

Evidence to Ofcom Consultation on the Draft BBC Operating Framework (July 2017) from Simon Albury, Chair, Campaign for Broadcasting Equality CIO

OFCOM'S WAIT AND SEE REGULATION IS WRONG FOR EMPLOYMENT DIVERSITY

This submission addresses the Draft BBC Operating Framework in relation to BAME diversity.¹ What it proposes in relation to BAME might be applied to other under-represented groups.

Conclusion

Ofcom has made it clear that its preferred approach to regulating the BBC in relation to diversity of employment is wait and see. Ofcom says it wants to wait and see how the BBC responds to the new statutory responsibilities on diversity and to monitor the BBC's progress towards meeting its own goals.

The Campaign for Broadcasting Equality evidence demonstrates that the BBC Annual Plan, fails to set credible goals based on credible data. It cannot stand as an adequate response from the BBC to its new statutory responsibilities on diversity. Ofcom no longer needs to wait. It should be able to see this.

Neither the BBC Annual Report nor the BBC Equality Information Report adequately take into account the BBC's new statutory responsibilities on diversity.

In order for Ofcom to ensure that the BBC meets its obligations under the Charter and Agreement, Ofcom must now establish, in the first operating licence, credible base lines and targets which can be incorporated in specific regulatory requirements and performance measures for off-screen employment diversity.

Employment Diversity – A Human Issue

Diversity in employment is a human issue. BAME people cannot be treated like spectrum, fibre and copper wire, which have no memory. Ofcom has limited experience of dealing with human issues.

Last November, the Ofcom CEO, Sharon White, agreed that diversity was “an area where we have not done enough in the past” and said “it is now a priority for us”.

On diversity, Ofcom's history is shabby.²

¹ I am grateful to Ofcom for agreeing that views expressed by its staff in a meeting held under Chatham House rules can be attributed to Ofcom.

² 1 Campaign for Broadcasting Equality Evidence to Ofcom PSB Review 2015.

This evidence was available via the Ofcom website but, alas, is no longer.

2 “Ofcom diversity record 'shabby’” Broadcast 9 March

Ofcom launched on 29 December 2003.

Section 27 of the Communications Act 2003 (the Act) imposed a duty on Ofcom to take appropriate steps to promote equal opportunities in broadcasting. Ofcom has not taken its equality duty seriously and has failed to take appropriate steps to promote equal opportunities. Had it done so we might have expected to see an increase in BAME employment. Skillset data shows that between 2006 and 2012, the reported BAME numbers working in the UK television industry declined by 30.9%.

But in addressing its regulatory responsibilities, Ofcom's historic reluctance to act as an effective regulator on diversity is now reflected in its reluctance to apply regulatory requirements and performance measures to off-screen and workforce diversity in the BBC.

On employment diversity, Ofcom must stop being a reluctant regulator.

Ofcom prides itself on operating as an evidence-based regulator but it has failed to look and see the history of an absence of diversity and the complete evidence of diversity failure at the BBC.³

Ofcom has also failed to recognise the urgency of the issue for BAME people who know they are grossly under represented among those who actually work for the BBC in UK creative roles making output for a British audience.⁴

Wait and see regulation

On 13 July, Ofcom held a "BBC Performance diversity stakeholder event."⁵

It was clear at that meeting that Ofcom could not see why it needed to introduce regulatory requirements and performance measures for diversity of employment at the BBC as a matter of urgency. BAME participants left the meeting angry at Ofcom's ignorance and apparent insouciance.

Ofcom's preferred approach to regulating on diversity is to see how the BBC responds to the new statutory responsibilities on diversity, and to monitor the BBC's progress towards meeting its own goals.

<http://www.broadcastnow.co.uk/news/ofcom-diversity-record-shabby/5084041.article>

³ There are numerous sources. The Campaign for Broadcasting Equality evidence to the Lords Communications Committee Inquiry on BBC Charter Renewal is just one. <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/communications-committee/bbc-charter-renewal-public-purposes-and-licence-fee/written/21757.html>

⁴ "The BBC's Diversity Strategy is Not Good Enough" Simon Albury, Guardian 4 May 2016 <https://www.theguardian.com/media/2016/may/04/the-bbcs-diversity-strategy-is-not-good-enough>

⁵ I am grateful to Ofcom for agreeing that I might report some of the views it expressed in the meeting. I cannot be comprehensive. If Ofcom feels I have left out significant elements I hope it will address the omissions as soon as possible and correct any matters where it believes it has been misrepresented.

Ofcom said that if the BBC was not achieving its own goals, Ofcom would return to the issue in two or three years' time and consider inserting statutory requirements into the BBC's operating licence. This is wait and see regulation.

BBC Annual Plan

The BBC Annual Plan sets out how the BBC proposes to address these matters.⁶

At the stakeholder event, critics pointed out that the section on diversity was strong on assertions for which no source or evidence had been provided. A former ITV company board director said that such a threadbare annual plan for diversity would never have passed muster even in a small ITV broadcaster.

Ofcom offered to circulate, later in the day, the relevant sources and evidence, to be supplied by the BBC, on which some of the assertions were based.

More than a week has passed but that information has not been forthcoming.

It was clear at the meeting, that the BBC Annual Plan for 2017/18 for diversity is manifestly based on unreliable assertions.⁷

One wonders how the BBC board, with its wealth of commercial experience, came to approve a document that is so flimsy on diversity. Ofcom explained it was giving the BBC board "the space to set out how they themselves are going to meet their objectives."

Despite articles in the Guardian and Broadcast last year, Ofcom appeared wholly unaware that the basis on which the BBC presents diversity data is misleading.⁸ As a consequence, Ofcom has, to date, failed to carry out the necessary due diligence on the BBC's published diversity data.

Ofcom must now recognise that for diversity, the base lines and targets in the BBC Annual Plan for 2017/18 are based on unreliable and unsustainable assertions.

⁶ BBC Annual Plan for 2017/18

http://downloads.bbc.co.uk/aboutthebbc/insidethebbc/howwework/reports/pdf/BBC_Annual_Plan_2017-18.pdf

⁷ To present the discussion in the Ofcom meeting on which this conclusion is based would breach the rules under which the meeting was held. The point is reinforced in RESPONSE TO: "HOLDING THE BBC TO ACCOUNT FOR THE DELIVERY OF ITS MISSION AND PUBLIC PURPOSES" WITH SPECIFIC REFERENCE TO SECTIONS 4.128 - 4.134 ON DIVERSITY By Lenny Henry.

⁸ As footnote 4

+ "Diversity targets must address creative roles" Simon Albury, Broadcast 20 May 2016 <http://www.broadcastnow.co.uk/opinion/comment/diversity-targets-must-address-creative-roles/5104235.article>

“What more do you need to know?”

When confronted with evidence of the BBC’s failure to come anywhere close to its BAME employment targets in production, Ofcom pleaded that it needed to know more and that it would be looking for more information.

Ofcom said it was a very information and fact-based organisation, and it wanted to know the reality of what’s happening, and the evidence before it could know what the BBC is committing to, and before knowing what Ofcom needed to do.

People with an interest in BAME employment were incredulous and asked “What more do you need to know?” and “Why aren’t you setting targets for the BBC on UK BAME employment on programmes made for the UK?”

Why is Ofcom so far behind?

When the BBC White Paper was published on 16 May 2016, it was clear that Ofcom would become its regulator and that diversity on-screen and off would become more important.

When the draft BBC Charter and Agreement were published on 16 September 2016, the diversity provisions would have been clear to Ofcom. If it had paid attention to Parliament it would have understood that these provisions were unlikely to be changed.

Ofcom would also have known that Parliament was giving equal weight to on-screen and off-screen diversity. Yet in explaining Ofcom’s dilatory approach to obtaining data on BAME employment, Ofcom said it had only been the BBC’s regulator since the 3 April 2017. Had almost a year been allowed to slip by before this evidence-based regulator did even basic desk research on evidence of patterns of BAME employment in the BBC? Why did it wait to see?

Ofcom offered that were it to find that the BBC was failing to meet the BBC’s own BAME employment targets, then Ofcom might initiate a “deep dive” on diversity and it might address the issue in the second or third iteration of the Operating Licence, in two or three years’ time.

It is hardly surprising that those who have paid closer attention to the issue of BAME representation in broadcasting left the Ofcom meeting angry at Ofcom’s lack of knowledge and lack of urgency.

“Wait and see” regulation will not wash on employment diversity.

With immediate effect, Ofcom should establish what it calls “an ad hoc deep dive” on BBC diversity, to establish credible base lines and targets which can be incorporated in specific regulatory requirements and performance measures for off-screen employment diversity. These should, *inter alia*, match

the requirements of BBC Charter Article 14, to which we shall return in this evidence.

What gets measured, gets done.

What gets measured, gets done. Matters that are subject to regulatory requirements and performance measures are taken more seriously than matters that are not.

Ofcom forcefully insists that it is wholly incorrect to say it does not give equal weight to on-screen and off-screen diversity.

It is naive or disingenuous for Ofcom to suggest that on-screen and off-screen diversity are given equal weight, when on-screen diversity is subject to regulatory requirements and performance measures while off-screen is not.

Ofcom's view demonstrates an ivory tower perspective - a profound failure both to understand the impact of regulation and performance measures on the regulated, in this case the BBC, and also their impact on the confidence of those with an interest in this issue, BAME people in broadcasting.

Ofcom bias against off-screen diversity

Following publication of the BBC Charter and Agreement, DCMS published the "BBC Charter Review 2016 Information Sheet – Diversity", to provide a guide to the key clauses on diversity.

Among the Charter clauses to which it referred were: Article 6. (4) Public Purpose and Article 14. Diversity.

From the Agreement it cited Clause 14, "Performance Measures", Schedule 2, Clause 2 (1)(d) on the needs of the diverse communities, and Schedule 3 Clause 12 "Equal Opportunities".

When Ofcom sent out the Agenda for the 13 July diversity stakeholder event, the only Clause to which Ofcom referred was Article 6. (4) "Public Purpose" which was set out in full.

Article 14. Diversity

Ofcom failed to include any reference to Article 14. "Diversity".

Why, at a diversity stakeholder event, would Ofcom not circulate the one Article in the BBC Charter that has the word "diversity" attached to it?

Article 14 contains the key clause about off-screen diversity. This Article was given greatest prominence in the DCMS Information Sheet which leads with a section on "The government's policy." Its first words:

“Over the next Charter period, the government wants the BBC to be the leading broadcaster in addressing diversity issues on and off-screen..”

Charter Article 14. Diversity says this :

(1) The BBC must ensure it reflects the diverse communities of the whole of the United Kingdom in the content of its output, the means by which its output and services are delivered (including where its activities are carried out and by whom) and in the organisation and management of the BBC.

This is emphasised and repeated again in the Article

4) In complying with this article, the BBC must have particular regard to the need to reflect underrepresented communities.

(1) The BBC must ensure it reflects the diverse communities of the whole of the United Kingdom in the content of its output, the means by which its output and services are delivered (including where its activities are carried out and by whom) and in the organisation and management of the BBC

“the means” must mean all suppliers of programmes within and outside the BBC including independent producers

the “by whom” must include those with a diversity of protected characteristics

This means that BAME people must no longer be under-represented in the suppliers of content and services or in the organisation and management of the BBC.

Ofcom has been quoted in the press saying⁹ “We expect the BBC to increase diversity off-screen, and it has a workforce target of 15% representation of black, Asian and ethnic minorities, across all staff, including leadership, by 2020. We are clear that we will consider further action if we don't see early and continued progress.”

Ofcom is not meant to monitor BBC overall employment, that is not its remit.

Ofcom is meant to monitor where programmes are produced and by whom. The BBC's 15% target can be met with little effect or relevance to what Ofcom is meant to be monitoring.

Ofcom must set targets (or at the very least monitor) for who is producing the programmes. The BBC's current statistics do not address this and Ofcom is not asking the BBC to do so. Ofcom does not appear to understand its duty and obligation. Article 14 cannot be ignored.

⁹ “Lenny Henry: Ofcom is practising 'fake diversity' with on-screen targets”
<https://www.theguardian.com/media/2017/jul/19/lenny-henry-ofcom-practising-fake-diversity-on-screen-tv-targets>

Turning to the Agreement

Schedule 2 Clause 2 (1)(d)

Schedule 2 Clause 2 (1)(d) The first operating licence: In setting the first operating licence, Ofcom must consider the need for the BBC to take into account the needs of the diverse communities of the UK's nations and regions. This is one of the ways Ofcom will be able to hold the BBC to account on their performance on diversity.¹⁰

This makes clear that in setting the first operating licence Ofcom must take into account the needs of diverse communities.

At the diversity stakeholder event, Ofcom stressed that it is “a evolving licence” which would be updated and improved from time to time. That may be acceptable for other elements of the Charter and Agreement but with regard to diversity, Ofcom needs to accept that there is an expectation that it will get diversity right in the first operating licence when it is published at the end of September. “Wait and see” for two or three years is not compatible with “the first operating licence.”

Schedule 3 Clause 12 Equal Opportunities

Schedule 3 Clause 12 Equal Opportunities: This clause specifies that the BBC needs to ensure equality of opportunity when employing anyone in connection with providing any of the UK Public Services.¹¹

The Equal Opportunities clause reinforces all of the above.

Article 6.4 Public Purpose

This Article is primarily about on-screen and on-air representation. It says “...the BBC should reflect the diversity of the United Kingdom both in its output and services. In doing so, the BBC should accurately and authentically represent and portray the lives of the people of the United Kingdom today, and raise awareness of the different cultures...”

The workforce informs the content in terms of accuracy, authenticity and portrayal.

Given this relationship, Ofcom should seek and publish simple on-screen and off-screen diversity data for the top ten programmes in each genre.

Ofcom has made it clear that it is not relying on Project Diamond. Project Diamond is a hugely ambitious and potentially valuable project. Not only would publishing such programme diversity data provide essential information, it might also persuade the Unions to lift the boycott on Project Diamond. The boycott itself is acknowledged to be making Project Diamond less effective.

¹⁰ DCMS BBC Charter Review 2016 Information Sheet - Diversity

¹¹ ibid

Sir Lenny Henry Speech

On 18 July, Sir Lenny Henry delivered a speech at an event at Portcullis House.¹² In it he provided compelling evidence which led him to the following conclusion:

“while the BBC’s official figures say 14.5% of their work force are BAME, the number of people actually responsible for making the programmes you and I watch, is probably closer to 1.5%.”

During a subsequent discussion, politicians made it clear that the BBC and Ofcom were far from meeting the objectives which Parliament had set them, and that they expected Ofcom to set regulatory requirements, performance measures and minimum standards for employment diversity now. They could see no case for “wait and see”..¹³

BBC Annual Report

On the following day, 19 July, the BBC published the BBC Annual Report 2016/7¹⁴ and the BBC Equality Information Report 2016/7.¹⁵

There was nothing in these reports to contradict Lenny Henry’s conclusion that the proportion of BAME people employed making programmes for the UK audience is closer to 1.5% than the 14.5% that the BBC claims.

Furthermore, as far equality and diversity is concerned, the form of BBC reporting in the Annual Report and Equality Information Report has not changed to take into account the new requirements of the BBC Charter and Agreement.

Ofcom’s duty

Ofcom has made it clear that its preferred approach to regulating the BBC is to see how the BBC responds to the new statutory responsibilities on diversity and to monitor the BBC’s progress towards meeting its own goals.

This approach is unsatisfactory for the reasons outlined above and fails to meet Ofcom’s obligations.

¹² Lenny Henry – Ofcom, TV and Fake Diversity

<https://cbesite.wordpress.com/2017/07/19/lenny-henry-ofcom-tv-fake-diversity-full-speech/>

¹³ A senior Ofcom member was present at the event but chose not to speak from the floor. Later Ofcom told a member of the press that Ofcom hadn’t been invited. Then a Chris Wynn, bearing the same name as Ofcom’s Director of Communications and a similar beard too, tweeted that Ofcom had only been invited two days before. Ofcom had been invited on 3 July more than two weeks before. It does not give confidence when a regulator cannot distinguish between the measure of a day and a week.

¹⁴ BBC Annual Report 2016/7

<http://downloads.bbc.co.uk/aboutthebbc/insidethebbc/reports/pdf/bbc-annualreport-201617.pdf>

¹⁵ BBC Equality Information Report 2016/7

<http://www.bbc.co.uk/diversity/strategy/eir-2017>

Ofcom no longer needs to wait and see. It is now clear that the BBC Annual Plan fails to set credible goals based on credible data. It cannot stand as an adequate response from the BBC to its new statutory responsibilities on diversity.

Neither the BBC Annual Report nor the BBC Equality Information Report adequately take into account the BBC's new statutory responsibilities on diversity.

Ofcom has a clear duty now to establish credible base lines and targets which can be incorporated in specific regulatory requirements and performance measures for off-screen employment diversity in the first operating licence.

Anything less shows a woeful lack of resolve to fulfill its own statutory duties.