is caught by draft Rule 2.1 and no separate rule is required. Surely the point is not “respect for the truth” but that broadcasters should not knowingly or recklessly present as facts points which they know to be untrue. Capital Radio also recommends deletion of this draft rule. The CRCA also believes this should be deleted.

The BBC points out that in “Proposed Amendments to the BBC Agreement” the Government stated that the BBC would not be subject to Ofcom codes with respect to requirements of accuracy and impartiality. It believes the draft rule is not in line with this clear policy and should be deleted, and suggests the fundamental standard of truth be moved to the Introduction: “the requirement that broadcasters comply with the law, respect the truth, and respect human dignity are minimum standards set out in accordance with Ofcom’s duties under the Act. They are included in the Broadcasting Code and relate to each standards objective as relevant depending on the nature of the broadcast”.

Channel 4 and Five do not believe this draft rule should be within the section Harm and Offence. They believe there should be a minimum standard that broadcasters respect the truth, but do not believe that it was ever intended to fall under Ofcom’s standards objective section 319(2)(f). They would prefer draft Rule 2.2 to read as follows: “Factual programmes must not materially mislead the viewer in their presentation or their content”.

ITV believes that “respect for truth” should be included in the Introduction to the Broadcasting Code and the draft rule should be amended to “Factual programmes must not materially mislead the viewer”.

MediaWise believes this fits more accurately elsewhere e.g. Section Eight: Privacy. .

S4C would have expected this draft rule to fall within the Due Impartiality and Due Accuracy section.

One individual is concerned about who determines what the truth is.

British Naturism (Eastern Section) believes the treatment of nudity is not accurately reflected nor factually correct in programmes.

Ofcom response

There is no specific objective in the Act that requires accuracy in programmes (other than news). Ofcom therefore has no jurisdiction to regulate programmes (other than news) for accuracy per se. Nevertheless, Ofcom considers that a rule requiring broadcasters not to mislead their audience when dealing with factual matters is essential in regulatory terms – it has been a longstanding and fundamental requirement.

We acknowledge that the regulation of “respect for the truth” as set out in the draft rule, in the harm and offence section of the draft code, would be better expressed in terms of ensuring that audiences are not misled. Therefore, following further consideration, the rule has been amended to require that:

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

(Note to Rule 2.2: News is regulated under Section Five: Due Impartiality, Due Accuracy and Undue Prominence of Views and Opinions of the Broadcasting Code)”

This rule is necessary to prevent potential or actual harm and/or offence and as such all broadcasters must comply with this rule. (Further guidance will be given on the relationship between misleading material and harm and offence).

Furthermore, it is important to note that misleading material in itself is not regulated by Ofcom. It is only relevant in this section where it is considered to be material rather than incidental.

Draft Rule 2.3 (now Rule 2.3)

The use of potentially offensive language and material – in particular, the inclusion of scenes of violence or sex, or scenes of humiliation, distress or the use of discriminatory treatment or language or scenes of graphic sexual violence – must be justified by the context, and information included where it might assist in preventing offence.

Meaning of “context”:

Context is used to denote, among other things, the matters referred to in section 319(4)(a),(b),(c) and (d) of the Communications Act which can be found in the introduction to this code. Those matters are: the degree of harm or offence caused by the inclusion of a particular sort of material, the likely size and composition of the audience, the likely expectation of the audience, the extent to which content can be brought to the attention of the audience, e.g., by the giving of information, and the effect of the material on somebody who views or hears it by chance. Context also includes the service, the time of transmission, what other programmes are scheduled before and after the programme concerned, whether the programme is a one off or part of a series as well as the editorial content of the programme. This list is not exhaustive. Context will also be applied to harmful and offensive material in 2.1.

Responses to the Consultation

Two individuals say that no context can justify offensive scenes of violence and sex. Another agrees, with the one exception of news type programmes. Another individual says this gives programme makers too much scope to “justify” the types of scenes listed. A faint marking in a corner of the screen indicating contentious content might help this particular problem. A further individual believes it is an excuse that explicit language and body exposure is needed in order to give a realistic reflection of life.

The OCR believes that the potential impact of the material on the casual listener/viewer is particularly crucial.

ITN believes the test of “potential” to be far too restrictive and recommends that the test should be “language and material likely to cause offence”. Capital Radio also considers the use of the word “potentially” to be over regulatory and disproportionate. “Scenes” is a visual term and can be deleted without losing the sense of what is intended.

Capital Radio asks why “graphic sexual violence” is differentiated from “violence”. The phrase “information included” is also unclear; in the event of a complaint, failure to give a warning could in itself be held as a breach of the rule, even if the substance of the complaint was not in itself considered to be a breach. It recommends that the draft rule be rephrased to read: “The use of offensive language and material – in particular, the inclusion of violence or sex, or humiliation, distress or the use of discriminatory treatment or language – must be justified by the context”.

The BBC suggests the following revision: “Broadcasters must ensure that the use of material which may cause offence, as judged by generally accepted standards, is justified by context and appropriately labelled”.

Chrysalis suggests this need not apply to stunts or competitions; it believes “potentially” is not a helpful qualifier here. Emap thinks that this draft rule relates solely to TV. If this is to apply to radio, the CRCA suggests deleting the words “potentially”, “scenes” and “graphic sexual violence”.

One individual objects to the amount of bad language, particularly using “Jesus Christ” as a swear word, even if it is beeped out. The fact that other religions would not tolerate such “blasphemy” towards their religion makes this individual think the acceptance of such “blasphemy” toward Christ is discrimination towards the Christian religion. Another individual believes strongly with this draft rule’s underlying message that such broadcasts are acceptable provided due care is taken.

Another individual contradicts the statement that draft Rule 2.3 covers treatment of religious views and beliefs, and argues that in its proposed form this rule seems too limp to be of any use.

Ligali believes this is vague and should include explicit reference to racism.

One individual believes the subjectivity of the term “graphic” may impair the transparency of this draft rule in its regulatory impact and may give rise to interpretative disputes or unfair criticism of Ofcom where it is perceived as failing to enforce the Broadcasting Code. This individual suggests the omission of the term.

ITV believes that “potentially offensive” is too wide a test and it is more reasonable to aim to minimise or avoid offence, rather than prevent it. Hence, they would like the draft rule to be amended to: “The use of language and material likely to cause offence – in particular, the inclusion of scenes of violence of sex, or scenes of humiliation, distress or the use of discriminatory treatment or language or scenes or graphic sexual violence – must be justified by the context, and information included where it might minimise offence”.

Channel 4 and Five support draft Rule 2.3, but (as mentioned above) have problems with draft Rule 2.1, which they say is just a repeat of an earlier principle. They advocate that harm is added to draft Rule 2.3 so that it reads: “the use of potentially harmful or offensive language or material where it might assist in preventing harm or offence”.

Ofcom response

We agree that the use of the phrase “potentially offensive” in this specific context is not appropriate and this draft rule has been redrafted. To enable the rule to apply harmoniously across both television and radio services, we have removed any references to “scenes”. We have also included the phrase “generally accepted standards” as it is the standard referred to in the Act.

Appropriate information can assist in avoiding or minimising offence and when this is the case, broadcasters should give it. We have therefore retained this part of the draft rule but amended it to remove its mandatory nature.

Research indicates that members of the public can be adequately protected from potentially offensive material if it is editorially justified and appropriate information given – in this case these are “generally accepted standards”. We do not agree that post-watershed viewers do not need such information. Research shows that viewers appreciate information which assists them in reaching a decision on whether to view or listen.

As this rule deals with “offence” rather than “harm”, we have given examples, which are not an exhaustive list, of issues that may cause offence. In doing so, we have reflected the comments received from Ligali, CRE and other bodies to embrace discrimination issues. We have, therefore, incorporated the six areas of equality which are or will be subject to legislation.

We have simplified the definition of “context” to aid clarity in line with the Act and as a result of submissions and in particular ITV’s.

Draft Rule 2.4 (now Rule 2.4)

Programmes must avoid anything that individually, and/or taken as a whole and in context, is likely to encourage violent, dangerous or seriously antisocial behaviour.

Responses to the Consultation

The charity RoSPA supports the draft rule, saying stunt programmes seem to be on the increase, encouraging irresponsible behaviour.

The BBC argues that this needs to draw a distinction between encouraging behaviour likely to lead to illegal acts and behaviour not generally approved of by the majority. It suggests that broadcasters should be able to broadcast material that reflects contemporary British society, and that this rule be redrafted or deleted.

Capital Radio believes this draft rule can be deleted, as it is covered by draft Rule 3.1 (which states that. “Material likely to encourage or incite crime, or likely to lead to disorder” must not be broadcast). It also regards note 12 on page 26 of the consultation as inferring that films such as ... If ... or Borstal Boy would be unacceptable. Context must be considered when assessing material of this nature. The CRCA also believes this draft rule is identical to draft Rule 3.1 and should be deleted. Channel 4 and Five agree that the draft rule is framed too widely and that draft Rule 3.1 adequately deals with this requirement.

An individual feels that persistently repeated examples of moderate violence, sex and antisocial behaviour have a harmful effect over time, and that free to air promotion of pornographic channels should be banned.

S4C is concerned about this draft rule as it does not offer examples and therefore would welcome guidance.

Industry organisation Portman Group strongly supports the proposed new Rule 2.4, suggesting that alcohol misuse should not be shown in isolation of its adverse consequences.

Emap thinks that this draft rule should be extended to include material that may incite racial hatred.

An individual wants the definition changed from “must avoid anything” to “must not include anything”. Another individual believes there is clear cut evidence that the casual use of “blasphemous” language breeds violence. Another believes this draft rule does not go far enough and that it should not be limited to “serious” antisocial behaviour.

Maranatha points out that many children have TVs in their bedrooms and access to late night programmes. SCBG thinks this draft rule is ill targeted and does not give viewers credit for managing their choices.

Ligali believes this fails to protect against stereotyping by repetition and suggests the wording: “Programmes, programme series and repeated themed programming must avoid anything that individually, and/or taken as a whole and in context, is likely to encourage violent, dangerous or seriously anti social behaviour”.

ITV believes that this draft rule could seriously restrict broadcasters’ ability to reflect any aspects of contemporary society and would like this draft rule to be amended to: “Programmes must avoid condoning or glamorising violent, dangerous or seriously antisocial behaviour, or be likely to encourage others to copy such behaviour, when taken as a whole and in context”.

Ofcom response

This rule has now been re-drafted. We believe the addition of the word “context” and giving a meaning to context will allow challenging material to be broadcast. However, the treatment is important and, as suggested by ITV, we have broadened the rule to explain where broadcasters should take care in not just avoiding copycat behaviour, but also avoiding condoning or glamorising it. We note that some respondents believe that the draft rule in Section Three: Crime is sufficient in this area. However, where the treatment of this type of behaviour runs contrary to this rule, it would not necessarily be caught by the rule in Section Three: Crime which is concerned with inciting crime or disorder.

We have not extended this rule to include incitement to racial hatred as that is in itself a crime and would be caught under Section Three: Crime.

We believe this rule regarding the condoning or glamorising and encouragement of seriously anti-social behaviour is proportionate. We believe that it would not be considered a generally accepted standard to permit broadcasters to transmit material that encouraged seriously anti-social behaviour.

Draft Rule 2.5 (now Rule 2.5)

The means or methods of suicide and self harm must not be included in programmes except where the context, scheduling and likely audience can justify them.

Responses to the Consultation

Capital Radio recommends that this draft rule be deleted, as it is covered by draft Rule 2.1 on harm. The CRCA says that this should be guidance under draft Rule 2.1. ITV also believes that this draft rule should be deleted. The BBC points out that there is value in children being able to discuss self harming behaviour and that programmes addressing these issues may help raise awareness and support. It suggests the draft rule be moved to guidance. Channel 4 and Five believe this draft rule is framed too widely and would be improved if it read: “the detailed means or methods of suicide”.

Two individuals raise concerns about copycat behaviour. Another individual disagrees with the policy of “provided due care is taken”. Another individual says that the population does not need lessons in suicide.

MediaWise welcomes this guidance.

Ofcom response

We understand that some broadcasters believe that draft Rule 2.1 is sufficient to cover the issue of suicide and self harm (as well as a number of other rules as set out in the draft section). However, whilst a causal link has never been conclusive, it is an area that needs special care and we believe it should remain as a discrete rule. As we explained in our consultation document on the proposed Ofcom Broadcasting Code: “Whilst it is always difficult to prove causality a study found that portrayal of self poisoning in a popular television drama (Casualty) was associated with a short lived increase in presentation of self poisoning patients to general hospitals. (Hawton et al 1999, British Medical Journal). Another study, The Werther effect after television films (Schmidtke A, Hafner H, Psychological Medicine 1988) studied the effect of a twice-broadcast (1981, 1982) six-episode weekly serial showing the railway suicide of a 19-year-old male student. Over extended periods (up to 70 days after

the first episode), the number of railway suicides increased.”

We have re-drafted the rule to reflect this concern. As framed, we do not believe that it prohibits the discussion or portrayal of suicide or self-harm in programmes, which can assist in greater understanding of these issues.

Draft Rule 2.6 (now Rules 2.6, 2.7 and 2.8)

Demonstrations of exorcism, the occult, the paranormal, divination and related practices must be treated with due objectivity. Entertainment programmes that contain such demonstrations must be clearly labelled as such for the audience. No potentially life changing advice may be given. (Religious programmes are exempted from the rule about life-changing advice but must, in any event, comply with the provisions in the section regarding religious programmes in this code.) (Please also note the scheduling restrictions contained in Section One: Protecting the Under-Eighteens of this code.) Films, dramas and fiction generally are not bound by this rule.

Meaning of “life-changing”:

Life-changing advice includes advice about health, finances, employment, relationships etc.

Responses to the Consultation

Two individuals say the paranormal should not be broadcast within programmes for children. Another asks if thought could be given to reducing the violent and occult aspects of many films. Another individual believes the exclusion of films, dramas and fiction drives a coach and horses through this draft rule. A further individual states that lumping astrology together with anything which causes “harm and offence”, and treating it the same as violence on TV and radio is offensive.

United Christian Broadcasters believes there should be a more general ban on the portrayal of occult practices in the media. It believes that, as religious broadcasters, they are better equipped to deal with occult practices, exorcism and the paranormal and would ensure that appropriate safeguards and warnings were in place.

Emap complains that this draft rule seems to prevent them from broadcasting horoscopes.

The AA believes the range of activities covered is too wide and unjustified by public research findings. It says that occult, paranormal, divination and related practices are not necessarily harmful. The AA provides this wording for draft Rule 2.6: “Demonstrations and attempts to possess, manipulate, emotionally exploit, harm and ridicule people by any real, or imagined means must be treated with due objectivity. Entertainment programmes that contain such demonstrations must be clearly labelled as such for the audience (Please note the scheduling restrictions contained in Section One: Protecting the Under-Eighteens of this code). Films, dramas and fiction generally are not bound by this rule. No specific potentially life changing advice should be given, except by people with recognised qualifications and bona fides to do so. It should be offered with due objectivity.

Religious programmes are exempted from this rule but must, in any event, comply with the provisions in the section regarding religious programmes in this code.”

Capital Radio believes that “the occult” and “paranormal” need to be clearly defined. As written, it would catch tarot and horoscopes. It also thinks the prohibition on “life changing advice” is too wide and could prevent agony aunts and radio doctors from giving advice. It

recommends the deletion of this draft rule on “life-changing advice” and the inclusion in guidance of the practices intended to be caught by the rules. The BBC suggests that “occult” and “paranormal” are too open to very wide interpretation to be of use, and calls for further research to determine if there is need for regulation.

Chrysalis is also concerned that this may prevent callers for advice in dial in shows. Capital Radio considers that the definition of “life changing” is not clear as it ends with “etc”.

The CRCA believes broadcast horoscopes should be exempt and would suggest a change to the wording as follows: “Entertainment programmes that contain such demonstrations must be clearly labelled as such for the audience and may not include the giving of any potentially life changing advice”.

SCBG believes there should be no requirement to label such programming after the watershed. Channel 4 and Five can see no legitimate reason for this prohibition.

S4C approves of the draft rule but believes that the commentary in point 18 in the background notes could be incorporated into this rule.

The Secular Society recommends the replacement of draft Rule 2.6 by the stronger ITC Code’s “Actual demonstrations of exorcisms and occult practices, such as those involving the purported invocation of unknown spirits of the dead or negative forces, are not acceptable in non fictional programming except in the context of a legitimate investigation. They should not, in any case, be shown before the watershed, as it is “dangerous for TV to give credence to this practice”.

The BHA thinks the draft rules about paranormal programming are not proportionate to the need and that the existing rules should be substantially retained.

Ofcom response

Section One: Protecting the Under-Eighteens provides protection for children where this kind of material is concerned and regulates these areas pre-watershed (Rule 1.19 in the Broadcasting Code).

This draft rule has now been amended creating three separate rules for clarity.

We believe that people are able to differentiate between purported fact and fictional occult material as represented in films and dramas (and therefore these genres are not covered by these rules).

We will provide guidance in relation to the practices outlined and where astrology fits within those practices. The ITC/BSC research Beyond Entertainment (BE, November 2001) is still the most comprehensive material available in this specific area.

The rules do not prevent the broadcasting of horoscopes (please see guidance).

We note the concerns that such matters should only be dealt with via specialised religious programming. However the right to freedom of expression and the needs of a pluralist society means that paranormal matters, which may have a wide range of adherents, with an extensive variety of world-views, should not be confined to programming offering a specific perspective.

We recognise that by no means all “paranormal” (in its broadest sense) practices are

“harmful”.

The reference to labelling has been removed in favour of a requirement that the purposes of such broadcasts must be made clear to the audience so that it is able to take an informed and objective view of the material. We recognise that broadcasters run the risk of creating a normalising environment for certain of these practices, which gives cause for concern to some. (BE p15).

BE makes clear that even at the level of “generally accepted standards”, let alone the potential for harm in susceptible and vulnerable audiences, there is significant concern over this material. For example, 44% of respondents considered tarot to be an occult (and therefore negative) practice (BE p15). Some material given as background in the consultation on the draft code related to this area and will be incorporated into web-based guidance.

We believe that the rules as now revised are proportionate in that they create an appropriate balance between freedom of expression and belief and the protection of the susceptible and vulnerable from harm. In short, they require that if the purpose of the programme is for entertainment purposes, then this must be made clear to the audience. If demonstrations purport to be real, then they must be presented with due objectivity. In any event, the Broadcasting Code prohibits all such demonstrations from giving “life changing advice” (we also give a meaning of “life changing”).

Draft Rule 2.7 (now Rule 2.9)

Broadcasters must prevent hypnosis being induced in susceptible viewers and listeners.

Responses to the Consultation

Capital Radio maintains that it is impossible for broadcasters to comply with this draft rule as written and Ofcom should be clearer about what it is intending to prevent. If there is clear evidence that listeners can be hypnotised over the radio, the draft rule should prohibit broadcasting the act of hypnotism on air, but otherwise the rule should be deleted.

The Evangelical Alliance, CBC, Maranatha and five individuals support the inclusion of draft Rule 2.7 if hypnosis is shown to potentially cause harm. Emap believes the only way to safeguard viewers and listeners is to ban hypnosis altogether.

The CRCA wonders whether Ofcom believes draft Rule 2.7 is achievable.

The BBC does not find this draft rule necessary as it is covered by the Hypnotism Act 1952 and it is not aware of evidence that broadcasts may induce hypnosis. It believes this should be moved to guidance. The BBC suggests that Ofcom seek expert opinion on the effect of hypnotism through broadcasting.

SCBG believes this draft rule is self evident and already covered under draft Rule 2.1. ITV also believes this draft rule should be deleted. Ofwatch believes that this draft rule is unnecessary as there is no evidence of harm. S4C believes this draft rule is harsh and disproportionate given the lack of evidence.

The Catholic Bishops’ Conference of England and Wales agrees that this draft rule is currently sufficient.

An individual says that hypnosis should not be used on broadcast media where the hypnotiser cannot monitor the state of the individual. Another individual thinks it should be a

criminal offence to attempt to hypnotise a TV audience. Another individual supports this provided there is evidence of harm.

Another individual does not see how hypnosis would be harmless. Another individual believes that allowing hypnosis could encourage viewers to experiment. Churches' Media Council thinks the draft rule is sufficient unless evidence of harm is found. The Church of England recommends a precautionary approach given the potential harm and loss of dignity hypnosis could cause.

Trustar wishes to encourage standardisation of UK standards with those of EU partners.

The AA suggests this be moved to guidance as it is covered by draft Rule 2.9. Channel 4 and Five can see no reason for this draft rule given that there is no evidence to show that hypnosis can be transmitted via the TV. ITV does not see a need for a rule on hypnosis. Campaigning organisation Campaign against Censorship says a rule on hypnosis should not be included. S4C would prefer no rule on hypnosis as they are not aware of any harm caused from previous broadcasts.

Ofcom response

Our consultation asked respondents to supply evidence that the broadcasting of hypnotists' techniques were either harmful or not harmful. None of them were able to supply this.

From enquiries made of professionals able to advise on the adverse effects of hypnotism, it would appear that the risks of people being hypnotised by chance in a kind of "overspill" reaction to such material being broadcast is minimal but nonetheless possible. The possibility that the susceptible and vulnerable could be harmed by some direct attempt to hypnotise members of the public through programming still remains as it is possible that the mere act of taking part in an attempt to hypnotise viewers or listeners might result in vulnerable viewers or listeners believing they have been hypnotised. As hypnotism lifts inhibitions the effect on a viewer or listener who believed they had been hypnotised could be harmful. There have also been television documentaries which have charted the allegedly harmful effects on audience members of stage hypnotism.

For this reason, we have concluded that a rule offering protection from demonstrations of hypnotic practices aimed directly at the television or radio audience should remain. However, this rule has been re-drafted, in light of representations, giving clearer detail on how this requirement should actually be achieved.

In the longer term, we will consider the suggestion made by the BBC to set up a working party with medical experts to determine whether this risk is significant. Reference to legislation in this area will also be included in the guidance.

Draft Rule 2.8 (now Rule 1.20)

No version of a film or programme refused certification by the British Board of Film Classification (BBFC) may be broadcast.

Responses to the Consultation

Religious organisations, mediawatch-uk and the Cornwall Community Standards Association believe the prohibition should remain. If films are unsuitable for the cinema and home viewing, then it is anomalous to make them available through television to an even wider audience, potentially including children. Ligali agrees with the prohibition, but suggests creating an independent public stakeholder group to meet quarterly to discuss these issues.

Two individuals say the draft rule should be kept but raise the issue of whether Ofcom should rely on the BBFC for 12, 15 and 18 classifications for more normal films.

Another individual says that any legal film should be allowed to be shown at least on an encrypted subscription channel. An individual believes the BBFC has lost all sight of objectivity in its decisions and should not be used as a yardstick by which all material can be judged.

One individual believes classification as currently handled by the BBFC is the best way to deal with this. Another individual believes this draft rule should be removed, as there are many reasons, some of which may not be relevant to TV, why certification has been refused. Another individual believes that unrated material should not be allowed, though this may lead to indirect censorship through changes in ratings levels. A third individual says that the BBFC has not been known for moving with the times or public opinion. Perhaps under the Ofcom proposals film makers, producers and broadcasters will be better placed to judge classifications.

Channel 4 and Five believe that the BBFC should only be referred to in order to provide guidance. ITV believes that this draft rule should be deleted. Ofwatch believes that this draft rule is unnecessary. The BBC would like further guidance on this draft rule and recommends this be rewritten as follows: "Broadcasters must not normally broadcast a film or programme, or illustrative clips from a film or programme, refused certification by the BBFC without clear editorial justification".

The BBFC is concerned that scheduling decisions may be arrived at through ignorance of the BBFC system and in clear conflict of the Video Recordings Act or Licensing Act. In their view, broadcasters have a general duty to take all reasonable steps to ensure that they support this legislation and the removal of this draft rule may have the effect of undermining the intentions of Parliament in passing cinema and video legislation.

Question 5h: *Should there be a prohibition on the transmission of films, videos and DVDs refused a BBFC certificate. If not should there be any rule and if so what rule?*

Responses to the Consultation

No prohibition on transmission

Seven individuals do not believe that material refused a BBFC certificate should be prohibited from transmission on TV. Two individuals agree that prohibition of material refused a BBFC certificate would rule out films suitable for viewing, including foreign art films. Three individuals point out that classifications change over time; a film banned in the 1980s might be perfectly acceptable today. Two other individuals believe that broadcasters are better able to judge these matters than the BBFC. Another individual points out that prohibition would render much of what we already watch illegal.

One individual suggests that prohibition is unnecessary, as live broadcasts do not require BBFC approval; however, consumers should be told whether the broadcast has been categorised. Another individual believes that with PIN access no further regulation is necessary.

An individual asserts that there should be no prohibition, because the BBFC have seen the evidence that there is no harm from this material and "continue to ban harmless, even helpful material". Also, reliance on the BBFC would undermine broadcasters' freedom to interpret the new Broadcasting Code as intended.

Another individual believes there should not be a prohibition on the transmission of films, videos and DVDs refused a BBFC certificate, as there are reasons other than illegality of material which result in refusal of BBFC certificates. Also, material which had historically been refused a certificate may now be perfectly suitable for broadcast, though it had not been resubmitted for BBFC certification.

An individual says that there should be no such rule because the broadcasters could be expected to only broadcast such material on appropriate channels at suitable times, and because many such films would not now be banned if they were submitted under the current regulations.

Campaigning organisation Campaign against Censorship says there should be no prohibition. Classification by the BBFC is expensive and therefore disproportionate for a single TV transmission.

One individual thinks there should not be a prohibition on such materials as attitudes change and it may no longer be suitable; scheduling and the channel should be important factors in considering whether the material breaks Ofcom rules regarding harm and offence.

SCBG does not support prohibition of material refused a BBFC certificate and suggests the decision be left to broadcasters. The Melon Farmers feels films not given a BBFC certificate should be reconsidered.

Channel 4 and Five believe that there should not be a prohibition on films refused a BBFC certification as the broadcaster can best decide what should be broadcast and can edit appropriately. ITV agrees that there should not be blanket prohibition. Ofwatch believes that there should be no such rule. Discovery Networks Europe believes that this area is already catered for in draft Rules 1.1 and 2.1.

The BBC does not believe there should be a blanket prohibition on the transmission of films refused a BBFC certificate, as these refusals may not be up to date with standards and may exclude worthwhile art or foreign films; it recommends rewriting the rule with an “editorial justification” exception. XplicitXXX does not think the BBFC should be involved because many of their decisions could be out of date, particularly with reference to R18 material.

Prohibition should remain

Seven individuals believe that films refused BBFC certification should continue to be barred. One individual thinks there should be a prohibition on the transmission of films refused a BBFC certificate providing the R18 classification remains and film makers, producers and broadcasters are able to challenge BBFC rulings. Another individual states: “If material has been deemed unsuitable for classification for cinema or home video viewing, it would be anomalous to make it available to an even wider audience, potentially including children, by broadcasting it”.

The Catholic Bishops’ Conference of England and Wales and S4C believe that material refused BBFC certification should not be transmitted. The Church of England believes there needs to be a distinction between what is transmitted into the home for all to see and that which people choose to see outside the home.

The Cornwall Community Standards Association says there should be a prohibition. It notes that the BBFC is financed by, and only concerned with, the film industry, whereas Ofcom’s responsibilities are wider and encompass the common good and Ofcom is answerable to Parliament.

The Churches' Media Council, Evangelical Alliance, CBC, Maranatha and mediawatch-uk believe that there should be a prohibition on films refused a BBFC certification. The Evangelical Alliance notes that a BBFC spokesperson at a Westminster Media Forum (15 September 2004) said pornographic material presented to the BBFC moves quickly from sexual acts to physical abuse and violence and the Evangelical Alliance is against the broadcasting of such material.

AA believes that material refused a BBFC certificate is generally not suited for transmission in its entirety, but suggests guidance for films not covered by BBFC such as films made abroad or homemade films.

Ligali believes there should be a prohibition but that Ofcom, BBFC, Video & Film and an independent public stakeholder group should create a body to meet quarterly to discuss these issues.

Ofcom response

This draft rule has now been moved to Section One: Protecting the Under-Eighteens (Rule 1.20). We appreciate the arguments put forward by all parties. As we explained in our consultation document, it is accepted that broadcasters make difficult and complex scheduling decisions about content on a daily basis and there is, in principle, no reason why films should be any different.

We accept the BBFC's representation that allowing the broadcast of films refused a certificate could undermine Parliament's intention in legislating for a classification system. However, we are also aware that there are versions of films that were rejected for classification years ago, but would now, under current standards, be acceptable. In re-drafting the new Rule 1.20, we have aimed to strike an appropriate and proportionate balance between these two arguments and requested that broadcasters should obtain confirmation from the BBFC, before broadcast, that the material would not now be subject to compulsory cuts or classification refusal.

Draft Rule 2.9 (now Rule 2.12)

Programmes must not use techniques which exploit the possibility of conveying a message to viewers or listeners, or of otherwise influencing their minds, without their being aware, or fully aware, of what has occurred.

Responses to the Consultation

ITV would amend the beginning of the sentence to read: "No broadcaster may use..."

Ofcom response

The draft rule has been amended to reflect ITV's comments.

Draft Rule 2.10 (now Rule 2.13)

Television broadcasters must minimise the risk to viewers who have photosensitive epilepsy.

Responses to the Consultation

Professor Graham Harding notes that the UK experiences very few complaints in this area. However he suggests that Ofcom could reduce the restrictions on patterns without incurring a higher level of risk. Current guidelines restrict patterns of five patterns and above.

Professor Harding proposes altering the guidelines on patterns restrictions as follows: If the pairs of bars change direction, oscillate or flash or reverse the current restriction would apply, however, if stationary the screen could show no more than eight pairs. If they move smoothly across, into or out of the screen then the broadcaster could show no more than 12 pairs. He also suggests that patterns should have to be on screen for at least 0.5 seconds to contravene Guidelines. Epilepsy Action supports Professor Harding's proposals.

The BBC asked if it would be possible to use an on-air warning in some circumstances. It suggested that Ofcom should differentiate between pre-edited material that can be subjected to testing and edited and news coverage of editorial importance.

Channel 4 and Five do not think that it is appropriate to include draft Rule 2.10 in the Broadcasting Code and stated that Ofcom should review the current rules to make sure they are not applied unnecessarily. Channel 4 and Five also suggest that the draft rule should allow some latitude to warn viewers when a programme might contain flashing images.

The RNIB states that it would be concerned if there was any change in the current level of protection.

Trustar Global Media state that Ofcom should allow broadcasters to label acquired material containing flashing images when it was broadcast on channels which attract a predominately adult audience who should already be aware of any susceptibility.

ITN suggests that Ofcom should review this rule in due course and should consider regulations in other EU countries. In the meantime ITN feels that the Broadcasting Code should allow for the fact that warnings may be appropriate.

ITV writes that it would like to see allowance for warnings when flashing content is unavoidable and editorially justified.

Discovery Networks Europe believes that technical interventions should be focussed on programmes targeting younger viewers. They maintain that for those who are already aware of their susceptibility it is reasonable to expect them to take note of pre-programme warnings and EPG information.

Question 5i: *Can a lesser level of technical intervention achieve the same protection for those with photosensitive epilepsy?*

Responses to the Consultation

We have received substantive responses from Epilepsy Action, two confidential respondents and from responses from private individuals.

The charity Epilepsy Action states that it is essential to protect people with photosensitive epilepsy and is concerned that Section Five: Due Impartiality, Due Accuracy and Undue Prominence of Views and Opinions on potentially harmful regular patterns has not been adopted.

Professor GFA Harding, Professor of Clinical Neurophysiology, Aston University, says that the guidelines in section three of the annex have been accepted unequivocally by the International Telecommunications Union, but not section five of the annex. Section 5 of the annex should be amended to reflect new research described.

Professor Harding notes that a paper is being prepared for publication by Professor Arnold

Wilkins, Dr John Emmett and Professor Harding which recommends changes in these restrictions. “This paper is based on experimental studies of our patients and we propose that the same low level of risk could be achieved with reduced restrictions. In summary, this would be that if the pairs of bars change direction, oscillate, or flash or reverse, the current restriction of five light/dark pairs of bars would apply. However, if the stripes are stationary the screen should show no more than eight pairs of bars. In addition, if all the stripes obviously move smoothly across into or out of the screen then the screen should show no more than twelve pairs of bars. Also, the stimulus has to be present for at least 0.5 of a second to contravene the Guidelines. I am sure that the application of this restriction would ease the problems of the broadcast industry in showing natural phenomena such as railings, balconies, colonnades, and Venetian blinds.”

SCBG agrees that more research needs to be done to determine the risk, but thinks the draft rule should allow broadcasters to provide warnings before broadcasting material containing flashing images. An individual suggests this is a matter for those who better understand the problems of photosensitive epilepsy.

Trustar believes the rule should allow broadcasters to label acquired material containing flash photography or flashing images. Discovery Networks Europe says that flashing images affect young people more and so any regulation should be directed more towards that kind of programming. Charity RNIB says it would be concerned by any change in the protection of those affected by flashing images, rapid cutting, etc. These would have to be supported by comprehensive, user led, research that clearly demonstrated they were not detrimental. Verbal warnings should be given when there is any chance of the TV screen having an adverse effect on viewers.

Cambridge Research Systems notes that this question implies a technical burden must be imposed on broadcasters to ensure that photosensitive individuals are protected. It notes that the use of the Harding FPA Flash and Pattern Analyser automatically analyses video and allows video to be checked in real time prior to transmission.

An individual believes the existing guidance seems wise.

Channel 4 and Five believe that this should not be included in draft Rule 2.10 as research is continuing as to its effect and is being dealt with by the technical matters best dealt with between the engineering departments of the broadcasters and Ofcom. ITV would like Ofcom to initiate more research in this area. The BBC again suggests that this requires “input from UK experts in the field”.

The Churches’ Media Council does not know of any lesser technology that would afford the existing protection for those with epilepsy. An individual does not know if there are possible technological improvements, but asks whether the current onscreen/verbal warnings are not sufficient. Another individual suggests a warning before programme transmission as well. The Evangelical Alliance and CBC support the proposed annex 8 to these codes on flashing images. The Evangelical Alliance suggests the continued use of the ICT guidance notes. Maranatha believes ITC guidance should apply.

Ofcom response

The guidelines on the use of flashing images and patterns published in the consultation are based on the most up-to-date research. As such, Ofcom does not believe that it would be appropriate to alter them without new evidence. In the event that new research is undertaken into this area Ofcom will review the guidelines as appropriate.

Ofcom acknowledges that in some specific circumstances (e.g. news stories) it may not be practical or possible for broadcasters to edit out flashing images or patterns that may trigger photo sensitive epilepsy. The legacy (ITC) guidelines allowed for the use of an appropriate warning at the start of a programme or programme item where there was a difficulty minimising the effect of flashing images and/or patterns.

Therefore, Ofcom has amended the rule to allow the transmission of material containing flashing images/and or patterns where editorially justified and where viewers are given an appropriate warning. Further details on the definition of editorial justification and on the form such a warning should take will be outlined in guidance.

Questions

Responses to questions 5a, 5b, 5c, 5h and 5i have been incorporated into the section above where the relevant rule is under discussion. Responses to questions 5d, 5e, 5f and 5g regarding R18s and adult sex material follow this section.

V Proposed New Rules

Responses to the Consultation

Maranatha cites last year's survey by the Broadcasting Standards Commission in which 40% of viewers said they had been offended by screened material and 56% complained about language.

SCBG points out that fewer than 50 programmes broadcast in 2002 were found to have breached Programme and Sponsorship Codes.

mediawatch-uk notes the late BBFC Director James Ferman's comments in the Sunday Telegraph: "Inevitably, if you go on seeing sex and violence year after year, you get used to it". mediawatch-uk also cites two studies by Jeffrey Johnson and Worchel that prove that poor behaviour on TV can lead to this being replicated in real life.

An individual is concerned that Parliament did not anticipate the possible religious implications of programmes of a largely or ostensibly non religious nature. This individual suggests adding a further rule or gloss to Section Two: Harm and Offence and Section Three: Crime to the effect that in relation to any religious references or material these sections will be interpreted in the light of Section Four: Religion.

Ofcom response

We know from annual research into audience attitudes that viewers are concerned about standards on television and radio. However, this represents a minority of viewers and listeners and the figure is lower still for those who can recall a specific incident that was offensive. We know that this is a cause for concern for a significant minority of the audience and we will continue, therefore, to research this area and examine any research studies which look at a causal relationship between behaviour and material on television and radio. Relevant research will be contained in the Guidance Notes. This section aims to give audiences the tools to understand better the content they receive and make informed choices about what they listen to and view.

We have added a reference to religion in the rule concerning offensive material.

We have moved two rules into this section – one regarding competition that was previously

in Section Ten: Commercial References and Other Matters (now Rule 2.11, originally draft Rule 10.11) and the other regarding Simulated News (Rule 2.10, originally draft Rule 5.5). Representations on these rules and Ofcom’s responses are contained in the sections they were originally consulted on.

R18 Material and its equivalent

I General Summary of Responses

Responses to the Consultation

We have received substantive responses from the BBC, ITV, Channel 4 and Five, ITN, Trustar, Kanal 5, Discovery Networks Europe, NTL, S4C, Chrysalis Radio, Capital Radio, Cross Rhythms City Radio, Commercial Radio Companies Association (CRCA), Scottish Media Group (SMG), Portman Group, Cambridge Research Systems, UK Film Council and the British Film Institute, Ofwatch, Campaign against Censorship (CAC), Sexual Freedom Coalition, Centre for Justice and Liberty, Royal Society for the Prevention of Accidents (RoSPA), Royal National Institute of the Blind (RNIB), Emap, XplicitXXX, Adult Industry Trade Association, Cornwall Community Standards Association, mediawatch-uk, MediaWise, **mediamarch**, Melon Farmers, British Naturism (Eastern Section), National Secular Society, Astrological Association of Great Britain (AA), Office of the Chief Rabbi (OCR), Christian Broadcasting Council (CBC), United Christian Broadcasters, Christian Institute, Catholic Bishops' Conference of England and Wales, Satellite and Cable Broadcasters (SCBG), British Humanist Association (BHA), British Board of Film Classification (BBFC), Ligali, Church of England, Church of Ireland Broadcasting Committee, Churches' Media Council, Evangelical Alliance, Libertarian Alliance and Libertarian International and Maranatha Community. There were seven confidential responses. We also received responses from private individuals.

General Comments

An individual believes the principles, rules and meanings are consistent except for Ofcom recommendations regarding R18 material or its equivalent ("R18"). One individual believes the principles, rules and meanings are acceptable and notes that small but vocal minorities disproportionately affect a sizeable proportion of the viewing audience.

An individual believes the minimum standards relating to broadcasters complying with the law and respecting human dignity should be repeated explicitly in the rules. Another argues that the minimum standard relating to respecting human dignity should mean a complete prohibition of not only R18 material, but also of "adult" sex material.

R18 Material and under-eighteens

Campaigning organisation Campaign against Censorship says protection of minors should be restricted to non subscription TV. As an evidence based regulator, one individual believes that Ofcom must allow R18 material, considering the lack of evidence of R18 material causing harm. An individual notes that protection of the young should not stop adults from being able to watch what they want on subscription channels. An individual thinks that if R18 were allowed on satellite subscription it would be safer to use the Sky access code.

Ofwatch believes that a total prohibition on R18 content under any circumstances is disproportionate given other factors that may cause real harm and this is the definitive test for Ofcom with regard to proportionality.

One individual is appalled by the contradiction between the sexual activity shown on children's programming and the prohibition of consensual sex on encrypted channels after 10.00pm. Another suspects the existence of a minority of families who would encourage R18 material as "family viewing". Two individuals object strongly to the showing of pornography on TV, even if encrypted, and urge Ofcom to maintain and strengthen R18 rules. Another

individual is dismayed with the level of offensive material in current programming and notes that Ofcom's role is to "protect viewers and listeners" and to "serve the interests of the citizen-consumer" Maranatha believes that no R18 material should be broadcast, as there are few effective methods of preventing children from witnessing this.

Melon Farmers suggests that all restrictions be justified with evidence of potential harm. One individual advises that adults not be discriminated against, noting that the majority of UK households do not have children. Where technology (PINs, etc) allows adult viewing pre watershed, they should have that choice. Two individuals believe the regulation of adults and adult programming should be minimal, given that appropriate barriers are in place, and in keeping with basic human rights.

General Comments on R18 Material

XplicitXXX believes that the blanket ban on R18 content is disproportionate to the likely harm and is inconsistent with the greater levels of risk accepted with post-watershed broadcasting of dangerous and easily imitable behaviour.

The existing prohibition on R18 content cannot be justified and a change should be effected as quickly as possible so that providers of this material do not lose out to competition on the Internet or other European providers.

Ofwatch believes that Ofcom should not make these decisions on the basis of the opinions of people who have no intention of watching the services about which they complain.

Campaign organisation Campaign against Censorship believes that adults should have the same rights when watching TV as they have regarding video recordings and DVDs. It says to do otherwise would be a denial of the human right of freedom of expression (Article 10 of the Convention).

Melon Farmers suggests that "the obvious denial of what we want to see is a never ending irritant reminding us of those who would deny us our pleasures". They suggest that the current guidelines for sex are too secret and would like to see more transparency to the public.

An individual notes that "R18 material is clearly compatible with the TWF Directive, as content equivalent to R18 has been broadcast from many European countries for many years". Another individual states: "Those who express distaste for R18 on religious or moral grounds are flying in the face of the Human Rights Act. They do not have to watch this material and it is not for them to say whether others should be allowed to watch it".

Two individuals assert that the restrictions on transmitting adult material on subscription services are illegal and must be scrapped since they state that there is no proof such (R18) material poses any risk and therefore it is not legal to restrict it at all. Causing "offence" is not harmful; indeed, it is protected by Article 10 as a means to "progress society".

Ofwatch points out that R18 material can be legally imported into the UK as well as downloaded from the Internet. Ofwatch also notes that R18 material is already a "generally accepted standard" for adult video.

One individual has no problem with allowing R18 material on subscription channels and says the prudish elements of society should not be allowed to dictate what is permissible.

The Adult Industry Trade Association is absolutely against hardcore being broadcast on television, as it is important that R18 material is only sold to people face to face in order to verify their age.

An individual says that there is already evidence of a long-term adverse influence exerted via R18 programming. Two individuals suggest that more people will watch “debasement material” if it is so readily available.

Two other individuals say that R18 content should be restricted to encrypted services that provide subscriptions only to adults with proof of age and which have mandatory PIN protection at all times. Five individuals believe R18 material should be allowed, as long as there are sufficient safeguards, such as encryption and PIN numbers to deter minors from viewing it. One of these notes that lifting the ban would bring economic benefits to the providers and open up the market, which would benefit consumers.

One individual thinks R18 material should be allowed on subscription adult channels, as adults who want to see it will watch it anyway. Minors are more protected from materials on subscription channels than on computers and from materials available in shops, because that material can be viewed by minors once it is brought into the home. Moreover, the violent, horrific programming that is allowed is more harmful to children than material with sexual content. This individual believes that if Ofcom is to be transparent in its regulation, it must put forward reasoned objections based on firm evidence that such material causes harm and offence, or its credibility will be undermined.

An individual notes that R18 material would not be shown on European TV if it was harmful, and there is no evidence that it is actually harmful. This has been shown in studies by Dr Beryl Kutchinsky and Dr Milton Diamond. Consensual acts are not obscene or harmful, as the High Court ruled in 2000, but where there is real harm to the participants, such as in extreme S&M, child abuse or “actual rape”, then the material should not be shown. As consensual sexual activity is not harmful, the health and morals clause “in the TWF/HRA should not be construed to include anything but the very worst type of material, which might be broadcast from outside the EU, e.g., terrorist beheadings, live suicide bombings and such”. Japan allows the broadcasting of very violent cartoons depicting rape, which the BBFC find difficult to pass. Nonetheless, Japan has one of the lowest sex crime rates in the world and has “reversed an upward trend in sexual violence by throwing out US imposed levels of censorship (similar to those in the UK) and allowing adults and youngsters alike access to such material. As these long-term criminal studies show, in countries that do not impose such “nanny” censorship, access to sexual and even sexually violent material has the effect of reducing sex crime and real harm in society. “The real harm lies in trying to force people to behave in ways which are unnatural, by depriving ordinary people of safe sexual outlets and, in creating environments where people feel there is something “wrong” with themselves for needing to express their innate sexual desires”.

The BBFC would like Ofcom to stop making reference to “R18 standard material” as the only arbiter of this is the BBFC and the phrase should be replaced by something like “similar to R18” or “other hard-core” material.

At the time of writing, 1,531 individuals had submitted responses in the form of the **mediamarch** postcard petition. This petition includes the clause: “NEVER allow R18 films (essentially hardcore porn), or R18 film re-classified as 18, on TV”.

Twelve individuals believe all R18 material should be banned. One of these states that it offends “decent moral standards” and that technological protection is not reliable enough to ensure prevention of under eighteens from accessing this material. An individual says that this draft rule is censorial and should be removed. Another individual finds R18 and “titillating

soft porn” offensive, but does not advocate banning it. This individual feels strongly that technological developments should be pursued so that one cannot see this material by accident, but rather by deliberate choice.

Freedom of Expression

Four individuals point out that “freedom of expression” is limited by rights of others not to be subjugated to violence, sex, etc. One individual acknowledges the Broadcasting Code has to balance the element of freedom of expression against the sensitivities of others. One individual feels there is more than enough freedom of expression in broadcasting under the current code and does not wish to see any changes which could allow even more violence and explicit sexual content than there already is.

XplicitXXX says that the existing total prohibition on broadcasting R18 content is not consistent with the position held by the BBFC, given that you can equate the restricted sale of R18 videos from licensed video shops with the restricted availability of R18 broadcasts from specialist licensed broadcasters. XplicitXXX further believes that the existing situation with proscription orders is unclear but that if it continues to outlaw R18 material then it should act to ban material from European competitors. XplicitXXX believes that R18 is already the “generally accepted standard” for “adult” videos and DVDs.

XplicitXXX further asks why, if the Government are so concerned about the effects of R18 material on the young, they have not used a proscription order since 1998. XplicitXXX believes that those who want to see this banned are a minority and have a predominantly religious motivation and if there were to be further restrictions this would force many companies out of business. XplicitXXX believes it is inappropriate to base regulation upon assumptions but rather on evidence and do not believe that Ofcom would have to employ extra staff. Finally, XplicitXXX claims that the economic benefits are clear and broadcasters lose through the retention of over-regulation or even their improvement.

The OCR acknowledges there must be room for broadcasters to enjoy freedom of expression, which facilitates creativity and innovation, but notes that some images and language on TV and radio are unsuitable for children and at times for a wider audience. The regulator must ensure that such concerns are given proper consideration and that there are mechanisms in place for complaints to be raised about specific programming.

mediawatch-uk believes the new rules are vague and open to abuse, and that “freedom of expression should not come before what is healthy for society”. It refers to its own surveys indicating that the public are fed up with the decline in standards of taste and decency.

Chrysalis suggests that the move from “taste and decency” to “harm and offence” adds little to the regulatory functions.

Maranatha believes that the BBC has failed to keep the rules of the 1990 Broadcasting Act against “nothing...which offends good taste or decency”.

Ofcom response

Background to decision: Not surprisingly, issues surrounding the transmission of explicit adult sex programming raised strong emotions on both sides of the argument. However, it was important that Ofcom did not reach decisions based on any moral approval or disapproval for this type of material – or with regard to any reputational impact on Ofcom. Decisions had to be rooted firmly in the relevant European and domestic legislation governing television broadcasts. They had to be the right decisions, not necessarily the popular decisions.

The law in the context of adult material requires a balance to be struck between the right to freedom of expression (under the European Convention on Human Rights) and the requirements in the Communications Act 2003 (“the Act”) to protect the under-eighteens (section 319 2(a)) and to apply generally accepted standards to television services (section 319(2)(f)). Any restriction on freedom of expression must be necessary and proportionate. It must stem from an evidence-based assessment, in this case linked to available research into the harm that may be caused by “R18” type material, and into the effectiveness (or otherwise) of current security systems.

In the absence of evidence of “serious” harm to minors, there can be no justification for an outright ban on this type of material under Article 22 (1) of the Television Without Frontiers Directive (“the TWF Directive”). However, if the material is caught by the test of being material which is “likely to impair” the development of minors (TWF Directive, Article 22 (2)), then Ofcom still needs to be satisfied that suitable protections are in place to so as to ensure that minors will not normally see or hear such broadcasts, before the transmission of such material can be allowed.

In addition to the European provisions above, UK legislation namely, the Act places specific duties on Ofcom, in particular it sets out a standards objective to protect the under-eighteens (Section 319 2(a)). It also requires Ofcom to have regard to “the vulnerability of children and of others whose circumstances appear to Ofcom to put them in need of special protection” (section (3)(4)(h)). In light of this, if Ofcom is not satisfied that sufficient measures to protect the under-eighteens can be applied (for example, through scheduling and/or security mechanisms), then R18 material should not be transmitted.

Some respondents made reference to the law relating to the distribution of “R18” on video and DVD. Whilst there are strict legal restrictions under the Video Recordings Act 1984 (as amended) (“the VRA”) on the supply of “R18” tapes and DVDs (which may only be supplied in licensed sex shops), the VRA does not prohibit the supply of this material for broadcast purposes. Its availability on television has therefore to be decided within the separate legal framework for broadcasting.

Selected Questions – R18 Material

Question 5d: *Is the inclusion of R18 and R18 standard material compatible with the TWF Directive, which requires that nothing is included in licence services which might seriously impair the physical, mental or moral development of minors?*

Responses to the Consultation

Compatible with TWF Directive

XplicitXXX points out that R18 equivalent programmes are broadcast from a variety of other European countries and believe that the degree of harm caused to children is exaggerated.

Channel 4 and Five believe that although they will not broadcast R18 material, they can see no reason why this should continue to be prohibited so long as they are protected by a PIN.

Discovery Networks Europe believes option two should be adopted.

22 individuals believe the inclusion of R18 material is compatible with the TWF Directive. Five of these individuals, Melon Farmers and the SCBG note that it is accepted in the majority of European countries with no evidence of harm. An individual says that although R18 material is harmful for children, it is not seriously harmful. Another individual believes the harm it causes is incomparable to smoking and alcohol. Another individual believes it is compatible and that R18 should become R16.

One individual notes that despite the widespread availability of R18 for many years throughout the Western world, there is still a great lack of any hard evidence that it causes serious harm to children. Another individual believes that as far as subscription, PPV or PPN services are concerned, broadcast material should be restricted only on grounds of legality of the content aired. One individual suggests restrictions are at variance to the spirit of the new Broadcasting Code and the Convention. Another individual says it is time for Britain to come out of the Dark Ages.

Ofwatch believes that the current DCMS policy of “indefinite indecision” is lamentable.

Not compatible

mediawatch-uk believes the existing ban on R18 material should be maintained as pornography “seriously impairs the physical, mental and moral development of minors and adults”.

The Church of England believes this material is in conflict with the TWF Directive and suggests proof of harm in the form of “porn addiction” and other sexual addictions that cause suffering and damage individuals’ relationships.

Maranatha suggests the inclusion of R18 material is incompatible. The Catholic Bishops’ Conference of England and Wales supports continuing the prohibition on R18 material. The Churches’ Media Council supports the maintenance of the status quo and continuing prohibition of R18 material. Two individuals also believe R18 and R18 rated material should continue to be unacceptable.

The CBC and Cross Rhythms City Radio would like unencrypted “adult preview” channels to be banned and removed from current cable packages and that anything of an eighteen+ nature can be made safe for children (inaccessible). The Evangelical Alliance also believes that R18 material should continue to be banned and that “adult preview” channels that can be accessed by anyone prior to the watershed should be completely banned.

Three individuals believe the inclusion of R18 material is not compatible with TWF Directive. One individual points out that the fact that such material may presently only be supplied to adults in licensed sex shops makes it clear that it is totally unsuitable for children; if Article 22 of the TWF Directive is to have any meaning at all, it must mean that such material should not be broadcast. Another would counsel caution in respect of children.

The BBC believes no TV service licensed by Ofcom should be showing R18 material unless there are adequate technical protections put in place by platform operators or encrypted on transmission.

Ofcom response

Ofcom has considered the responses carefully in the context of both European legislation and national law.

It is clear from European law that a balance has to be struck between rights and responsibilities (Article 10, European Convention on Human Rights).

The Convention says: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority, and regardless of frontiers”. This core principle is also referred to in the TWF Directive, which sets the framework for European television regulation.

On the other hand, Article 22(1) of the TWF Directive states that programmes must not be included in television broadcasts which “might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence.”

In order to inform Ofcom’s consideration of these issues, Ofcom commissioned an academic review of R18 material and its potential impact on people under the age of eighteen (available on the Ofcom web site). The research asked: might R18 material seriously impair the development of minors? Because of ethical restrictions there is a severe lack of research regarding the exposure of minors to R18 material so the available evidence is limited. However the review concluded that from the research covered in the report the answer would be no. Most European countries already allow the transmission of R18 material and, self evidently, do not regard it as having potential to “seriously impair” the development of minors.

We also noted the results of a survey of public opinion of 1,200 adults commissioned by the BSC and ITC (The Public’s View 2002). It was found that 76% agreed that people should be allowed to pay extra to view particularly sexually explicit programmes on subscription services. The survey did not, however, distinguish between “R18” material and more commonly available “adult” material (i.e. soft core pornography).

Ofcom considers the test for Article 22(1) is intended to be a high one - because freedom of expression is such a fundamental right in the European Convention on Human Rights, it should only be restricted to the extent that it is necessary to do so. In other words, the material in question must be regarded as so potentially damaging to minors that it should never be shown, regardless of security protections. Until now, such a judgement has only been applied to illegal pornographic material e.g. paedophilia and/or sexually violent material. This should not be allowed on television services under any circumstances.

Ofcom therefore concluded that the transmission of R18 material is compatible with Article 22 (1) of the TWF.

However, in deciding whether the broadcast of R18 material should be prohibited, we also considered Article 22(2) of the TWF Directive and Ofcom’s duties under the Act. These are discussed further under Question 5e.

Question 5e: *If the answer to 5d is yes, then are there technical and other protections that broadcasters and platform operators can put in place to protect the under-eighteens, who should not, and adults, who may not wish to, access R18 and R18 standard material? (the Act section 319(2)(a)(f) and 319(4))*

Responses to the Consultation

An individual suggests specific measures:

- R18 content could be restricted to encrypted subscription services.
- Subscriptions could be restricted to adults by forcing payment by credit/debit card.
- Access could be further restricted by mandatory PIN entry before each access.

According to this individual, a range of other measures is possible but would be needlessly restrictive.

Another individual notes that satellite and cable systems use encryption, PIN-code blocking and other systems which prevent unauthorised access to content. The Cornwall Community Standards Association suggests that no protections would suffice and that the only route is to ensure that the material is not broadcast at all.

Campaigning organisation CAC says this is an issue of parental responsibility.

NTL details the significant steps it takes to provide its digital TV customers with a comprehensive set of parental control tools.

Nine individuals recommend PIN numbers, parental locks, viewing cards, credit card subscriptions and parental responsibility. Another suggests the following protection: purchase of material by debit/credit card or cheque requiring age verification; channel PIN protection enabled by default, though better than existing four digit codes; and an age verified access card. Parents should also provide safeguards. Another individual believes that access to those channels offering R18 material should require a positive request from the subscriber, as payment would be evidence that the subscriber actually wants to view this type of material. Two individuals say that very little additional protections are required. Six individuals believe that R18 content should be limited to encrypted subscription services that have the appropriate safeguards. Two individuals say the technology to protect minors and viewers is already well in place.

Melon Farmers does not feel PIN protection should be mandatory for adult only households and suggests a separate PIN for 18 material and R18.

One individual suggests that current protections applied on adult channels carrying the BSkyB system are sufficient to prevent underage viewers; if Ofcom does not believe this acceptable they should state why, and allow for further technological developments.

Ligali suggests an encoded theme indicator in programmes similar to the PEGI system for video games.

XplicitXXX agree provided payment is by those who have a credit card that can only be accessed by over-eighteens, the exact nature of the content is made clear to the subscriber and broadcast is only allowed after entering the PIN and then allowed for up to eight hours.

Ofwatch believes that the imposition of any arbitrarily heavy burden of regulation on such services would be more acceptable than an absolute prohibition.

mediawatch-uk believes the present technology does not work. The Church of England suggests significant technological improvements need to be made to reduce risk of access by under eighteens. An individual says that the only realistic protection is to make sure that it is not shown.

An individual believes that given changes in technology pre broadcast warnings are ineffective.

Ofcom response

Having decided that the broadcast of “R18” material is not prohibited outright under Article 22(1) of the TWF directive, Ofcom then considered Article 22 (2) of the TWF.

This sets a minimum standard that broadcasts do not include programmes that are “likely to impair” the physical, mental or moral development of minors except:

“...where it is ensured, by selecting the time of the broadcast, or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts”.

The arguments made by respondents that viewing such material might harm minors can be summarised as follows:

- minors will be inappropriately sexualised;
- minors may innocently copy sexualised behaviour which opens them to harm;
- minors will be exposed to and acquire attitudes to sex which are immoral;
- minors will be exposed to and acquire discriminatory attitudes to women;
- minors may be led into sexual encounters which may lead to a rise in unwanted pregnancies, abortions and STDs

It should also be noted that while more than 70 per cent of households do not have any children in them, research into the value of the 9pm watershed suggests that a large proportion of adults without children accept the basic principle of protecting them (The Watershed: Providing A Safe Viewing Zone – BBC/ITC/BSC).

It is of course not ethically possible to commission direct research on children into the possible effects on them of such material. However, as explained above we have conducted a literature review of such research as is available on this issue in order to inform our decision-making.

It is unlikely that Ofcom, or anyone, can prove conclusively that “R18” material is “likely to impair” the development of minors. However, in considering the protection of children in line with s319(2)(a), we noted the precautionary approach set out in the government consultation paper on the regulation of “R18” videos in 2000:

“There is always a risk of age-restricted material, such as tobacco or alcohol, falling into the hands of, and being misused by, children. Unlike tobacco and alcohol, which are widely available, there is no known and substantiated health or other risk associated with watching a video which has been given an “R18” classification.

However, there is widespread public concern about the possibility of children viewing sexually explicit material which is clearly unsuitable for them and the Government takes the common sense view that exposure to such material at an early age may be harmful to children.”

That paragraph continued by concluding:

“There is, therefore, a need to ensure that controls on the distribution and viewing of these videos is as stringent as possible.”

If it is accepted either that it is likely that minors will be impaired by viewing this material or that the protection of persons under the age of eighteen requires additional protections to those required by adults (taking into account both the precautionary approach and the possible harms listed above), then consideration needs to be given as what scheduling measures and technical measures would be sufficient to protect minors so that a standard may be set which is best calculated to serve the objective of protecting under-eighteens.

In that regard, Ofcom noted that the measures provided for in TWF Article 22(2) permits the broadcasting of material thought likely to impair the development of minors provided it can be “ensured” that by “selecting the time of the broadcast, or by any technical measure.... minors in the area of transmission will not normally hear or see such broadcasts”. Explicit material is permitted in most EU states on this basis, and various combinations of technical and scheduling restrictions are applied to protect minors.

Ofcom’s view is that measures currently available, such as PIN security and a late watershed, are consistent with the requirement that minors will not “normally” access these broadcasts. Article 22(2) does not therefore require a prohibition on the transmission of this material.

However, Ofcom is not bound to adopt the standards applied in other European countries. It must consider its policy in the light of the UK legislation and its specific duties under the Act.

Accordingly, Ofcom is required under section 319 of the Act to set standards for the content of programmes to secure certain objectives. These standards objectives include the objectives that:

- persons under the age of eighteen are protected (section 319(2)(a)); and that
- generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material (section 319(2)(f)).

We therefore considered whether this material can harm adults; whether it is offensive to adults; and finally whether generally accepted standards can be applied to services containing such materials, so that members of the public are adequately protected from such material.

- The arguments **for harm** made on this subject in response to the consultation are many but can be summarised as follows:
 - vulnerable adults may be harmed;
 - it is possible to become addicted to pornography (note: respondents do not on the whole distinguish between adult sex material – soft pornography - which is already available on air, and “R18s”);
 - adults who are addicted can be led to act out in real life pornographic acts and fantasies which can lead to relationship/family breakdown;
 - such addiction is progressive, leading to an addiction to harder material and possibly eventually to illegal material;
 - adults who progress to illegal material may be led to commit sex crimes;

- pornography is exploitative to the women involved in making the films (and to the men) and should not be supported;
- pornography engenders a discriminatory attitude to women;
- pornography may lead to a rise in unwanted pregnancies, abortions and STDs;
- this material is not compatible with a moral society.
- The arguments **against harm** but can be summarised as follows:
 - there is no evidence of harm;
 - other European states transmit this material with no evidence of harm;
 - the Japanese allow material much stronger than “R18” (such as rapes) to be broadcast, yet it is argued that their society has one of the lowest sex crime rates in the world. Other studies show access to such material, in fact, reduces sex crime ;
 - the government found no compelling evidence of harm to adults in their consultation of 2000;
 - this material is available legally and there is no evidence of harm.

We were persuaded that there was no compelling evidence available that R18 material causes harm to adults.

However, it must be accepted that R18 material does offend many adults and therefore would be highly offensive and totally unacceptable on a free to air channel. However in setting standards in the Broadcasting Code, Ofcom must have regard (as it appears to be relevant to Ofcom in securing the standards objectives) to a list of matters set out in section 319(4) of the Act including:

“the likely size and composition of the potential audience for programmes in television services.....of a particular description”; (section 319(4)(b)); and

“the likely expectation of the audience as to the nature of a programme’s content.....”; (section 319(4)(c)); and

“the likelihood of persons who are unaware of the nature of a programme’s content being unintentionally exposed, by their own actions, to that content” (section 319(4)(d)).

Taking these elements of the Act together, it can be surmised that the generally accepted standard applicable to an encoded premium subscription service devoted to R18s (and where the individual subscriber has to enter a PIN code to access material and use a credit card to purchase a viewing) is a standard that could encompass R18 material.

The expectations of the audience wishing to see such sex material would not create any difficulties under (section 319 (4)(c)). With such financial restrictions and protection, the likelihood that an adult would stumble across it unprepared, is remote if not non-existent. It is reduced, perhaps, to a visitor to a household which subscribes to “R18”s who has been given access to the PIN code and uses their own credit card to buy a viewing in error (section 319(4)(d) (i.e. unlikely).

Ofcom is therefore satisfied that generally accepted standards could be applied and that there are sufficient protections available now (e.g. scheduling, encryption, subscription etc) - to ensure that adults who do not want to view this material do not.

We now turn to the protection of children.

Our previous academic review into research on R18 material and its potential effects on people under eighteen included some analysis of the available research work on the effectiveness of security systems (although this was not the primary motivation of the review). It concluded: “As far as could be determined no research is available testing the effect of PIN numbers on the availability of pornography to minors.....”

PIN Research

In order to assist with the examination of this area research into the effectiveness of PIN protection systems and into the viewing habits of the under-eighteens was commissioned by Ofcom. That research will be published on the Ofcom web site.

As far as we are aware, this is the first time that research of this kind into the use of PIN numbers by children and young people in the context of broadcasting has been carried out in the UK. We are not aware that there is any other available research into whether children access similar programmes in other EU countries, where this material is already permitted. So, it appears that our own research is breaking new ground, and should be read in this light.

The research involved both a representative sample of eleven to seventeen-year-olds and a separate representative sample of parents.

The main objectives of the research with children aged eleven to seventeen was to investigate PIN number awareness, sources of PIN knowledge and PIN usage in households across the UK. Questions were asked about both voluntary PIN codes that are set by parents to restrict viewing to rated programmes, and PIN codes for PPV services.

The research among parents was conducted in order to complement the children’s survey into the knowledge and use of PIN numbers. It interrogated similar PIN protection issues, and acted as a “sense check” to the children’s survey – addressing possible over-claiming by young people, and also the issue of children who are unaware that adults can set PIN protections.

Before considering the key findings it is important to acknowledge some inherent methodological limitations to the research we commissioned:

- researchers recognise that some children may be prone to exaggerate in their responses to some questions, and that their answers may, as a result, be less reliable than those of adults;
- the nature of the questions means that the initial sample size becomes progressively smaller as it breaks down into sub-groups for detailed interrogation (base sizes and confidence intervals are detailed in the report, please see Ofcom website);
- the questions on PIN usage were only asked of those children eleven to seventeen who said they knew that their parents/carers actually used PIN numbers for television. There may, of course, be parents who set PIN numbers without their children being aware of the fact.

Despite these research limitations, the pattern that emerges from the research is that, under current arrangements, some children and young people say they know their parents'/guardian's PIN numbers, even though their parents think they do not. Furthermore, some children say they have, at least occasionally, used the PIN number without permission, even though their parents think they have not done so. It is not possible to say whether these patterns of use and behaviour would change if such PIN systems were used to protect people under eighteen from R18 material, as parental attitudes to PIN numbers may tighten if there are stronger concerns about the materials available for potential access among minors.

The research among secondary school children revealed that, of those minors who were aware that their household employed security PINs to limit access to rated programmes, around a half knew their parents'/guardian's number (note: systems can currently be set to BBFC rated "12", "15" or "18").

- Of those who knew the number, slightly less than two thirds claimed they had gained access to PINs with parental permission, but one third had gained access by other means.
- More than three quarters of those minors who knew the PIN number claimed their parents were aware of the fact.
- Slightly less than half of those who say they know their parents'/guardian's PIN number say they have actually (whether frequently, occasionally, or not very often) accessed PPV material without their parent's permission (although it should be noted that the evidence does not disclose what type of PPV material was accessed).

The research carried out among the parents reached broadly similar conclusions regarding awareness of PIN protections, and on children's knowledge of their parents'/guardian's PIN numbers – although the level of claimed PIN knowledge among children was considerably higher when compared to parents' assumptions. (It is possible that the research interviewed some parents who were successfully using PINS, without their children's knowledge).

The biggest difference between the survey with children and the survey with adults is in the proportion of children who claim to have used PIN numbers to access pay-per-view programmes without parental permission. Slightly less than half of children who had awareness of the PPV PIN number claimed to have used it, at least occasionally – without parental permission, but 90 per cent of parents believed their children had NOT done so. Even given the small sample size - parents may be underestimating their children's willingness to use - and their actual use - of PINs to gain access to material without permission.

Taken together, the results indicate that PIN numbers are, to a certain extent, known and used by under-eighteens within the current UK family context – and that keeping the numbers "secret" is not regarded as an imperative. This may be because PINs are currently used for a variety of non-harmful purposes.

The research also examined the viewing patterns of children and young people, and the self reported figures indicate that around one fifth of eleven to seventeen-year-olds were still watching TV after 2300. Analysis of BARB viewing data for this age group also shows a relatively high level of viewing in the 2300– 2400 slot, which declines dramatically post midnight.

Overall, Ofcom acknowledges that PIN mechanisms in the current broadcast environment do provide protection for minors to some extent and should therefore continue to be used as a

form of protection against the sort of material currently broadcast, along with a watershed and clear information. But it should be noted that the potential harm/offence that could be caused from exposure to material currently available in the broadcast medium is limited - because of the limited nature and strength of that material.

In addition, Ofcom also took into account further research (“R18 Pornography: Are experts in the position to say that children are harmed if they view R18 videos?” commissioned by the BBFC in 1999) which found that the children most likely to be harmed by pornography were the most vulnerable children.

Overall, we therefore considered it appropriate to take a more pre-cautionary approach to this very explicit sexual material, given our statutory duties.

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

Question 5f: Which of the options described in the RIA regarding R18s, and R18 standard material is the best option, and why?
continue the existing prohibition on “R18” material?
remove or change the rules regarding “R18” material?

Responses to the Consultation

Continue prohibition on R18 material

As stated previously in this document, at the time of writing 1,531 individuals had submitted **mediamarch** petition postcards which include the clause that R18 films, or films reclassified as 18, should never be shown on television. In addition to this, 52 individuals believe the prohibition on broadcasting R18 material should remain. A large number of individuals express a strong feeling on this issue, expressing disbelief and alarm that Ofcom would even consider lifting the ban on R18 material.

The Christian Institute objects to the idea of allowing R18 material to be broadcast on UK media, saying the existing prohibition is necessary for the protection of the moral development of children and to limit harm to adults. The Catholic Bishops’ Conference of England and Wales supports continuing this prohibition. The Church of Ireland Broadcasting Committee urges Ofcom to consider the wider issue of the potential social effects that R18 viewing might have for the vulnerable and other societal groups.

An individual believes the idea that broadcasting R18 videos late at night will protect children is invalid since many children have a TV in their bedrooms. A youth worker says the prohibition on broadcasting R18 material should remain, as it would put many children and young people at risk and have long lasting effects on society.

An individual suggests the broadcast of R18 material must be contrary to the intentions of Article 22 of the TWF Directive. The majority of “decent-minded” people would find such material offensive and inappropriate for broadcasting.

The CBC does not like the broadcasting of R18 material. The Evangelical Alliance supports the continued prohibition of R18 material. The Church of England suggests option one to

reduce risk of harm to children and other indirect forms of harm such as possible “porn addiction” relationship damage and economic consequences. Maranatha advocates option one on the grounds that the public is disgusted with pornographic material. Ligali prefers option one, as it does “not have confidence in the ability of Ofcom to protect children from irresponsible broadcasters,” since the strategy is reactive: “harm first occurs and then there is a response”. mediawatch-uk suggests that upholding the ban is the simplest option.

Remove prohibitions on R18 material

Sixteen individuals support the removal of prohibitions on R18 material, provided appropriate safeguards are in place. Four individuals support the removal of prohibitions, citing a lack of proof that such material is harmful, and the fact that 76% of people think this material should be available on premium channels. SS observes that Ofcom’s own reports cannot establish proof of harm.

One individual argues that the prohibitions on R18 material could be relaxed with careful and responsible restrictions and control mechanisms. A smart card solution would allow responsible access to R18 content while maintaining the physical human age verification checks inherent in the sale of products via the licensed sex shop industry. This would allow the expansion of an existing industry in line with the changing (and more sophisticated) demands of responsible adult consumers.

One individual who fully supports R18 material being shown on adult subscription services asks how a ban on these channels can be enforced when Sky Movies is free to broadcast R18 strength images in some films.

An individual wishes R18 material to be broadcast on subscription TV, saying that EEC residents are treated in a more adult manner. This individual believes there is adequate provision on the current Sky transmission protocols to restrict R18 material being viewed by children.

Another individual supports the showing of R18 adult material on subscription satellite TV, saying adults should be able to view this after 10.00pm as long as it has been certified by the BBFC as R18. Subscriptions by credit card or possibly National Insurance numbers would act as a check to prevent minors viewing.

Campaigning organisation Campaign against Censorship says R18 material should be available to adults on TV, as it is on video recordings and DVDs. No restrictions should be imposed, as is the case in other European Union countries. There should be no watershed for subscription TV, which is controlled by adult payers.

City Radio cannot understand why the BBFC can make judgements on material that people want to see but will be excluded from platforms that anyone, including children, can access. S4C prefers this option.

One individual believes this option is best because R18 material is legally certified by the BBFC and can be legally distributed and sold within the UK and imported. This individual believes continued prohibition is a denial of freedom of expression and that sufficient safeguards exist to stop children, or adults who do not wish to view the material, from doing so. The UK Government acknowledges that no evidence of harm exists.

Ofwatch would choose option two and suggest that Ofcom contact the BBFC to find out about their research into the likely effects of R18 pornography on children. Ofwatch believes the case for outright prohibition is disproportionate.

XplicitXXX would choose option two and believes that regulation must create an appropriate balance between the need to protect children and freedom of expression.

An individual believes that possible complaints from licensed sex shop owners about the lifting of the R18 prohibition are likely to be little more than an unfair attempt to preserve their monopoly.

One individual prefers option two as public attitudes have become much more liberal with regard to sex and because technology prevents misuse. The arguments regarding potential paedophiles are out of date as R18 material has been widely available; this argument was not accepted in the BBFC's stance and is less applicable now.

Melon Farmers also prefers this option on the grounds that no one "should deny sexual pleasure to their fellow man...to placate a perceived majority".

An individual believes continuation of the ban on R18 and related material would perpetuate inconsistencies between TV providers, video/DVD producers and distributors and other European broadcasters.

Ofcom response

Ofcom anticipated that responses to this issue would be polarized. We have assessed the arguments carefully, with particular reference to our statutory duties, the need to balance competing interests between the protection of children and freedom of expression and the available evidence including the recent research we have commissioned into the effectiveness of prevailing security mechanisms in the UK (as outlined in detail elsewhere in this assessment).

In view of doubts about the effectiveness of those security mechanisms, we have concluded that a precautionary approach was an appropriate and proportionate response to this strong sexually explicit material. Such an approach is consistent with that taken by Parliament when the "R18" category was introduced under the VRA (and see recent judgement of the Divisional Court on *Interfact Limited and Pabo Limited v Liverpool City Council* [2005] EWHC 995 (Admin) where an approach designed to eliminate as far as possible the risk that such material might be viewed by persons under-eighteen and which confirms a wide degree of discretion to individual member states in terms of restricting freedom of expression.

We believe that we would be failing in our responsibilities under the Communications Act 2003 if we were to remove the current prohibition on the broadcast of "R18" material at this time. We consider that retaining the prohibition is necessary, appropriate, proportionate and targeted to an area where it is necessary, in all the circumstances.

However, we accept that future developments might make it possible for more secure protections to be put in place in the future. We are therefore willing to consider whether to review this issue again in the light of relevant developments.

Accordingly, the broadcast of "R18" and "R18" equivalent material is not permitted at present.