

This document is a response to the 2009 OfCom Consultation on proposed changes to the Broadcasting Code.

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## **INTRODUCTION**

This document is a response to the 2009 OfCom Consultation on updating the Broadcast Code with particular emphasis on the public attitudes survey and implications re Generally Accepted Standards (GAS) in relation to late night niche “Adult” unrestricted “Free To Air” channels. Related issues are addressed.

Options to improve child protection and prevent accidental exposure to offensive material are presented.

## **BACKGROUND**

Earlier this year OfCom commissioned a qualitative survey of attitudes towards sexual content on television, a survey conducted by research group Opinion Leader, referred to as “The Survey” throughout this document.

OfCom has a legal duty under Section 319 of the Communications Act to set standards including “Generally Accepted Standards” that “provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material”. In order to determine what Generally Accepted Standards are, OfCom has a legal duty under Section 14 of the Act to conduct consumer research into, among other things, public opinion regarding broadcasting content and the effect of programmes.

In these matters OfCom is bound by public opinion, not scientific research, personal opinion, religious belief, or political pressure.

A total of 169 participants were shown clips and interviewed, and their responses recorded in The Survey. Participants were chosen to reflect a range of ages, parental status, and liberal/conservative attitudes. Their responses relate to channels without access mandatory restrictions, often referred to as “Free To Air”, but including mainstream Sky/Virgin Media subscription packages, and capable of voluntary restriction.

Significant findings by the survey were that:

- The public are more concerned about non-broadcast material (eg the internet)
- There is a place of sexual content in the broadcast spectrum
- Sexual content is acceptable late at night on niche channels
- Unexpected sexual content is a concern, eg on mainstream channels or during the day
- No distinction was made between real and simulated sex
- Little or no distinction was made between sex in drama, documentaries or sex-themed shows – some “serious” content was believed to be “sex for sex sake”
- More parental responsibility is required

The 2005 Broadcasting Code was seen as a significant relaxation and updating of regulations when announced. However between 2005 and 2009 there has been a progressive, year-on-year clampdown on dedicated sex-themed channels by OfCom, with progressively tighter restrictions. There is no evidence that Parliament intended this

when the Communications Act 2003 was passed, or that there was any widespread public appetite for tighter regulation at the time or since. Although the number of adult channels has increased, the number of operators has decreased, innovation and variety has been stifled, and many channels are now indistinguishable.

Furthermore sexual content in general entertainment programmes has all but vanished. The rich tradition of mixed format entertainment (Monty Python, Kenny Everett, Benny Hill, The End of the Pier Show [1970s satire], Saturday Night with Denise van Outen, etc) has all but vanished, as sexual content for the sake of entertainment is now considered high risk. General entertainment has been bowdlerised.

## **RULE CHANGES**

The following rule changes are proposed, as well as others stated or implied in other sections of this document:

- Material up to and including BBFC 18 certificate strength can be transmitted after the watershed, subject to additional controls for strong sexual content.
- Strong sexual content up to cert 18 can be transmitted after the watershed provided there is a genuine educational justification.
- Brief accidental breeches, for example genitalia visible in long shot for a second while changing position, shall be tolerated.
- Strong sexual content up to cert 18 but without a genuine educational justification, including sex themed entertainment, can be transmitted after 10:30pm provided it is flagged as “18” and voluntary settings can block this.
- Strong sexual content up to cert 18 including material intended for sexual gratification or arousal can be transmitted after 10:30pm in the Adult section of an Electronic Programme Guide, such that voluntary means exist to block access to the entire Adult section.
- Strong sexual material equivalent to BBFC R18 strength can be transmitted after 10:30pm on PIN protected channels with adult verification.
- Material stronger than BBFC R18 may not be transmitted.
- Where ambiguity exists, material shall be regarded as BBFC 18 equivalent rather than BBFC R18. Material shall only be considered BBFC R18 strength if there is a prolonged clear view of genital contact. A small distant view shall not be regarded as clear.
- Being in the Adult section of an Electronic Guide shall be regarded as editorial justification for sexual content including nudity, gestures, and language, subject to access restrictions defined above.

## **SUMMARY OF SURVEY FINDINGS**

Participants were more concerned about sex in mainstream broadcasting than in late night adult channels. This applied to romantic scenes in teatime soaps, drama before and after the watershed, and spicy content in chat shows. There was a feeling that producers of mainstream television use sex to generate ratings rather than because of genuine editorial justification.

Most participants felt that there was a place for outright sexual material on television.

Participants were more concerned about the internet than television.

A frequent concern was protecting children from exposure (or deliberate access) to sexual content, both in general entertainment (drama, documentaries) and adult channels.

A lesser, but still significant concern, was that the participants themselves might stumble across content that they personally found offensive, or that other adults (elderly relatives, etc) might do so.

Concern was highest among older people, older women, parents with older children, and those with conservative views. Concern was less among younger people, men, parents with pre-teen children, and those with liberal views. There were some variations depending on content – the pattern was not identical for every clip seen, with younger women and older men finding content more acceptable in some cases than would be expected if they conformed to crude stereotypes.

One of the most offensive clips was from The Alan Titchmarsh Show, broadcast in the day time.

The clip rated “Totally Acceptable” by the highest number of people (31%) was a late night sex channel trailer apparently featuring genuine sex. (Genitals were not visible).

Consensual sex was seen as more acceptable than “acting”. In other words spontaneous free-form sex between a couple was felt to be acceptable, where scripted moves in some form of rehearsed and directed drama might not be.

Mainstream sex, as generally perceived to be practiced by most couples in the privacy of their own homes, was seen as acceptable in circumstances where more “deviant” sex might not be. This was both because some participants felt uncomfortable with “deviant” sex themselves, and because they did not want young people to copy it. Mainstream sex covered vaginal entry and oral sex between a couple. “Deviant” sex was felt to cover content with more than 2 people, anal sex, bondage, S&M, and so on.

There was a consensus against violent sex.

The survey group felt they should be neutral about the relative acceptability of male/female nudity, heterosexual, lesbian and (male) homosexual content, ie content is acceptable with a boy-girl couple should be equally acceptable for girl-girl or boy-boy.

Participants could not distinguish between genuine and simulated sex.

For example in a bedroom scene in a TV drama, or sex-documentary, the survey group could not be certain whether the sex was genuine or simulated. (This refers to images where there were no genital close-ups).

The BBFC draws a distinction between “clear images of real sex” and images that *may* be simulated. The latter category includes real sex where the images are ambiguous, eg detail sufficient to determine that the action is genuine is out of the camera shot. Images that *could* be simulated are subject to lighter regulation. By contrast, current OfCom rules and practice apply *tighter* control to unclear images of sex that *could* be real (or might not), as noted in some Broadcast Bulletins. As participants cannot distinguish between real and simulated sex, scenes that could be simulated should be treated as if they are not real. The alternative is that for consistency OfCom takes a hard line on **all** material – including BBC drama and Hollywood films – where sex might be genuine, pushing all this content into “encrypted” channels with adult verification.

There was a split about acceptability of showing male or female genitals after 9pm. It was clear that it depended how graphic the material was. This implies that a brief glimpse, say while someone moves, might be acceptable, but outright lingering photography is not.

Sexual content on late night adult channels that could be locked out was seen as more acceptable than on general entertainment channels. Being in the adult section of an electric programme guide (EPG) and late at night was seen both as mitigation and context.

The limit of what adult sex channels should be permitted to broadcast “FTA” should be same as for other channels, not more or less explicit.

It was felt that a degree of parental responsibility should apply, with parents (rather than broadcasters) shouldering responsibility for preventing children accessing unsuitable channels late at night.

The relative acceptability of 9 sample clips is indicated in the table below.



Green indicates people who ticked maximum acceptability, red people who found a clip totally unacceptable. The purple collars indicate average acceptability scores on a 10

point scale (1-4: unacceptable, 5-7: neutral, 8-10: acceptable) – the lower the purple collar, the less acceptable it was.

The clips were:

- Daytime / Pre-Watershed
  - Clip 1 Alan Titchmarsh Show ITV1 3pm
  - Clip 2 Let's Talk Sex C4 8pm
- Post-Watershed
  - Clip 3 Rome BBC2 9pm
  - Clip 4 A Girl's Guide to 21st Century Sex Five 11pm
  - Clip 5 Sin Cities Virgin1 10pm
  - Clip 6 Sexcetera Virgin 1 11pm
- Post Watershed 'Adult-Sex' and Trailers
  - Clip 7 Sex House Playboy One 11pm
  - Clip 8 Trailer Spice Extreme 10pm
  - Clip 9 Trailer Red Hot 40+ midnight

It is notable that one of the least acceptable and most complained about clips was from The Alan Titchmarsh Show. One of the most acceptable clips, with the highest number of people rating it "Totally Acceptable" was the Red Hot trailer containing strong sexual images. The Playbox Sex House clip, with strong images of real sex, also had high approval ratings. Sin Cities was not approved of due to time and was felt to be sex disguised as documentary. The Spice Extreme clip was felt to be too strong for the time of night and the fetish material counted against it. Clips that were acceptable were generally late at night, clearly signposted, on specialist channels and featured mainstream consenting sex. Strength of the imagery was less of an issue than time, consent, channel and clear labelling.

## **VOLUME OF COMPLAINTS**

In its preamble, OfCom states that there have been a number of successful sanctions cases against adult channels in the previous 2 years. What OfCom does not do it to provide any context for this. It does not state how many complaints were made and not upheld, nor how this compares with all manner of complaints against other channels.

Between 1 Aug 2005, when the Broadcasting Code came into effect, and 10 Sept 2007 (broadcast bulletins #40 to #92 inclusive) 91 complaints have been reported in detail, and just 31 found to be in breach of the Broadcasting Code, 10 have had Sactions applied (fines) and one has been revoked for non-payment of a fine imposed for a 2006 broadcast.

To put this into context, it must be acknowledged that some complaints are believed to have originated with competitors, and adult channels have been to subject of sustained campaigns by groups who are fundamentally opposed to the broadcast of adult material for religious or political reasons, or because they are uncomfortable with their own sexuality.

The legitimacy of complaints from people who deliberately seek out material that they will object to, in order to complain about it, is suspect at best.

In the 4 years since the Broadcasting Code came into force, there has only been one complaint where it has been clearly established that children (teenage boys) were watching adult material.

Also to put this into context, Broadcasting Bulletin 42 lists three pages of programmes where complaints have been received but the programmes found not be in breach – about 120 separate programmes. This volume of complaints is not untypical, with 3½ pages of complaints in the 8 June 2009 issue (#135), suggesting the complaints have been received about approximately 6,000 programmes in this period. To only investigate 120 complaints about adult channels (1.5% of total), find only 31 in breach (half a percent of the total), and fine just 10 (one sixth of a percent) is remarkable in context and shows, that despite campaigns against these channels, there is not a widespread problem.

### **ADULT-SEX**

The British Board of Film Censors (BBFC) classification guidelines defines “Sex Works” as works whose primary purpose is sexual arousal or stimulation, and goes on to state that these are only likely to be passed in adult categories, eg certificate 18 or R18 (Restricted). Clear images of real sex and strong fetish material will be confined to the R18 category. Material which does not contain clear images of sex or strong fetish material, and which *may* be simulated are generally passed in the 18 category.

What constitutes “clear images of real sex” ?

- Visible penetration
- Visible genital contact (visibly touching genital flesh)
- Ejaculation emerging from a penis

What is not “clear” eg possibly simulated ?

- Penetration out of camera shot (but seems likely)
- Contact with clothing over genitals
- Contact with flesh to the side of genitals
- Ejaculation (not seen emerging from penis)
- Any of the “clear” images with an obstruction
- Any of the “clear” images from too great a distance to be clear

As all of these have an ambiguity

When the Broadcasting Code was first introduced, OfCom chose to generally adopt BBFC classifications and guidelines, with two significant exceptions, treatment of “Adult-Sex” and R18.

The BBFC regards “Adult-Sex” material as a form of 18 or R18 material, and subject to exactly the same rules as other 18 or R18 material. By contrast OfCom regards “Adult-Sex” material as a special category, requiring tighter control than other cert 18 material.

Under BBFC-type regulation, sexual entertainment would be permissible on ordinary television channels at a suitably late time, just as strong horror films, violent war films and movies/drama glamorising gangster crime are, as well as gambling, occult, drug use and “contemporary” humour containing strong language. Examples of permitted TV content unsuitable for children include *The Texas Chainsaw Massacre* (C4, 4/9/2009 23:25), *The Sarah Silverman Program* (Comedy Central, 4/9/2009, midnight), *South Park* (various), *Silent Witness* (BBC, various).

Under OfCom rules, all the above are permitted on general television channels, in the late evening, with the sole exception of “Adult-Sex”, which is specifically limited to so-called encrypted channels, after 10:30pm, and subject to proof of age.

At no time has OfCom provided a justification for singling out adult-sex content. There is no specific legislative justification – the Communications Act refers to “harmful material” not sexual content. It is highly likely that the same survey group who found some samples of sexual broadcasts disturbing, would also be very disturbed by strong horror films (say *Saw*, *Hostel* or *Audition*), like ghost hunting, and the trivialisation of death, murder and gun use in some action films. Some would regard gambling channels as an open invitation to addiction. Others of a religious persuasion would regard live mediums as potentially leading the young and impressionable into areas of the occult that they believe to be dangerous.

All these areas can be regarded as “dangerous” by large numbers of people, and in each case there are sections of the public – sometimes quite large sections – who would regard their easy availability as contrary to “Generally Accepted Standards” as defined by them.

To put this into context, sex themed 18 certificate DVDs are available in many newsagents, and sale is not subject to adult verification. Cinemas do not ask for proof of age when admitting people to films with sexual content. Even registered sex shops do not ask for proof of age when selling R18 DVDs. Instead age is challenged if the purchaser seems to be under 18, and the degree of enforcement is often less in small backstreet newsagents than in large supermarket chains. In effect, the system controlling DVD sales broadly works, but is leaky rather than absolute. Some 17 year olds gain some limited access to material that technically they should not, but the volumes are low and enforcement is more effective for younger people.

Despite this long established leaky system for controlling access to adult DVD content there is no public appetite for change or tighter enforcement.

It is unclear why OfCom singles out sexual content for special restrictions. The parents of a teenager in an inner city plagued by gang violence may be far more concerned by depictions of crime-related adrenaline lifestyles in action dramas than normal sex.

The only rational explanation is that sex uniquely generates a “squirm factor” when discussed between generations.



It is proposed that the distinction between 18-certificate non-sexual material and 18-certificate “Adult Sex” material is either abolished or watered down. If watered down it should be subject to a later watershed on “unencrypted” channels than other cert 18 material. For example, strong sexual content should only be available after say 10:30pm, rather than 9pm. Rules may also be required to protect against mainstream channels adopting wall to wall sexual content, and to prevent accidental exposure by people who find it offensive. While these still constitute special rules, they would be less discriminatory than the current highly restrictive rules.

Adult sex content on “unencrypted” channels could be restricted:

- Until after 10:30 on most channels
- Until after midnight on BBC1 though Five
- With a mandatory “18” age flag set (so blocking mechanisms can be enabled)
- Subject to clear trailers and warnings (except in the Adult section of an EPG)

Mandatory encryption and adult verification should be reserved for the strongest sexual material.

### **ENCRYPTION AND PAY PER VIEW**

“Encryption” is a term which has been loosely and incorrectly used by many people and organisations, including OfCom, to refer to various forms of access control, sometimes including adult verification. This includes access without entering a PIN code to subscription services, PIN protected subscription channels, and PIN protected pay-per view channels. (Technically all Sky and Virgin Media channels are encrypted for copyright reasons and to deter access by non-subscribers. This includes BBC and ITV content where different broadcast fees would have to be negotiated if the channels were available in Europe).

For convenience the term “encryption” is used to refer to these access controlled channels. “Free To Air” or “FTA” refers to the other, easy access channels.

In general whether a channel is encrypted or not is a commercial decision, not a regulatory one. There are films on the Sky Film package that could equally be shown on Film 4 or the BBC, if the relevant broadcaster negotiated a fee with the copyright owner. The cost would have to be balanced against the impact on audience ratings, advertising and subscription uptake.

Usually there are different, competing broadcasters in the “encrypted” and FTA areas. Sky Films competes with the BBC, ITV and Film 4. Paramount Comedy (in an encrypted bundle) competes with BBC and ITV comedy offerings. Sky Arts (encrypted) competes with Channel 4 and BBC 2. Setanta (as was), ESPN, MUTV (Manchester United football team), Chelsea TV offer subscription sport.

The above are not fundamentally different categories of broadcaster or content, the non-PSB channels have simply made commercial decisions about their funding model.

In general, strong-adult content should be available on BOTH FTA and encrypted channels, rather than encryption being used primarily for access control. This is subject to suitable controls to prevent accidental exposure and child access, eg time (after 10:30), limitation to Adult sections of the EPG (or other channels after midnight), ability to lock out the Adult section, and flagging content as cert 18.

### **IMPROVED CHILD PROTECTION**

Issues raised in the survey were the possibility of accidentally stumbling across sexual content, and children (particularly teens) deliberately gaining unauthorised access to dedicated adult channels. While it is difficult to prevent accidental exposure to sexual content on general mainstream channels, there are steps that could be taken to prevent accidental or unauthorised access to the dedicated adult channels. Some may be easier to implement than others, or cost less, but all are technically feasible and none are outrageously expensive.

Requiring one or more of these would be in line with OfCom's statutory duty to protect children for accessing unsuitable material.

#### ***OPTION 1***

Transmit a new certification code indicator, "18-Sex" to Electronic Program Guides to indicate certificate 18 strength sexual content. Adults would then have the option of selectively blocking sexual content at 18 but allowing unhindered access to other material such as violent films.

While this would have no legal significance, it would have the practical effect of blocking access to the Adult section of the Sky EPG plus Channel 5/Fiver programmes such as "Sex: How To Do Everything", "A Girls Guide To 21<sup>st</sup> Century Sex", serious films/drama with sexual scenes such as "Untold Scandal" (Sky Arts 1), "Diary Of A Callgirl" (BBC), "Rome" (BBC and History Channel), late night erotic films on Movies 24, Movies4Men, sex-documentaries such as "Married People: Single Sex" on True Ent, "Sexarama" (Virgin1), "Porn Week" (Bravo).

This would be a low-cost option, requiring one-off minor firmware updates to Sky/Virgin Media receivers to add a new classification. Since care already has to be taken over scheduling of sexual content, the additional ongoing cost would be negligible.

#### ***OPTION 2***

By default, the Adult section of Sky Electronic Programme Guide (EPG) is unlocked, accessible to all viewers. The default setting should be changed so this is locked out, requiring a PIN to unlock the entire section temporarily or permanently. This could be achieved by means of a low cost firmware update and advance notice in the monthly Sky newsletter. The situation for Virgin Media is probably similar.

#### ***OPTION 3***

By default all unrestricted channels in the adult section of the EPG are permanently unlocked. Pay per view channels are only unlocked for 24 hours at a time. It should be

possible to lock the entire section each day, such that a PIN number can be entered once, without any complex menu options (as per Option 1). Once entered, the PIN should not be needed again during (free) channel surfing. This would prevent access by children in households where adults view these channels themselves and cannot constantly supervise older children. Again, the cost should be no more than a low-cost firmware upgrade and a paragraph in a newsletter that would be sent anyway.

#### ***OPTION 4***

The PIN number used to lock out the entire Adult section of the EPG, and individual channels, has an easily guessable default on Sky boxes. This becomes non-obvious when replacement viewing cards are issued. The default PIN should be non-obvious, requiring changes to some factory settings, investment in printing letters with PINS hidden under flaps (as for bank cards), and remotely resetting PINS for Sky boxes in circulation. This would cost more than Options 1 and 2, but would still be relatively low cost, and the cost of an extra letter could easily be recouped. Again, the same comments may apply to Virgin Media equipment.

#### ***OPTION 5***

The same PIN number is used for access to non-sexual PIN protected channels, eg Pay Per View (PPV) football matches, and possibly cert 18 films, as is used to control access to Adult channels. It can also be used for lower age thresholds. In some households children may be authorised by their parents to open PPV events, or for older children to watch, say, cert 15 films when younger siblings are not around. As the default PIN is rather obvious, teens can probably find it if they want.

At the moment one “key” opens everything.

Having a different PIN to control access to Adult channels would drastically reduce the incidence of children watching unsuitable material. However it is possible that firmware in the Sky/Virgin boxes, or circuits in the access cards do not support having two separate PINS on one box/card.

#### ***OPTION 6***

Some households never want access to Adult channels, but risk accidentally stumbling across them. One solution to this would be to ship new Sky/Virgin boxes with the entire Adult section of the EPG locked out, and requiring a phone call to Sky/Virgin to unlock the section. While robust, this would add considerable cost to Sky/Virgin, repeat calls might be needed after power cuts/equipment resets, and many customers would resent the additional steps required.

Any one of these options would reduce accidental access by adults and unauthorised access by children. Some would involve minimal cost and minimal inconvenience to adults. OfCom cannot complain about offences against public taste or access by children if these options have not been explored.

## **ROMANCE**

In the pre-OfCom days and early days of OfCom some of the material broadcast both on Free-To-Air and so-called “Encrypted” channels was orientated at couples, either as erotic themed entertainment, or to get in the mood for love-making, or even as background to liven up love-making. This material appealed to both male and female partners. While not to every couple’s taste, some enjoyed it. This included couples in the early stages of their relationships, and couples seeking to regain excitement.

The material was sufficiently explicit to appeal to the male partner, but also had content to appeal to the female partner, such as discussion of relationship issues, or humorous games, or tasteful male nudity. The sexual elements tended to be tasteful rather than direct or clinical, and set in a tasteful atmosphere, all encouraging female viewing. Explicit content was necessary to retain male interest “during the relationship bits”.

However, as the sector has declined, these longstanding types of show have dropped by the wayside. Explicit content is seen as too risky in the current compliance climate, so the shows had to change or close. The result is that there is very little content that would appeal to a broadminded couple.

It cannot be in the public interest to harry channels resulting in a lack of female or couple-orientated content.

## **GHETTOISATION**

Under previous regulatory regimes erotic content was intermingled with other content on general broadcast channels. This was in line with the long British tradition of musical hall, cabaret, ballet, modern dance, even panto, which, within limits, provides “something for everyone”. Outright explicit content may have been absent, but comedy programmes would often contain “something for the dads” in the form of scantily clad women in chase sequences (Benny Hill, Kenny Everett, Monty Python), leggy dancers (Top Of The Pops, old Bruce Forsythe shows, Come Dancing), or even gratuitous but short sexual content (The End of Pier Show – BBC satire, 1970s, OTT, etc). The consequence of Ofcom regulation, whether intended or not, and fear of sanctions, is that current general entertainment is relentlessly dull to many men. Shows can have female-interest content, but lack male-interest content. Rather than bringing families together it serves to drive them apart. A man interested in even mild erotica will not be happy watching endless sanitised content with his wife, and will be more likely spend time apart. This situation will not improve as long as even mildly erotic scenes have to pass an “editorial justification” test. The dead hand of regulation is driving families apart.

Further, by limiting gratuitous sexual content to specific sex-orientated channels which are in ratings wars, the temperature will be turned up to the regulation limit, with no middle-ground. The absence of a middle-ground attractive to both genders cannot be in the public interest.

## BOUNDARIES FOR FTA CHANNELS

This section discusses what should and should not form acceptable content for so-called Free To Air channels in the Adult section of an Electronic Programme Guide which can be locked out as a whole block. The current broadcast code is far from clear on this point.

The proposed revised boundaries are based on the 2009 public attitudes survey conducted for OfCom, “*Broadcasting Code Review: Proposal on revising the Broadcasting Code*”.

Sex acts, mild portrayal	Short inexplicit scene, two adults, no genital images. <b>OK</b> – most participants said OK after 9pm (page 39).
Mild nudity	Not prolonged, not close up, does not linger on genitals. <b>OK</b> – most said acceptable after 9pm. Also the more acceptable the later it is (page 39).
Nudity, bits	As above but lingers on “bits” (genitals, buttocks, breasts). Less acceptable but not an outright ban. This was in the context of mainstream broadcasters. (page 39) <b>OK</b> - As there is more tolerance of late night Adult section this is acceptable for Adult channels.
Genitals	Non aroused, non explicit, desexualised. <b>Borderline</b> - Equal numbers said acceptable and unacceptable on general channels with voluntary or mandatory access restrictions. (page 39/40) Since there is more tolerance of sexual content within the Adult section of the EPG this would push the decision towards acceptability in the Adult section with voluntary access restrictions (eg can block out). Note that this refers to desexualised non-explicit images. This could cover a brief flash as a naked woman changes position, or see through underwear showing a closed “slit”.
Aroused genitals	<b>NO</b> - Nearly always unacceptable. Referred to aroused male genitals as being unacceptable outside mandatory PIN protection. (page 39/40)
Sexual Intercourse	Genitals not shown, after 9pm. Survey refers to sex on mainstream channels – majority said OK (page 40, 41). <b>OK</b>
Explicit Sexual Intercourse	Intimate body parts visible – vagina, penis. Does not specifically refer to penetration being visible, but this was in the context of clips from “Sex A 21 <sup>st</sup> Woman’s Guide” showing intimate penetration footage using on-penis and in-vagina cameras. (page 40) <b>Borderline</b> - This was felt to be less acceptable without some form of access restriction. Although in the context of a documentary, there was some cynicism about it being an excuse to show sex rather than having genuine educational merit. As such this is borderline on

	with a bias towards not being acceptable without access control.
Stronger Sexual Intercourse Images	Group sex, anal sex, bondage, other fetish sex (non explicit). Majority said should be shown after 10:30pm. Again, this was in the context of mainstream channels. “Stronger content” refers to material found offensive – group sex, anal sex, fetish sex. The survey group did not say that this should be banned, just that it should be limited to later hours (page 41).
Real Intercourse	Genitals not visible. <b>OK</b> - The survey group said that, provided there was an absence of genital images, they could not distinguish between real sex (penetration, genital contact) and fake sex (hips, fingers or face in same area but no actual contact). It was implied that this was in circumstances when detailed (forensic) examination of movements or positions might indicate that sex had to be genuine by elimination – there was no way of avoiding contact in said position. (page 41). Because the group could not, themselves, distinguish, they felt that regulation should be the same for real and fake sex. A scene that would be permitted if fake should be permitted if genuine (eg genital contact not actually shown).
Genuine Explicit Intercourse	Very close up / focus on genitals. <b>NO</b> – Vast majority would require mandatory or voluntary access restrictions. (page 41).
Real Intercourse SUMMARY	What the above sections mean is that non-explicit genuine live sex on channels in Adult section of the FTA late at night is acceptable. This covers side-on dildo action, finger penetration, oral sex and even boy-girl penetrative sex. <b>OK</b> - This is more acceptable if it is unscripted (“consensual”) action between two people. It is less acceptable if it is scripted (“non-consensual”), involves more than 2 people, bondage or violence. Anal sex (and the other factors) becomes more acceptable the late at night it is.
Knicker Rubbing SUMMARY	Knicker rubbing It is not possible to tell if knicker / crotch rubbing amounts to genuine masturbation or not. This was a frequent component of pre-OfCom and early 2005, 2006 shows. Previously OfCom has treated apparent masturbation as genuine. The current survey makes it clear that if it is not clear that action is genuine, then it must be treated as fake. <b>OK</b> - Therefore anything other than most close up knicker rubbing is acceptable.
Hands Inside Pants SUMMARY	Another staple of the pre-OfCom days and 2005, 2006 was presenters putting their hands inside knickers and appearing to masturbate. In some cases one presenter would do this to another presenter.

	<p><b>OK</b> - The knickers hid the details, so again, there is an ambiguity about what genuinely happened, except where knickers were so insubstantial that no detail was hidden. Provided detail is hidden this is acceptable as the survey group have said they cannot distinguish between real and fake action, and fake action is permitted.</p>
Dildo Action SUMMARY	<p>Another regular activity was rubbing a dildo laterally along the crotch of knickers, putting it inside knickers and appearing to masturbate or insert it, or pushing it against the knickers.</p> <p><b>OK</b> - In almost all cases sufficient detail was not visible to tell if action was genuine or fake, and whether arousal was genuine or fake. Apparent insertion could be achieved by passing the dildo behind/under the body (in some cases it was badly faked and unconvincing), or by use of a soft “jelly” dildo that would compress. Masturbation is a normal human activity, and not a fetish. Given the above re fake/genuine this is therefore acceptable.</p>
Dildo Anal Action SUMMARY	<p>Some presenters appeared to push a dildo against the anal region of their knickers (pushing but non-penetrative) and occasionally seemed to actually push in, either pushing some knicker material in or going to the side. While the general area was visible, it was not shown in sufficient detail to determine if the action was genuine. Apparent insertion always involved a soft “jelly” dildo that might compress.</p> <p><b>Borderline</b> - The survey group expressed reservations about anal sex, requiring it to be limited to later at night. Therefore this is marked Borderline depending on transmission time.</p>

### CHANNEL HOPPING

A strength of the Free-To-Air (FTA) adult channels is the ease with which viewers can hop between channels. Many viewers value being able to flick through the channels until they find one that they like, or even to hop back and forwards between to that they both like, or while waiting for an intermission to end. Viewers can also easily navigate away from content that they dislike, for example a presenter using language that they find offensive, borderline S&M, borderline anal poses, and so on. The ease of navigation away creates market pressure with fast feedback times – days or even realtime – resulting in avoidance of unacceptable content.

Current PIN protection systems do not encourage channel hopping. Instead they actively discourage it. Even when a PIN has been entered for a Subscription or Pay-Per-View programme, navigation away and back requires the viewer to re-enter the PIN. This is a relatively slow and error prone process, so viewers are more likely to stay on a channel that they find temporarily unpleasant.

Any improved measures to prevent accidental exposure and to improve child protection must retain easy channel hopping around FTA channels, and to and from other channels.

The options listed above retain easy hopping with, at worst, one PIN code entry per day. Making channel-hopping difficult will deepen ghettoisation. Some viewers will also feel that if they have to enter a PIN code each time they change channel, they might as well tune into full-blown PIN-protected Adult-Sex channels, paradoxically increasing consumption of semi-explicit content.

### **MARKET IMPACT**

Since 2005 adult channels have been subjected to relentless pressure by social pressure groups with an agenda and OfCom itself, and this has had a severe negative impact on the market. The 2005 Broadcasting Code was seen as a relaxation of outdated and unduly restrictive regulation when it was announced. At best OfCom miscommunicated the position.

OfCom has a legal duty under the Communications Act 2003 to encourage diverse formats, ownership, competition and choice and to encourage innovation. In the adult section it's actions have reduced these.

Following the new code, new channels launched, under many different owners, and different formats were tried. A few mistakes were made and a small number of rogue channels misunderstood reduced regulation to mean no-regulation. However following regulatory action, the remaining operators were anxious to stay in business and avoid large fines. Despite this there have been a series of incremental actions, "ratcheting" regulation to levels that did not previously exist.

As a result the number of operators has reduced drastically with closure and mergers. Most channels are now operated by Portman or Sport. The few other operators have few channels each.

Innovation has vanished. Most channels have essentially the same content, one or more women wearing underpants and wriggling around while talking into a mobile phone. Rude audience chat is banned as it breaks ICTIS rules. It is now commonplace to wear two or more pairs of underpants, as a one second accidental exposure of inner labia while changing position can result in being found in Breech. Generally granny pants are worn rather than thongs for the same reason. Pretend masturbation is avoided as anything remotely convincing is treated as a breach under the interpretation of the "Adult Sex" rule that obscured action that could be genuine must be limited to encrypted channels.

Girl-girl interaction is perceived by the public to be milder than boy-girl action, and to be at the milder end of the pornographic spectrum. Despite this it has all but vanished from the adult airwaves.

Regulation is currently so tight that even at midnight it is not uncommon to see female presenters with their breasts covered. While OfCom may argue that the rules permit them to be shown, there is now a climate of fear where caution rules.



Having a sex themed programme in a sex themed channel in the Adult section of the Electronic Programme Guide is not regarded by OfCom as editorial justification for having sexual content. The innovative idea of having occasional late-night teaser strips with brief flashes of genitalia while removing all onscreen advertising was therefore banned as being contrary to Generally Accepted Standards.

(This is in a climate when the Deputy Prime Minister, Harriet Harman, is promoting equality for nudists).

Not only has the FTA market diminished, the encrypted sector has diminished too. The number of channels has increased, but the amount of new material shown is very small. TelevisionX / Red Hot / Portland undertakes to provide one new show per day, but the reality is this often amounts to 30 minutes of new material. This group operates 12 distinct encrypted heterosexual channels (not counting the Adult Nightly PPV variants and the gay channels), so much of the content across the 12 channels has been seen many times before.

By contrast, before OfCom took over, and in the early days of the 2005 Broadcast Code, Portland transmitted one new show per day on the Adult Channel alone (rather than across the package), and had a long running 6 hour live show 7 days a week, in addition to pre-recorded material. Several other operators had encrypted live shows too.

Today there are **zero encrypted live shows**. In the light of enforcement action by OfCom and **in the absence of public complaint**, a format that was successful and thriving for many years has been closed down.

## **REGULATORY IMPACT**

Adult channels are typically small operations, though exceptions exist and there is a trend towards consolidation. It is certainly desirable to have large number of operators, each with one or two channels in their stable, than a handful of large operations. A large number of potential employers makes it easier for performers to walk out if pressured or otherwise treated badly. On a positive note, innovation and variety are more likely with many separate operations.

However there is a vast body of regulatory material that any operator needs to digest. Regulations imply certain minimum staff levels. Broadcast Bulletins 1 to 135 (up to 8 June 2009) are 28Mb in size – recent OfCom announcements have directed broadcasters to look through these to see details of previous rulings. The language is sometimes opaque, and meaning would not necessarily be clear to someone skilled in broadcasting or entertainment rather than, say, a lawyer. If it takes an optimistic 1 hour to read and fully digest each document (median document size is about 28 pages), the time taken to do so would be 135 hours – about 4 full working weeks.

In other words, a small start-up operation would have to employ, say, their Producer, for 4 weeks simply to digest previous rulings, before broadcasting a single second of content. This would be in addition to building sets, recruiting staff, etc.

Once in operation, someone would have to digest the fortnightly bulletins, plus any proposed changes, and draft responses, adding significant ongoing cost.

Furthermore any investigation by OfCom carries significant cost in terms of senior management time, plus lost market share through playing safe until the matter is resolved. This cost is incurred even if OfCom decides that the original complaint was not justified, or if an amicable solution is reached.

In other words, even a minor complaint which is not upheld has a significant cost.

This acts to push smaller operators out of business. Five complaints in five weeks against a small operation may be enough to paralyse it, tying up the only manager, while a larger operation would be able to allocate tasks to different people and keep the operation going.

There are also implications for on-site staffing levels. There are documented cases (breeches) where rostered production staff have been absent (possibly sick), inexperienced staff have covered, and unsuitable material has been broadcast, resulting in breach. In other cases staff have had to take their eyes off the camera, possibly due to calls of nature, and no cover has been available. Camera angles have not been changed when they should, guidance not been given to presenters, and again, unsuitable material has been broadcast unintentionally.

If a small channel is to avoid these issues it must be able to guarantee minimum staffing levels even when there is illness and holiday, pushing up routine costs. An operator with 5 or 10 channels can guarantee staff levels at proportionately lower cost.

The only alternative is for occasional inadvertent breeches of this kind to be less significant, eg more tolerance by OfCom.

**The simple act of regulation drives out smaller operators, and creates a trend towards large bland ones.**

## **FINANCAL MODEL**

The financial model employed by most FTA adult channels is that they promote adult sex chatlines in return for a fee, possibly related to call volumes. General advertising is almost non-existent. This is an open, honest model – viewers know exactly what is being advertised, and how.

Advertising rules prohibit sexual content in adverts and in teleshopping shows. This is on the good grounds that usually the product is non-sexual and placing advertising in a sexual context would create a false association, and perhaps unrealistic expectations. However this is arrant nonsense when the product being advertised is blatantly sexual, for example adult sex chat lines.

Ofcom has in the past found free channels to be in breach for having overly-sexual content while showing adverts, or for promoting products “without editorial justification”, or for use of sexually explicit language while broadcasting adverts such as superimposed telephone numbers. Relevant regulations quoted related to the Broadcasting Code itself, ICTIS regulations (the pay telephone regulator) and the BCAP Television Advertising Code.

A mature position would be to accept that there is demand for specific sex-orientated channels in the free-to-air sector, and that these will generate revenue through sales of related products, rather than allowing the channels but attempting to cut the revenue stream, which amounts to back-door banning.

This is particularly ironic in relation to the BCAP Television Advertising Code. The print version permits adult content, in context, in adverts for adult services. Back page adverts in mens magazines feature sexually explicit photographs and text. The Television version of code does not permit equivalent images. The irony is that the television part of the code is administered by OfCom.

OfCom should change codes within its remit to permit sex-services to be advertised in shows with sexual content. It should use it's influence to lobby for equivalent changes in external codes including ICTIS.

### **OPPRESSIVE REGULATION**

In Broadcast Bulletin 130, Ofcom stated “During the course of recent investigations, Ofcom has noted that licensees, when defending their broadcasts, are increasingly citing material transmitted previously that has not resulted in regulatory intervention. Ofcom reminds broadcasters that when complying material, decisions should be based on the requirements of the Code, with reference to Ofcom published guidance (Code guidance, Ofcom Findings, Notes to broadcasters etc), where necessary. Compliance decisions should not be based on material previously broadcast - by the licensee or any other licensee - which Ofcom has not considered.”

While understanding that not being caught in the past does not provide immunity from action, the above statement is overly harsh and threatening. Some channels routinely show material from their back catalogue, either mixed with recent material or in order to follow a theme. It is routine to show material dating back to at least 2000, material that may have been repeated monthly ever since. This material will generally adhere to the prevailing standards, but since Ofcom only ever views a fraction of the material broadcast, it might never have been assessed. To suddenly announce that a complaint has been received and impose a sanction or warning places broadcasters in an impossible situation. A reasonable approach would be to accept that this is long standing material, that it has been rebroadcast in good faith, and explain why it should not be broadcast again, then declare the matter “Resolved”. Instead Ofcom practice has been to declare the broadcaster “In Breach”, the first step towards a fine or revocation of licence.

Broadcast Bulletin 134, published 26 May 2009, found various channels in breach for promoting unsuitable websites back in August 2008. It had taken Ofcom 9 months to investigate and publish its findings. Broadcast Bulletin 138 dated 20 July 2009 found Sex Station/Lucky Star in breach for a broadcast on Thursday 21 May 2009 and references a finding dated Monday 18 May 2009 as well as one a year earlier. Compliance would have required SexStation to digest the report, realise its implications, and redesign its website in 3 working days. A better solution would have been to make SexStation aware of the issue and declare the matter “Resolved”. It is also notable that OfCom initiated the complaint itself, having observed the advert as part of a separate investigation.

With regard towards Adult channels Ofcom appears to have a bias towards intervention, investigation and finding channels in breach, while it is more tolerant of other sectors. This is out of all proportion to the level of complaints, or audience size.

### **R18 MATERIAL**

When The Government drafted the Communications Act 2003 it had every opportunity to include a clause specifically banning the broadcast of R18 material. It is probable that the theoretical ability to do so had been pointed out by both the previous regulators and by civil servants with expertise in broadcasting. Indeed the BBC’s long-standing right to transmit any sexual content it saw fit was well known, and the introduction of external regulation was widely commented on. Likewise Parliament had every opportunity to introduce an amendment banning transmission of R18-strength material. Not only did Parliament not pass such an amendment, so far as is known, there was not even a serious minority call to do so that was defeated. It is therefore arguable that by specifically banning R18 material, OfCom has exceeded what Parliament intended.

While the 2005 research re impact of R18 non-abusive explicit sex material is still available on the OfCom website, the reasoning behind banning it is either no longer on the website, or not in an obvious location. The research itself drew a distinction between violent pornography of a type not legally available in UK, and R18 material. It said “The studies that refer to R18 porn often find no effects or sometimes even positive effects.” (page 24)

Positive effects outlined were that it:

- Lowers the drive for sex crimes
- Lowers aggression towards others
- Improves attitudes towards others

Regarding negative effects, it has been suggested that pornography causes sexually deviant behaviour. The research found “there seems to be no difference between sex offenders and others in their use of pornography”, eg no effect, and that “child molesters use other images (adverts and other television programmes) to create their own sexually arousing pornography” (page 22).

However OfCom chose to disregard it’s own research and ban R18 material anyway.

Regarding the effect of children viewing R18 material, the research found that “There is no empirical research that proves beyond doubt that exposure to R18 material seriously impairs the *mental or physical development* of minors.”

However a lack of research material due to it being unethical to deliberately expose under-18s to pornography for research means that there might be an adverse effect on the moral development of minors (page 4). No evidence supported this, but the absence of evidence meant it could not be ruled out.

Purely on the basis of an absence of evidence, OfCom chose to introduce a ban on R18 material. By doing so they protected children from the vaguest of theoretical risks (no evidence) but OfCom also removed the benefits to children of adults having access, eg reduced drive for sex crimes, reduced aggression and general adult attitude, as outlined above.

The risk of under 18s accessing R18 material can be reduced by:

- Limiting broadcast hours to times when few children will still be watching the main household television, say 11pm rather than 9pm,
- Requiring adult verification as for existing “Adult Sex” channels,
- Limiting R18 material to subscription or Pay Per View channels,

Enhancing PIN protection (see above).

**On balance OfCom can reduce harm to children by permitting R18 material to be broadcast.**

### **OTHER SOURCES OF PORNOGRAPHY**

The 2005 OfCom research into the effect of R18 material on children focussed on R18 material legally available in the UK (through licenced sex shops, but not currently via broadcast). It did not address violent pornography that would not be legally available in the UK, nor certain fetishes that the BBFC ban in the UK.

The fact remains that in 2005 other sources of pornography were widely available, namely the Internet and non-UK satellite channels. Since then Internet take-up has increased drastically and connection speeds have improved to the point where streaming video can be downloaded in real-time for an easily affordable monthly connection fee.

Also since 2005 there has been substantial growth in the number of Internet sites offering free pornography, both commercial sites offering samplers and advertising funded libraries.

The other significant change since 2005 is that now sexually explicit videos can be purchased and downloaded to mobile telephones for relatively modest costs.

All of these sources are unregulated by UK standards. Some limit content to strong fetish material (that would be banned in the UK) but others contain violent material.

Foreign satellite sex packages currently available and widely sold in the UK include:

- Free-X TV £29 for 3 channels for 6 months
- SexView £39 for 6 months access to 4 channels
- Free-XTV £69 for 5 channels for 12 months
- Dorcel £69 for 5 channels for 12 months
- Club Privee £89 for 12 months
- Private Spice £119 for 12 months
- SCT Satisfaction £129
- Dontpanic £149
- Elite £149
- SexView £169 for 12 months access to 12 channels
- French Lover (bundled with other channels)
- Hustler (bundled with other channels)

At least some of these channels have been in operation for many years and have a strong following in their counties of origin – they are not fly-by-night operations specifically aimed at the UK.

What can be seen is multiple channels of professionally produced pornography can be obtained for months a low cost (£29), and this may contain material regarded as unacceptable by UK regulators and Courts.

Large numbers of adults who find UK broadcast material unfulfilling will turn to alternatives such as the Internet or foreign satellite services. In most cases they will not be actively seeking banned fetish or violent material. Instead they will be seeking R18 strength content, but will be exposed to material that OfCom, the BBFC and Courts have deemed unacceptable.

OfCom can encourage UK adults to access strong unregulated material by continuing to ban R18 broadcast material, or it can encourage UK adults to stay within the bounds of regulation by permitting R18 material to be broadcast.

By permitting R18 material to be broadcast OfCom would strengthen child protection.

## MAIN SURVEY FINDINGS

This section extracts, summarises and interprets findings of the 2009 public attitudes survey.

### Sex acceptable

Most participants believed in general that *there is a place for sexual material on television* for those adults who would choose to watch it. (page 5)

Sexual Intercourse (page 40)

“scenes showing more private body parts (especially breasts, vaginas and penises, but also to some extent buttocks) were seen as less acceptable with the majority of participants saying they did not want or expect to see such material on television without some form of restriction.”

Clip #9 was a trailer for an encrypted channel featuring what appeared to be genuine sex (genitals not visible). “Just under half of all participants (43%) believed this clip to be acceptable overall, whilst just over one in four (26%) believed it to be unacceptable. However, this clip had the highest number of participants (28%) saying they believed it to be totally acceptable, whilst at the other end of the scale over one in ten (13%) believed it to be totally unacceptable. A further 21% were neutral.” (pages 65 and 66).

**Most participants did not object to unrestricted sex-channel trailers** provided they were in the Adult section of the Sky EPG (or equivalent) and could therefore be blocked to under-18s by **voluntary** access controls. Participants also thought that such promotional trailers should only show content that was no stronger than that which would be shown on non adult-sex channels at the same time. (page 67)  
*(this is confusing and contradictory. If content is no stronger than available on non-sex channels, why require it to be blockable ?)*

“longer sex scenes, more explicit sex scenes or nudity, group sex, fetishes) was likely to divide participants and generally to be seen as being more suitable for late-night viewing (at least after 23:00) or viewing on channels with mandatory access restrictions.” (page 69)

#### Can't distinguish between genuine and simulated

“Participants did not seem to distinguish between real sexual intercourse and portrayals of intercourse per se, rather it was the strength of the content that most concerned them and the way in which it was presented.” (page 41)

Clip 7 – Playboy One sex drama showing strong sex scenes (genitals not visible).

“This clip featured a male and female actor engaged in what appeared to be real sex acts including oral sex and sexual intercourse (although no sexual organs i.e. neither a penis nor vagina, were visible).”

“All participants considered this material to be “porn”. However, they were divided on its acceptability. Approximately three in ten participants (29%) believed this clip to be unacceptable overall, whilst two in five believed it to be acceptable (40%). Looking at the most and least acceptable scores, just under one in five (17%) believed this material to be completely acceptable, whilst just over one in ten (12%) believed it to be completely unacceptable. Twenty-one per cent (21%) were neutral.” (page 60).

~ a high proportion, 40% believed this to be acceptable, while 29% did not. On this basis material of this strength CAN be shown UNENCRYPTED on ADULT channels LATE AT NIGHT.

For example, side-on live oral sex.

By implication (same strength), side-on dildo vaginal action, and hands down knickers.

This does NOT indicate acceptance for:

Fetish action

Group sex

Anal sex

Casual sex

Potentially restricted to straight couples.

### Channel and Time as Mitigation

Factors making clip #9 acceptable were:

Late hour

Straight sex

Consensual sex (preferable to “acting”)

Adult channel

(c. pages 65 and 66).

### Sex works no less acceptable than drama/doco / “context”

One of the most explicit/strongest clips, (9), had a large number of participants who found the content totally **acceptable** for broadcast without any form of mandatory access restriction (28%). The survey group did however, make acceptability conditional on voluntary access restriction being possible to protect under-18s. Factors contributing towards acceptability included being only in the adult section of the Sky EPG and the late broadcast time. (page 65, 67)

Participants thought that this adult-sex material “should be no stronger than that which would be shown on non adult-sex channels at the same time.” (page 67). Nowhere is it stated that adult-sex material should be less strong/explicit than material on other channels. In combination these two positions mean that the upper threshold for adult-sex material should be the same as for ordinary channels – neither more explicit nor less explicit. This is a significant change from the existing position, which is that unrestricted adult-sex channels cannot show certificate 18 strength material at any time.

**Most participants did not object to unrestricted sex-channel trailers** provided they were in the Adult section of the Sky EPG (or equivalent) and could therefore be blocked to under-18s by **voluntary** access controls. Participants also thought that such promotional trailers should only show content that was no stronger than that which would be shown on non adult-sex channels at the same time. (page 67) (duplicated above).

### Parental Responsibility

Participants did not pass sole responsibility for protection of under-eighteens over to broadcasters and regulators; stating that *parents should also take responsibility for their children’s viewing.* (page 5?)

### OTHER SURVEY FINDINGS

Television was not the platform of greatest concern to participants – they were more concerned about the internet. (Key Findings, page 5)

While *sexual content on television* was a concern for participants it was also not their area of greatest concern, with violence, sexism and racism also being cited as examples of unacceptable content that were of equal or greater concern. (Key Findings, page 5)

When shown the clips, most thought that there was a place for all of the content shown. The main issue, and the main area where participants differed, was the *degree to which they wanted such content to be regulated* in terms of channel, timing, editorial justification and mandatory access restrictions. (Key Findings, page 5)

Most participants believed in general that *there is a place for sexual material on*



*television* for those adults who would choose to watch it. (Key Findings, page 5).

Participants voiced the need for mandatory access restrictions where appropriate, depending on the type and strength of sexual material, and highlighted the importance of other contextual considerations such as: the channel, time of broadcast and pre-transmission announcements.

### **AUDIENCE CONTEXT**

Section 319 paragraph 4 of the Act states that standards must take account of “the likely size and composition of the potential audience” and “the likely expectation ... as to the nature of a programme’s content”.

In plain English, this means that the strong content can legitimately be shown late at night while the same content would be unacceptable at other times of day, including the early evening. An example of time affecting acceptability is BBC 1 scheduling on 4 Sept 2009, with “Pulp Fiction”, a violent Tarantino film, and “The One Show” shown at 11:40pm and 7pm respectively.

It also means that the audience size, demographics and nature of the channel has to be affect acceptability. What might be acceptable on one channel would be unacceptable on another with a different reputation, even at the same time of day. “Sex: How To Do Everything” is more acceptable on Fiver than Living, Dave or GOLD where expectations are different. (10pm 3 Sept 2009, Living has “Private Practice” scheduled, a cosy vet series, Dave will showed “Dragons Den” while GOLD has classic repeats of family comedy “Only Fools and Horses”.)

Clearly the Communications Act authorises sexual content, within limits, to be shown on niche channels late at night. Content that would be unacceptable on mainstream channels (BBC1 through Five and Sky 1), documentary channels, children’s channels, or religious channels may be acceptable on niche “adult” channels.

**One-size-fits-all regulation is specifically rejected by the Communications Act.**

### **PROPORTIONALITY**

In general there is a principle that enforcement action should be “proportionate”. Action taken against an obscure small-audience channel with few or no actual complaints should therefore be less severe than action taken against a channel which broadcast an offending programme seen by thousands or millions of children and which generated large volumes of complaints.

### **SCOPE**

It is disappointing that yet again OfCom has chosen to focus restrictions solely on sexual material, using the justification of Generally Accepted Standards. The only known surveys that OfCom has commissioned to help define this have focussed on sex, or sex and offensive language to the exclusion of all other areas. This is in the absence of any supporting definition, and OfCom should be aware that this leaves it open to legal

challenge, both by groups seeking restrictions on other material, and by groups seeking relaxation of rules relating to sexual content.

Section 319(2f) of the Communications Act clearly states that “The standards objectives are ... 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;” The wording of the Act relates Generally Accepted Standards to ANY offensive or harmful material, not just sexual content. This could be interpreted to include horror/gore, desensitisation to violence (eg cage fighting), religious cults, gambling and even tobacco advertising.

Potential areas of concern include gambling, religion, news, violent action films, and horror films. It is not sufficient to have policies relating to these areas – OfCom could be challenged on the grounds that it has arbitrarily decided not to assess where the boundaries of public acceptability lie, and could be accused of operating double-standards.

Previous examples of strong horror films shown unrestricted (“free-to-air”) include *Audition*, *Re-animator*, *Saw*, *Hellraiser* and *Live Feed*. In *Audition* a man’s foot is shown being sawn off with cheese wire. Later he is seen with about 20 long acupuncture needles in one eyeball (BBFC consumer advice states “Contains scenes of strong psychological horror and gore”). In *Re-animator* visceral body parts come alive. In *Live Feed* people are tortured to death for entertainment. At one point a live snake can be seen being inserted into a woman’s belly, then bursting out through the chest. (BBFC consumer advice states “Contains very strong bloody violence and gore”).

Other recent examples of strong horror material broadcast free-to-air on the Sky platform include:

<i>Alien</i>	18	Channel 4	10:45 pm	3 Sept 2009
<i>Zombies AKA Wicked Little Things</i>	18	Zone Horror	10:55 pm	4 Sept 2009
<i>Days of Darkness</i>	18	Zone Horror	10:55 pm	5 Sept 2009
<i>Bride of Re-Animator</i>	18	Zone Horror	00:45 am	9 Sept 2009

Some people would also express concern about shows depicting dangerous and imitable stunts, boxing and cage fighting, all shown without access restrictions.

This is not to say that restrictions should be increased, merely to indicate that there is an inconsistency in the way in which strong controversial material is regulated. If clips from the above named shows were shown to the focus groups used to determine GAS for sexual material, doubtless they would express surprise and concern that children could access this strength of horror film without restriction or even subscription, from their bedrooms.

If a methodology is used then it must be used consistently.

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## ACRONYMS & TERMINOLOGY

BBFC	British Board of Film Control – awards certificates to cinema films and DVDs. Does not issue certificates for television, though OfCom tend to use BBFC certificates as a guide.
Encrypted	A term often loosely used to refer to channels that can only be accessed via some form of subscription or one-off payment, and subject to adult verification. Even after subscription or payment, a PN code must be entered each time the channel is activated, unlike other subscription channels. ( <i>Technically almost all content on Sky and Virgin Media platforms is encrypted due to UK territorial copyright agreements, but this is not the usual understanding of the term</i> ).
FTA	“Free To Air” Content that can be accessed without specific subscription or payment. Usually accessible without a mandatory PIN code.
GAS	Generally Accepted Standards – the benchmark for determining whether something meets public expectations for broadcast content.
PIN	A code number entered to access some channels.