

**Ofcom review of procedures for handling broadcast complaints, investigations
and sanctions**
Response by the BBC

The BBC welcomes Ofcom's intention to make its procedures more effective and efficient, and, with a small number of reservations about matters of detail, we welcome its specific proposals for doing so.

In particular, we welcome:

- The proposal to introduce a "Preliminary View" (2.17). We believe this will assist broadcasters in focusing their representations on the issues of concern to Ofcom.
- The proposal to remove the internal review mechanism (2.17). We believe this is the appropriate counterpart to the preceding proposal, provided that Ofcom will not rule out on merely procedural grounds reasonable representations by broadcasters about its adjudications and findings. We understand this to be Ofcom's position, but it would give reassurance if Ofcom would confirm it, either in the wording of its procedures or by letter to broadcasters.
- The proposal to remove the Broadcasting Sanctions Committee (2.17). We believe the Ofcom Executive is best placed to ensure consistency and proportionality in the consideration and determination of statutory sanctions.

Our reservations about matters of detail concern:

- The proposal to allow only 15 working days for the broadcaster's statement in response to a fairness complaint (4.12). This is a significant reduction from the 20 working days currently allowed, and previous experience of operating a 15-day deadline showed that it was often too short a time for broadcasters to research, draft and finalise their statements with the necessary level of internal consultation. If proceeded with, we think this change likely to lead to broadcasters requesting extensions in many, perhaps the majority, of cases, and that, in practice, it will do little to expedite Ofcom's process.
- The proposal that, after notification of Ofcom's view that a sanction is appropriate, the broadcaster should be invited to make representations only on "*the type and level of the sanction being proposed*" (5.11). Broadcasters should properly be invited at this stage also to make representations on whether a sanction is appropriate at all – and 5.12, which says "*After consideration of written and/or oral representations from the broadcaster, Ofcom may decide that no sanction is appropriate in a particular case*" seems to envisage representations to that effect.

There is, however, one matter of substance on which we have strong reservations; and, though it does not represent a change to the procedures promulgated on 16 December 2009, we will comment on it here because a) it was introduced into those

procedures without opportunity for consultation, and b) because points made about it by the BBC and other broadcasters have not been adequately addressed by Ofcom. This is the provision that, in some circumstances, Ofcom may consider fairness or privacy issues in the absence of a complaint from the affected party.

Concerns about this matter were put to Ofcom on behalf of the BBC, ITV, Channel 4 and Five in Praish Naik's letter of 26 February 2010, supported by detailed legal argument. Ofcom's reply (Polly Weitzman's letter of 30 July 2010) maintained that the issue was one of statutory construction, and merely asserted that the broadcasters' construction was "*wrong*" without addressing the arguments in favour of that construction or providing arguments to the contrary. So that the matter can be properly addressed, we set out the broadcaster's arguments again here ("the Amendment" refers to the provision for consideration of fairness/privacy issues in the absence of a complaint from an affected party, promulgated on 16 December 2009).

Ofcom's Duty

Ofcom is required to have regard to a number of factors set out in sections 3(2), 3(3) and 3(4) of the Act in the exercise of its duties and, of particular relevance to the Consultation are the following:

- 'adequate protection' for unfair treatment or an unwarranted infringement of privacy;
- the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed;
- that this is achieved in a manner that best guarantees an appropriate level of freedom of expression.

The Procedures must also be within the ambit and consistent with the following:

- the Act
- the Broadcasting Act 1990 and 1996 (as amended by the Act)
- Television without Frontiers Directive 89/EEC, as amended by 97/36/EC (updated by the AVMS directive 2007/65/EC)
- the Human Rights Act 1998.

Parliament struck a careful balance between fairness and privacy investigations (complainant-initiated investigations) and standards investigations (which can be commenced by a complaint from the public at large or by Ofcom). This is clearly set down in statute and has operated effectively for both broadcasters and complainants for many years. While there is an overlap between fairness/privacy and standards issues, the two types of complaint have different functions and Ofcom acknowledges this in the Ross/Brand adjudication. Paragraph 10.12 of the Ross/Brand Adjudication states that:

"Finally, the Committee took care when considering the seriousness of the breaches of Rules 2.1 and 2.3 in this case, to distinguish between protection of individual members of the public from unwarranted infringements of their privacy, and protection of the public in general from the harm and offence which

may arise from the infringements of the privacy of others (e.g. through humiliation, distress and/or violation of human dignity)''

Standards complaints are concerned with the protection of the public in general from harm and offence. Fairness and privacy complaints are intended for the protection of members of the public from an unwarranted infringement of their privacy or unfairness to them.

There can be some cases where there is an overlap between these two distinct areas and where consideration of unfairness or a breach of privacy in a standards arena may be warranted. For example a standards complaint may arise where public offence is caused by the belief that an individual has been treated unfairly or their privacy has been infringed. Such a complaint centres on the *perceived* harm caused to that individual and the public offence can manifest itself by the perceived humiliation or distress of that individual. However this is distinguishable from a fairness/privacy complaint brought by that individual as this centres on the *actual* harm suffered which can only be measured in real terms by that individual.

This does not however warrant an extension of Ofcom's powers in the fairness/privacy arena to consider complaints without a complaint from the person affected as defined in the Broadcasting Act. Ofcom cannot substitute itself in place of that individual as it is in no better position to assess the actual harm caused in the absence of the complainant.

We understand that it is Ofcom's view that it has the power to introduce the Amendment on the basis of its general duty under section 3(2) (f) of the Act. We understand that it is Ofcom's view that this general duty is entirely separate and distinct from its specific statutory obligations under sections 111 and 115 of the Broadcasting Act 1996 (as amended) ('BA 1996'). We believe that this interpretation of the Act and the extension of Ofcom's powers in this way are both misconceived and wrong in law.

In our view section 3 of the Act sets out Ofcom's general duty as the standard to be met as a starting point only. The mechanism by which this duty is met, clearly set out under sections 111 and 115 of the BA 1996, flows from section 3. Ofcom's published procedures are the practical embodiment of that duty and set out in a transparent, accountable and proportionate manner the way in which the general duty under section 3(2) (f) is to be achieved. This is supported by Ofcom's own procedures which state that:

"Ofcom has a duty under section 107 of the Broadcasting Act 1996 (as amended) ("the 1996 Act") to draw up a code of practice with respect to fairness and privacy. This code sets out the principles to be observed and practices to be followed by broadcasters to ensure the avoidance of unjust or unfair treatment of people appearing in programmes and unwarranted infringement of privacy of people appearing in (or in connection with the obtaining of material included in) programmes. Under section 110 of the 1996 Act, Ofcom must consider and, where appropriate, adjudicate on fairness and privacy complaints. Sections 111 to 130 of the 1996 Act provide further detail of certain of the procedures to be followed

by Ofcom, complainants and broadcasters in the consideration of complaints relating to fairness and privacy.” [Paragraph 2 of Procedures for the handling of Fairness and Privacy complaints]

The fairness and privacy complaints procedure as drawn up under section 107 have always operated under Ofcom (and formerly under the ITC and BSC) on the strict understanding that complaints must be made by the person affected by the programme or by someone else authorised to make a complaint on behalf of the person affected. This principle has always been widely understood and applied by broadcasters and complainants alike.

The absence of a complainant

The Broadcasting Act 1996 (as amended) provides that a complaint of an unwarranted infringement of privacy or unfairness “shall not be entertained” by Ofcom unless it is made by the person affected. This is a mandatory requirement derived from sections 110(1) (b); 111(1) and 130(1).

The procedures introduced on 16 December 2009 extend Ofcom’s powers to allow it to consider and adjudicate on privacy and fairness complaints in the absence of a complaint by the person affected. As we have stated above fairness and privacy complaints are intended for the protection of the individual members of the public from unwarranted infringements of their privacy or unfairness to them.

There is often good reason why an individual or company may decide that they do not want to pursue a formal complaint through Ofcom. They may consider that their complaint would not succeed; that it would attract unnecessary public attention; it would not be in their financial interests to pursue; it would place their conduct under scrutiny; or simply they do not want to go through a protracted complaints procedure. However in all cases it is the right of the individual not Ofcom to decide whether they wish to proceed with a formal complaint. The procedures introduced on 16 December 2009 extend Ofcom’s powers to give them the power to exercise a right granted by statute to individual complainants only. This is in our view misapplication of section 3(4) of the Act and beyond Ofcom’s powers.

Ofcom already has the power to investigate issues of harm and offence in respect of rules 2.1 and 2.3 of the Code (whether initiated by a member of the public or by Ofcom) under its standards duty under section 3(1) of the Act. This addresses the viewers’ perceived harm (humiliation, distress and violation of human dignity) caused by the treatment of the affected person. Equally the affected person who suffers the actual harm in respect of an infringement of their privacy or unfair treatment can pursue a complaint under sections 7 and 8 of the Code. Ofcom has provided no evidence of a pressing social need to extend its powers to initiate a fairness/privacy complaint on behalf of an affected person when they have chosen not to pursue this right. This is in our view outside Ofcom’s powers.

Compliance with Ofcom’s Other Duties

Ofcom's duty to protect under Section 3(2) (f) of the Act is not an absolute duty to protect. It is in fact a qualified duty to provide 'adequate protection'. Ofcom's duty under Section 3(2) (f) is therefore more than adequately met by the provisions of Sections 110(1) (b); 111(1) and 130(1) of the 1996 Act and the application of those provisions under the old procedural rules. Ofcom has provided no evidence to demonstrate that 'adequate protection' has not been provided to members of the public from unfair treatment or unwarranted infringements of privacy under the old procedural rules.

Ofcom is also required to have regard to the manner that best guarantees an appropriate level of freedom of expression (section 3(4) (g) of the Act) in performing its duties. We do not consider that Ofcom has complied with this provision on the basis that we do not believe that the Amendment is either prescribed by law nor is it necessary or proportionate. To date both the public and broadcasters have been fully aware of the parameters within which an affected person can complain (or not as the case may be). This has provided both complainants and broadcasters with a fair and transparent system of procedural rules while at the same time providing the correct balancing of the competing Article 8 and 10 rights. In contrast the Amendment creates uncertainty for both licensees and the public at large. The procedures introduced on 16 December 2009 do not define what constitutes 'exceptional circumstances' and as such provides Ofcom with a complete unfettered discretion in this area.

We would add one point to those already put to Ofcom. It is principally the restriction to affected persons which differentiates the Act's treatment of the fairness and privacy remit from its treatment of the harm and offence remit. If Ofcom were indeed empowered to consider issues of fairness and privacy in the absence of a complaint from an affected party, this differentiation would be redundant. All that would remain to differentiate the two remits is the provision (in the case of privacy only) for complaints in connection with the obtaining of material included in programmes. It is surely unlikely that Parliament carried forward the differentiation between the remits from previous legislation with the intention of nullifying its principal component, especially when such an intention could have been more easily and clearly given effect by abandoning the general distinction between the remits while preserving the one feature which is unique to privacy complaints.

Finally, we note that Mr Naik's letter of 26 February 2010 raised a number of concerns about the procedure to be adopted for the determination of fairness/privacy issues in the absence of a complaint from an affected party. In the event that Ofcom continues in the view that it is able to act in such circumstances, we would wish to make further representations in relation to procedure at a later date.