

Better Media - consultation response

1	Introduction	2
2	Recommendations	3
3	Summary of Observations.....	4
4	Section Responses.....	4
5	General Concerns.....	8

1 Introduction

This submission is on behalf of Better Media, which is a members-based organisation, campaigning for openness and transparency in media policy, pluralism in media ownership, and access to media platforms as a civic right. See <https://bettermedia.uk/>

Better Media is pleased that Ofcom is proposing to review its impact assessment methodologies and practices, though we are somewhat concerned that this has taken so long. We are also concerned that this review is supported by so little illustrative documentation that allows external organisations to understand and comment on the practices that Ofcom typically follows in each part of its regulatory operations.

It is also worrying that this is the first time Ofcom has indicated that it will incorporate the Equality Act 2010 into its specific practices and processes. While Ofcom has referred to the requirements of the Equality Act in its evidence gathering, deliberations and decisions in the past, we are concerned that this consultation suggests that the Act has not been part of Ofcom’s integrated processes. If this review is to be purposeful, then, it may well indicate that past decisions by Ofcom might also now be subject to review.

Better Media is principally concerned with Ofcom’s inability to recognise the challenges faced by many people who are protected by the Equality Act 2010. Better Media believes that Ofcom should act in accordance with the terms of the Equality Act in all its operations, particularly those that affect minority communities who have limited access to lobbying and engagement with Ofcom, and who have historically been discriminated against because of embedded social bias, stigma and prejudice.

Certain regulatory decisions that Ofcom have made in the past suggest that Ofcom has not operated as effectively as it might in regard to minority or disadvantaged communities, and so this review is an opportunity for Ofcom to be seen to correct these lapses and give all citizens confidence that Ofcom acts in their interests, as is the duty placed on Ofcom when founded in 2005.

Our response, then, is made in the spirit that Ofcom’s impact assessment processes are important, regardless of how internal they may be to Ofcom’s management and policy development operations. Disadvantaged and minority communities are repeatedly overlooked in the operation of communications regulation in the UK, despite Ofcom, like all public bodies, having a statutory duty to bring forth representation from all minority communities in the regulatory process.

At its worst, it might be suggested that Ofcom is comfortable maintaining a view of minority and disadvantaged communities that is stereotypical and preserves structural disadvantage for people identified with those communities. It is Ofcom’s duty to correct these disadvantages by taking action to support public engagement with people who are recognised by the protected characteristics as defined in the Equality Act, and not the other way around.

Better Media agrees that Ofcom’s impact and assessment processes have important consequences for citizens and consumers. Our aim, then, is to constructively assist in the improvement of Ofcom’s regulatory practices overall, and to ensure that they meet the duties laid out in the Communication

Act 2005, to act in the interests of citizens and consumers, and so we support the full incorporation of the 2010 Equality Act into Ofcom's operations and practices.

2 Recommendations

- Ofcom should place the Equality Act in a primary position in regard to its impact assessment process and the work that it undertakes to understand the outcomes of regulatory decisions.
- Ofcom should invite the Equality and Human Rights Commission to review these proposals, with a view to consulting more widely with the public, and in order to anticipate the strategic updating of Ofcom's systems and practices.
- Ofcom should provide a robust framework of consultation and engagement with the public, with a specific framework for change management that can be used to justify when, and in what circumstances, interventions are appropriate, and when not.
- Ofcom should widen and strengthen the public engagement model used, and the activity that it generates, by including a wider range of civil society, public sector, education, business, industry and other appropriate stakeholders.
- Ofcom should lead on the development, the provision and the maintenance of an open-research commitment to impact assessment that promotes information for the public good as processes of the 'knowledge commons.'
- Ofcom should establish regular and inclusive forums for maintaining a continual and rolling review of its impact assessment methods, processes and reporting.
- Ofcom should move beyond simply publishing guidance in the public domain, to facilitate meaningful interaction for wider participation in impact assessment processes.
- Ofcom should include an ethics review framework within these processes.
- Ofcom should widen the range of stakeholders to include representatives from public authorities, the civic society sector, and the education sector.
- Ofcom should not assume that the public cannot follow or come to a valid view about complex issues.
- Ofcom should undertake active public engagement programmes of consultation and communication that explain and invite public participation in its decision-making processes.
- Ofcom should establish an independent and transparent partnership forum with external impact assessment analysis-led organisation.
- Ofcom should develop a programme of data analysis skills, research interpretation capacity building and data literacies for stakeholders.
- Ofcom should introduce a hierarchy of interests that prioritise the citizen first, then the consumer, then the content producer, then the platform and technology supplier.
- Ofcom should introduce a hierarchy of needs that anticipates impact at the lowest level first, starting with the local, then the regional level, followed by the national level, and only then the international level.
- Ofcom should invest in data gathering and monitoring systems that track and monitor social changes in as close to real time as possible, with an emphasis on those least able to afford or access media provision.
- Ofcom should replace the bias towards non-intervention with the requirement that in the areas where Ofcom has decided not to intervene this is done in accordance with a published and open statement of what Ofcom considered to be in the public interest by not intervening, and when it will be reviewed.

3 Summary of Observations

Our first request is that all considerations within this review must apply the principles of the Equality Act to this process of review, and its anticipated outcomes and changes in practice. Better Media believes it is in the interests of the public, as both citizens and consumers, to have an independent communications regulator that understands the needs of a complex and changing society in which people of minority identities and diverse social characteristics are not simply protected, but are able to thrive.

Any improvement and review of Ofcom's impact assessment processes must acknowledge that differential methodologies of impact assessment may embody significant variations in reasonings, practices and outcomes across each category of Ofcom's regulatory work. Therefore, any impact assessment process must be suited to the needs of each area of regulation, technology, economic activity and social impact, in a way that is integrated with all the statutory obligations placed on Ofcom. This can't be a one-size-fits-all policy review that allows Ofcom to take what is expedient and forego that which is challenging from an organisational resource and a policy perspective.

As a general point, therefore, Better Media's concern is that this process of review is way overdue, and that in only undertaking it now, Ofcom has undermined public confidence in its role as a public regulator by demonstrating that it does not lead in this area, and is following and trailing behind what is happening in other sectors. If Ofcom's impact assessment process is outdated and insensitive to social change and cultural diversification, then Ofcom will not be able to plan and act with the future interests of citizens and consumers in mind.

Better Media would be happy to work with Ofcom and other stakeholders to rectify any shortcomings on a contributory basis. We believe that the independent regulation of media and communications must be socially and cultural anticipatory, and would be most effective if based on inclusive and participatory input to the process. Such input could take the form of a democratic widening of voices, in addition to the best use of research methodologies and data that can be easily, frequently and effectively sourced, monitored and updated.

Better Media recognises the value of Ofcom being an independent communications regulator that is able to anticipate technical, economic and social change, and to independently identify what would be of benefit to citizens and consumers in the future.

4 Section Responses

1.1 Ofcom must ensure that impact assessment models and processes are held in the public domain, as part of the knowledge commons and as a public recourse, so other organisations and civic society groups can interrogate them, compare them, and use their own modelling to test and independently validate them.

1.2 Ofcom must remove the bias towards 'least intrusive' regulatory mechanisms and change to an integrated policy requirement giving bias towards that which is 'most effective,' and as required to meet the priorities that are set for Ofcom in statute, principally by the Equality Act.

1.7 Many of the changes in research practice noted here have been available for many years, which indicates that in the future Ofcom will benefit from timely and regular reviews of its processes, and the public should not have to wait for another decade for them to be reviewed.

Ofcom should establish a rolling process of review, working with independent research-led and public policy organisations to ensure these processes are in line with Ofcom's objectives, and favour the interests of the citizen and consumer.

Ofcom must be prepared to use and champion competing methods of impact assessment. These might include behavioural modelling, for example but there are many other research approaches that are critical of behaviourist modelling.

Ofcom must do all it can to ensure that any analysis methodology it uses are not subject to inherent social, economic or cultural assumptions and biases that pre-determine outcomes and favour some social groups over others. Ofcom must accept, therefore, that alternative research models may be better suited for use in determining the viability of any of the impact processes which it chooses to use, and which may be better suited to the tasks at hand.

1.8 Ofcom should establish an independent and transparent partnership forum with external impact assessment analysis-led organisation. This forum should be mandated to report on and review Ofcom's processes on a rolling basis, with the aim of testing the validity of the adopted approaches, and where necessary, broadening the scope to cover contiguous issues.

1.10 Ofcom must go beyond simply making guidance 'user friendly' and should instead develop a programme of data analysis skills and capacity building, or data literacies for stakeholders who are not able to draw on specific technical or research practice expertise, but who are well able to raise valid concerns about any proposed changes and modes of analysis.

1.13 The range of stakeholders should be widened to include representatives from public authorities, the civic society sector, and the education sector. Ofcom should recognise the value of widening participation in impact analysis, and should include stakeholders who are able to anticipate social policy needs and public services provision in the future, but who do not traditionally fall under the media and broadcasting related regulatory methods.

Many public bodies, for example, have a duty to ensure that their operational framework is aligned across different sectors, despite them operating separately. An integrated and managed cross-sector process can ensure that processes that Ofcom adopts, and decisions that it makes, do not have an adverse impact on their capability to undertake their public functions. Advertising of junk food, for example, is a public health issue, not simply a media issue, and must be regulated cohesively and holistically.

1.14 By establishing a forum group of related expertise and public organisations, who can be commissioned by Ofcom to provide cross-sector advice as part of the regulatory process, Ofcom would take an essential step towards a more active form of regulation which will accommodate other regulatory requirements, such as Levelling Up, public health and education needs. Ofcom's present approach tends to undertake consultations passively, by issuing calls for evidence, and awaiting the responses that are submitted. This reactive approach must be given a clear expectation that it will be sunset, and replaced with a system of direct commissioning of evidence and analysis by Ofcom, rather than simply waiting for evidence to be given.

1.18 The bias towards non-intervention must be replaced with a commitment for open and transparent decisions that are regularly and frequently reviewed.

1.20 Because the law does not require intervention in certain sectors by Ofcom, it does not follow that Ofcom should not act in the interests of citizens and consumers by taking it in itself to intervene in the public interest. This bias towards non-intervention should be replaced with the requirement that in the areas where Ofcom has decided not to intervene, this is done in accordance with a published and open statement of what Ofcom considered to be in the public interest by not intervening. This statement should indicate when and in what way each decision will be reviewed.

Changing circumstances and the unintended consequences of social and economic development, for example, may necessitate intervention in different ways at different times, that have not been previously anticipated, nor are anticipated at the present time. Ofcom must therefore regularly

review these established positions to demonstrate that if circumstances are changed, Ofcom will review their needs bias.

Moreover, Ofcom should introduce a hierarchy of needs interests that prioritise the citizen first, then the consumer, then the content producer, then the platform and technology supplier. Ofcom should also introduce a hierarchy of needs that anticipates impact at the lowest level first, starting with the local, then the regional level, followed by the national level, and only then the international level. Presumption of any needs analysis should always be biased towards the interests of the disaggregated citizen and their location of experience.

Ofcom must invest in data gathering and monitoring systems that track and monitor social changes in as close to real time as possible, with an emphasis on those least able to afford or access media provision, or those most distant from population concentrations with a bias towards universal service provision.

1.22 Ofcom should not assume that the public cannot follow or come to a valid view about complex issues. If Ofcom is concerned about this, then partnerships with education providers and civil society organisations, in addition to public authorities and governments, must be developed to mitigate knowledge gaps in the population.

Ofcom should always be minded that they are required to act in the public interest first, in order to explain and gain consent from citizens for the decisions that it makes, which means undertaking active public engagement programmes of consultation and communication that explain and invite public participation in the decision-making processes.

Ofcom should regard this, where possible, as a duty to explain and educate the public to the complex matters relating to media regulation, expanding its media literacies remit to go beyond consumption of content and access to services as consumers, and to encompass public education of how media is provided and regulated.

1.24 In simplifying documents, Ofcom must ensure that this is done in accordance with best practice and standards of public policy engagement that are followed in other sectors, such as public health, transport and energy. This must not remove any practical support for documents in minority languages, or formats suited to people with visual or other impairments. Ofcom must establish a rolling-review panel process that provides advice on the most appropriate way that other similar public sector organisations operate in this regard.

1.26 Guidance on qualitative and quantitative methodologies should be subject to consultation as part of a standing review forum that is able to examine and offer independent guidance, such as those found in other sectors. As this point stands, there is no indication of what form the qualitative assessment might take and what methodology is being proposed. There are many alternatives, ranging from behaviourist-focussed analysis to ethnographic data collection methodologies. Each form of qualitative analysis is different and will result in different outcomes and results. Each methodology will require context specific justification.

A multidisciplinary research advisory panel would be able to assist Ofcom form independent view on the validity of each of these available processes. There is no mention of an ethics review process within this document, and any research and impact assessment would normally only be validated on the basis that it complies with internationally recognised ethical standards.

1.30 Iterative approaches are standard in other sectors, and should be well integrated into Ofcom's impact assessment systems and methodologies by now.

1.31 The concept of 'feasibility' needs to be continually reviewed as circumstances change and society changes. A multiple options approach may therefore be necessary, anticipating the growing

need to consider other perspectives and points of reference that had not previously been considered when an impact assessment process was first set up.

The definition of 'feasibility' must be shaped by the incorporation of the Equality Act (1.33), which will enable Ofcom to assess 'who' the impact assessment will favour, benefit or restrain. For example, any bias towards universal digital access that is assumed when assessing platform and technology provision may suggest that there are no further issues to consider.

It should be noted, then, that when a social and cultural assessment is applied, it may indicate that the proposed impact model used to demonstrate the validity of a new platform has not provided sufficient data for Ofcom to act in the interests of the citizen or consumer, and especially minority groups and people who are defined by the protected characteristic of the Equality Act.

1.33 The fact that Ofcom's guidance has not previously incorporated the Equalities Act has is worrying. The Equality Act places an obligation on public bodies to

- Eliminate unlawful discrimination.
- Advance equality of opportunity.
- Foster good relations.

There are both direct and indirect forms of discrimination and inequality. Ofcom's approach to equalities policy development and practice must, therefore, put the Equality Act in a primary position in regard to its impact assessment process and the work that it undertakes to understand the outcomes of regulatory decisions that are made in relation to the duties noted above. Ofcom should make clear that it recognises that we are a society in which media technology changes rapidly and continually, so Ofcom will continually review how it will undertake its impact assessment work in accordance with these changes as the relate to the principles and duties in the Equality Act.

However, this requirement to review Ofcom's equality operations should not be left to Ofcom alone to make these determinations for itself, but should be independently reviewed by the EHCR.

In addition, Ofcom must establish an independently constituted standing advisory panel that draws contributions from civic society organisations, public sector organisation, education sector organisations, as well as business and industry stakeholders, to anticipate social change that is reduces discrimination, is more inclusive of people of protected characteristic groups, and leads to improved public relations between minority groups and the majority population.

1.40 For Ofcom to state that 'we do not consider that any of the proposed changes to our Assessment Guidance will in themselves have any equality impact' is alarming, and suggests that Ofcom has not undertaken a significant and meaningful review of these equalities matters, nor taken advice on what changes that Ofcom might anticipate are likely to be prominent given the implementation of evidence that is made available in the public domain, or commissioned by Ofcom and its stakeholders.

The EHRC should therefore be invited to review these proposals, with a view to consulting more widely with the public, and in order to anticipate the strategic updating of Ofcom's systems and practices.

Ofcom indicates that these updated processes 'should' result in 'positive equality impacts', but what will happen if they do not? What happens if members of the public are not engaged fully in the review of Ofcom's assessment processes? We've seen how the BBC's consultation processes have been reduced from previously extensive public engagement commitments to cursory and limited public engagement, which it is arguable are undermining consent for the BBC's services and its public service role.

There is no reason to assume that changes to the processes of impact assessment should themselves lead to an improvement of Ofcom's decision-making processes. Unless these proposals are subject to public scrutiny, taking place in the public domain, and matched by a commitment to engage with the public, and respecting the public's ability to deal with complex issues, these changes will be of internal benefit to Ofcom only.

In addition to the equalities assessments defined in this consultation, there is no mention of net-carbon assessments or social economy assessments. Does anyone have a summary of points we can include on both of these because they fit with and bolster each other given the circumstances.

5 General Concerns

Better Media is concerned, based on the statements made in this consultation call-out, that when it comes to Ofcom acting in the interests of citizens there is a high bias towards regulatory passivity, and that Ofcom is not intending to actively anticipate the needs of citizens by investing in robust frameworks of consultation and engagement with the public. This might have been suited to the perceived economic and social needs of the early 2000s, but given the increased complexity of the communications economy, and the rapid growth of social diversity, it is Better Media's view that this passivity is no longer desirable.

There are many examples of best practice from other public and economic sectors that Ofcom could draw on, which illustrate the benefit of well informed and timely impact assessments, but as outlined in this consultation, Ofcom seems content to keep a narrow focus on policy development and regulatory practice within Ofcom's existing routines of practice. This consultation suggests that this process is merely an updating of Ofcom's legacy processes, rather than a wholesale learning from best practice for policy development in other fields and sectors.

Better Media is therefore concerned that the proposals do not identify any specific or significant framework for change management that will be used to justify when, and in what circumstances, interventions are appropriate and when not. Ofcom's bias towards non-intervention cannot be self-justified, but must be available for scrutiny by the public and bodies and organisations acting on their behalf.

It is our recommendation that Ofcom should adopt policies and practices of public engagement that are active in nature, are defined by a published rationale, and have a demonstrable bias towards intervention. We call on Ofcom to widen and strengthen the public engagement model that is used to consider impact in all areas of Ofcom's regulatory activity, in line with good practice in other sectors.

Ofcom must also review and determine the scope and profile of any and all work that it undertakes to ensure that it not only refers to the legal duties outlined in the consultation proposals, but that Ofcom has the resources to undertake this work. It is one thing to consider impact; it is another to demonstrate in practice that any review and examination of impact is meaningful and can be effectively implemented.

It is Better Media's recommendation that Ofcom review its practices of assessing impact by establishing and facilitating a rolling forum of public authority and civic-society stakeholders that have an interest in enhancing the status and provision of communications-related information for citizens and consumers. This must include a wide range of civil society, public sector, education, business, industry and other appropriate stakeholders.

The Covid-19 pandemic demonstrated the need for effective cross-sector coordination of media and communications for the benefit of public health, social cohesion and economic recovery. However,

we are unaware if Ofcom's systems have been publicly and independently reviewed in the light of the needs of public authorities acting in the interests of all citizens, and not just commercial interests.

A balanced approach to the review of data and research methodologies would include multiple stakeholders from across society and not simply platform or communication service providers. The tendency to rely on information provided by economic actors in the communications industry - for example the dependence on RAJAR for information about radio listening - is incompatible with Ofcom's duty to provide independent regulation in the interests of both citizens and consumers. A healthy attitude to research is to 'test' and not 'celebrate' information that is fed into any process.

It follows that it would be of significant benefit to the public if Ofcom can commit to becoming a leading advocate and developer of open-research resources related to communications, with data being shared in the public domain for review and testing by all interested parties.

We believe it will benefit both citizens and consumers if Ofcom is committed to open data-management and open research-monitoring processes, with published and shared outputs that can be maintained as a public good within the 'knowledge commons.' Ofcom should therefore move beyond simply publishing guidance in the public domain, and should instead facilitate meaningful interaction by members of the public based on wider participation in impact assessment processes.