

Response by Channel 4 and Five to the Ofcom Consultation on an outline procedure for sanctions in cases relating to broadcasting.

This response is made on behalf of Channel 4 Television Corporation (Channel 4) and Channel 5 Broadcasting Limited (Five) and includes the following:

1. General observations on the principles underlying the sanctions procedure in broadcast cases;
2. Comments on the draft proposed outline procedure (Sections 2 and 3 of the consultation); and
3. Responses to the consultation questions (Section 3.1 of the consultation).

General observations on the principles underlying the sanctions procedure in cases relating to broadcasting.

1. Ofcom has extensive powers to impose sanctions against broadcasters. These include a direction not to repeat a programme or to broadcast a correction or statement of Ofcom's findings (in such form and to be included in such programmes and at such time as *Ofcom may determine* [italics added]). This power has the potential to be a significant and very real interference with a public service broadcasters' Article 10 right of freedom of expression *and* the viewers' rights to receive information, both protected by the European Convention on Human Rights and the Human Rights Act 1998. The imposition of a financial penalty will have a real and damaging impact on any legitimate broadcasting business, particularly given the levels of such penalties permitted at Ofcom's discretion by the Communications Act 2003 (the Act) of up to 5% of qualifying revenue for Channel 4 and Five. Finally, the use of the ultimate sanction of a direction to shorten or revoke a licence (although not applicable in the case of Channel 4) would have both an impact on freedom of expression under Article 10 as well as potentially undermining the importance of a wide range of television services and plurality of broadcasting (maintenance of which is an Ofcom duty under the Act (Section 3(2))) *and* a damaging impact on any legitimate broadcasting business. The purpose of making these points is not to suggest that serious cases should not be the subject of significant sanction where that serves the wider public interest but to highlight the fact that Ofcom's powers to impose sanctions are

extremely wide and can only be reviewed or checked by the court through Judicial Review.

2. It is therefore absolutely vital to broadcasters and viewers that these powers are exercised, in all respects, fairly which is also a necessity to ensure compliance with the law. There are two elements to ensure fairness:
 - a. the procedure through which a sanction is imposed; and
 - b. the decision making process of the adjudicating individuals or body which finds a breach, decides to impose a sanction, recommends the sanction and decides to impose a sanction.

Obviously, the consultation and this response are concerned with point (a).

4. The importance of returning to the first principles invoked by this consultation is imperative because of the extensive powers given to Ofcom under the Act. They are powers as extensive as those held by the courts; however, the judicial process includes numerous safeguards including an independent professional judiciary, interlocutory procedures to allow cases to be properly investigated and rights of appeal against decisions. It is not suggested that the principle of the timely and efficient investigation of cases and, where appropriate, the imposition of a sanction should be undermined, but that the procedures should reflect the seriousness of the powers of sanction Ofcom holds. By analogy, parking infringements and minor driving offences can be dealt with by way of a fixed penalty with limited rights to make representations, while more serious offences will be dealt with by the Magistrates Court, and where the most severe penalties can be invoked, by a Crown Court with a jury. Given the powers held by Ofcom, and the Convention rights in play, it is vital that the timely and efficient disposal of cases is balanced with a procedure which is genuinely fair to broadcasters threatened with sanction. It is of fundamental importance that a broadcaster has a full and proper opportunity to understand the case against it and sufficient time to consult internally all those in a position to clarify the facts and circumstances and prepare and present a full response.

5. Reference is made in the consultation to Article 6 (the right to a fair trial) as a principle to which Ofcom is bound as a public authority in cases where a sanction is being considered. As Ofcom will be aware, Article 6 is a right against which a particular procedure or action will be measured. Therefore, some analysis is required as to what the application of Article 6 means in cases where a sanction is being considered by Ofcom. The following should be the starting point to ensure a 'fair trial' under Article 6:

- a. It should be established that a breach has occurred and that the broadcaster has had the proper opportunity to make any representations it deems appropriate before that decision is taken. It should then be given an opportunity to exhaust any right of review of this decision.
- b. Once a breach has been established and a sanction is considered, the broadcaster has the proper opportunity including a reasonable amount of time within which to make any representations it deems appropriate to the decision making body/bodies which decides whether to impose a sanction and the nature of that sanction.
- c. The broadcaster must understand the case against it and be supplied with copies of all documents which any individual or decision making body may see or to which they are referred.
- d. Any decision must be made by an individual or body which is impartial and independent and has no interest of any kind in the case or any person or body associated with it.

Where there is no right of appeal in the procedures (as is currently the case), the importance of these procedures being unimpeachable and manifestly fair is heightened. We will seek to apply these principles in commenting on the proposed procedures.

6. Reference is made in the consultation to the "public interest". This principle also needs proper analysis in the context of the proposed sanctions procedures. Given the significant powers to sanction which Ofcom holds, the public interest lies in ensuring that cases involving a possible sanction are

dealt with fairly, allowing the broadcaster the proper opportunity to investigate any potential breach and present its cases as it thinks appropriate in a timeframe which is reasonable and which will not cause injustice. Rarely or ever will the speedy disposal of cases override these principles in the public interest, particularly where Ofcom has the right to issue a direction to cease certain conduct under a broadcasting licence. This means that any harmful behaviour by a broadcaster can be suspended so that the sanctions procedure can take its course without being rushed. Only in cases where there is genuine ongoing viewer harm which is not capable of remedy or a direction by Ofcom to stop a particular activity is not possible should the sanction process be 'fast-tracked'.

Comments on the proposed outline procedures for sanctions in cases relating to broadcasting.

A. General

7. We believe that the general emphasis of the consultation raises significant concerns about the principles underlying the outline sanctions procedure. In Section 2 (Background) of the consultation it states that the proposed procedures have been drafted in the light of the informal consultations which took place in 2006 and the experience of the procedures. However, it should be noted that the draft procedures have not been prepared in the light of the broadcasters' experiences but only those of Ofcom which is reflected in the Summary to the consultation. In our view it would have been preferable if Ofcom had conducted a pre-consultation de-brief with broadcasters as we believe that an informal and open discussion of practical experience from both sides would have better informed the review of these procedures.
8. Ofcom has stated that the procedures have been found to be "lengthy and quite cumbersome" which has the "potential to inhibit Ofcom from reaching decisions quickly and efficiently in the interests of broadcasters, consumers and other stakeholders." While we believe the procedures could be improved and in certain areas streamlined, it is our experience that they are not lengthy and the time frames currently imposed and those envisaged in the draft procedures have the real potential to create genuine unfairness because broadcasters are unable to fully investigate and properly present their case.

We believe that the speed by which a case is processed should reflect the interests of natural justice, that is, the proper investigation of the facts and the ability of the broadcaster to present its case. Quick decision making of itself is not necessarily in the public interest particularly when cases are being considered against a background of often intense and hostile media scrutiny and political attention.

9. The importance of ensuring that the procedure allows for the proper presentation of a case by the broadcaster is heightened by the fact that there is no right of appeal as specifically cited in paragraph 7 of the procedures. While it is stated that that the broadcaster should have a “fair and reasonable opportunity to respond to the case against it” this must be borne out in practice. The procedures state that Ofcom is “mindful” of Article 6, however, this does not in our view reflect the legal position. Ofcom is bound to act pursuant to and in accordance with this Convention right and it should form the basis of the procedures. As Ofcom will appreciate, it is not enough to merely cite a principle, it has to be applied in practice.

10. It should also be noted that a ‘fair hearing’ is required not just by Article 6 but also by the common law principles of procedural fairness applicable to Ofcom as a statutory body. It is well established under the common law that the principles of procedural fairness include:
 - a. A right to see the information on which the complaint is based; and

 - b. A right to respond to the allegation after adequate time for consideration.

It is Ofcom’s duty under the common law to respect these principles even if they cause inconvenience to the regulator, or to the interests which the regulator seeks to protect. It is a well established principle of English administrative law that “justice and convenience are often not on speaking terms”. See the Divisional Court in R v Secretary of State for the Environment ex parte Brent LBC [1982] QB 593, 646C-G.

Given the severity of the sanctions which Ofcom may impose, these principles must be respected and any unfairness in the application of the procedure would give rise to a remedy by way of Judicial Review.

11. Paragraph 8 states that a sanction will not be imposed before the broadcaster has been given a “reasonable opportunity to make representations” about:
 - a. whether a sanction should be imposed;
 - b. what type of sanction; and
 - c. at what level.

Further, what constitutes “reasonable opportunity” will depend on the facts and degree of urgency in each case. However, experience by the broadcasters of the timetable set out in the procedures, which it is not unreasonably assumed will be used in most cases, is often barely sufficient to allow us to respond to the very serious issues raised in cases where a sanction is being considered. Often investigations where a sanction is considered can go back many years. It is likely that it will involve individuals both from the broadcaster and, in the case of Channel 4 and Five, production companies who will have long moved on, as is the nature of the independent sector and who may have no obligation to assist in an investigation. Therefore, the time required to investigate and prepare a case can be lengthy. If the timetable were shortened in cases where Ofcom believed a more urgent response is required, then the likelihood of genuine unfairness is real. Further comments on the timetable in sanctions cases are set out below.

12. Paragraph 11 states that broadcasters will “normally” be provided with copies of the “relevant documentation” subject to the non-disclosure of certain classes of material. We believe that this paragraph, which includes an important Article 6 right to be able to see and comment on the case against the broadcaster, should be amended to reflect properly the principle. It is also a well established common law right that a person against whom sanctions are threatened should be shown all relevant documents, other than in very exceptional circumstances. See, for example, R v Secretary of State for

Health ex parte US Tobacco International Inc [1992] QB 353 (Divisional Court).

13. We therefore believe in order to make paragraph 11 compliant with the law, the second and third sentences should read:

“Broadcasters will see all information relied on by the Executive or the Committee. Broadcasters will be provided with copies of all documentation seen by or relied on by the Executive or the Committee subject to the withholding of any documentation that is confidential, market sensitive, legally privileged or that Ofcom is under a legal obligation not to disclose.”

It is suggested that an additional sentence should then be added:

“Where the Executive or the Committee relies on any withheld documentation or information in making a decision the broadcaster will be made aware of its existence and the reason that it has not been disclosed.”

This additional provision is important in the interests of fairness and transparency to ensure that the broadcaster is aware that certain information has been seen or relied on by the decision making body even if they are not permitted to review such information. Also, as a matter of natural justice, if the broadcaster feels that it wants to challenge the non-disclosure of certain information they can only do this if they are made aware of its existence.

B. Procedure

14. Paragraph 12 deals with the point at which the sanctions procedure commences. We believe that the finding of a breach and the notification that a sanction will be considered must be kept separate. In fairness and privacy cases and standards complaints the procedure allows for a review of a finding to be sought, therefore any consideration of a sanction cannot be considered until the review process has been completed. It may be the case that the broadcaster wishes to raise an issue about the finding of a breach, for example to argue that the adjudication itself is flawed and merits a

reconsideration, or new evidence may have come to light which has a bearing on the finding or it wishes to commence Judicial Review proceedings in respect of the finding of a breach once the review process is exhausted. Therefore, we believe it is important that the decision to find a breach and the decision to recommend a sanction remain distinct and are not blurred. The finding of a breach and the presentation of a draft sanctions paper at the same time creates unfairness because it allows no opportunity to challenge the finding of a breach and does not reflect the procedures in fairness and privacy and standards cases. We recommend that the broadcaster should be notified that a breach has been found and that a statutory sanction will be considered. There is then the opportunity for the broadcaster to request a review of the decision.

15. It has been noted from our own practical experience of the process that the basis of the breach itself and/or the reasons for judging the breach to merit the consideration of a statutory sanction changes once the sanctions paper is drafted and as it is reviewed and amended, sometimes with fresh issues being raised. It is not helpful to the broadcaster for there to be uncertainty in relation to the case against it and which it is being asked to respond as it leads to a lack of clarity and undermines the effectiveness of the process. Experience also informs us that once the sanction procedure commences and the sanctions paper is drafted it is unlikely that the process will be suspended to allow any outstanding issues concerning the substantive decision to be dealt with. This means that the broadcasters' response to the sanctions paper may have to deal not only with the decision to find a breach but also the issue of a recommended sanction. It is therefore vital that issues relating to the breach are concluded and then the sanction paper is subsequently sent out separately based on the finding. To do otherwise gives the impression that the issue of a sanction has been pre-judged.

16. Pursuant to paragraph 15 it is proposed that the broadcaster should provide representations on the draft sanctions paper and the case generally to a more senior manager, that is, not the person who drafted the paper. We do not object in principle to removing one of the steps when broadcasters are permitted to make representations. However, it seems to us fairer and more logical that the representations should be made to the person who drafted the document, not the person making the decision as to whether to refer the case

to the sanctions committee. Therefore, we suggest that the broadcaster's representations at this stage should be addressed to the manager. Those representations and where necessary the amended sanctions paper would then be passed to the senior manager.

17. Seven working days is permitted to make representations at this stage. Ofcom should not underestimate the difficulties encountered in meeting a deadline this short. The draft sanctions paper is often many pages long and this has to be analysed and responded to. Further, representations have to be drafted and information gathered from producers and other members of staff. Then the document needs to be considered by senior executives within the broadcaster and sometimes, where necessary, reviewed by counsel. To do all this within seven days as proposed in the procedure is impractical and impacts significantly on the ability of the broadcaster to present its case. We do not believe that seven working days provides a "reasonable opportunity" to make representations in most cases. We believe this period should be 10 working days as a minimum and suggest that there be an opportunity for Ofcom and the broadcaster to agree at the outset whether it is a case requiring urgent resolution and the appropriate timetable for consideration of the case.
18. It would be helpful to understand the basis on which a senior manager could decide not to refer a case to the sanctions committee where a sanction has been recommended by the manager and whether this has ever happened in practice.
19. Paragraph 18 deals with the next step where the senior manager decides that a sanction is appropriate. The broadcaster is provided with the draft sanctions paper which will now include a provisional recommendation of the type, and where appropriate, the level of a sanction. The broadcaster is then given five working days to provide any further representations. Again, the practical and logistical difficulties in meeting this timetable are significant. Further, the broadcaster now has more information with which to deal, namely, the recommended sanction on which it is likely legal advice will be required, potentially from outside counsel. However, the ability to review the sanctions paper, seek advice, prepare a detailed response, include appropriate mitigation and take instructions is seriously undermined by a deadline of five

days. In effect a broadcaster is given a total of 12 working days to make representations on the decision to consider a sanction and then any sanction recommended and, where appropriate, the level. This could be in circumstances where a broadcaster could be fined many millions of pounds or lose its licence. By any standards this timetable is unlikely to be considered reasonable in most cases and we do not believe it meets the principles under Article 6 which guarantees a person the right to a proper opportunity to respond to the case against them. We also note the lack of any timetable in the procedures for Ofcom to respond, while broadcasters are often given absolute deadlines which Ofcom states will not be extended.

20. It should be noted that the senior manager includes the recommended sanction and, where it is a fine, the level. In our experience there is no explanation of why a particular sanction has been chosen and where it is a financial penalty how the sum was arrived at. While Ofcom does publish Penalty Guidelines which set out the tests to be applied when considering a financial penalty how these are applied in practice is not explained by either the senior manager or the Sanctions Committee. This has the effect of making the decision to impose a particular sanction appear arbitrary and hinders the broadcaster's ability to question or make representations about the proposed sanction. We believe it is important that in future the senior manager provides some explanation for his/her decision in the interests of fairness, openness and transparency as referred to in Paragraph 7 and pursuant to Article 6 and the common law so the broadcaster can properly respond to the case against it.

21. The hearing procedure is somewhat prescriptive and we would suggest the broadcaster be permitted to make representations on any compelling matters which might justify a deviation from the stated procedure or any proposals by the Chair to change the procedure. We would propose that 10 minutes is a more appropriate duration for a summing up of the broadcaster's position.

22. Given that the final decision on sanctions are made by a committee of Ofcom's Content Board we note that there is no procedure to ensure that none of the committee members have any direct or indirect interest in the matters under consideration or the parties concerned. We believe that to

ensure that the committee is impartial and appears so that the disclosure of any interest (direct or indirect) should form part of the pre-hearing protocol.

23. Paragraph 23 deals with the Sanctions Committee's adjudication and its publication. While we understand that Ofcom wishes to limit comment by the broadcaster on the final adjudication to factual or typographical errors, the time allowed in practice before publication causes significant problems for the broadcaster. Not only does the broadcaster have to deal with the sanction decision itself, ensure the adjudication is accurate and brief senior executives but also ensure that its press office is prepared and a public statement to hand. Ofcom's decisions to impose a sanction will inevitably be the subject of considerable press interest, but there is little time to deal with all the significant PR issues arising from the decision. All this work is currently undertaken within a timescale of a few hours and we advocate that broadcasters are provided with the adjudication and given 24 hours (or at least a working day) to respond to the final adjudication save where publication is required as a matter of urgency.

C. Fast-track procedure for statutory sanctions

24. Ofcom has not provided any evidence as part of this consultation in support of the need for a fast-track procedure where the interests of viewers or third parties have been adversely affected in practice by the existing procedures. It is likely that this proposed fast-track procedure would be invoked in the most serious cases where the sanction is likely to be greater and therefore the importance of allowing a broadcaster a proper opportunity to respond to the case against it is that much greater. This would militate against a fast-track procedure in the most serious cases. If it is the case that ongoing harm is being caused, Ofcom has the right to issue a direction requiring this to cease. Once stopped the need for a fast-track process is removed and the case can proceed in the normal way. We believe it is important to avoid injustice or the sense that the procedures are unjust, for Ofcom to provide some explanation in support of the need for a fast-track procedure before we are able to respond properly to the proposal. We are also concerned about the element of pre-judgement inherent in the proposal, for example the sixth bullet point states one criterion as "where...it appears that there may be a serious failure in the compliance procedures of a broadcaster..."

25. While we are unclear as to the pressing need for a fast-track procedure, we raise concerns about when it is proposed that it should be invoked, based on our experiences of the sanctions procedures. We believe that significant unfairness to broadcasters exists in the current timetable for responding in sanction cases and therefore the further shortening of the timetable can only lead to further unfairness.
26. If a fast-track procedure is proposed then it is vital that Ofcom defines precisely when it should be invoked because any such procedure by its nature limits the rights of broadcasters under Article 6. If Article 6 rights are to be curtailed this should only be done in the most urgent of cases where there would be genuine ongoing harm if the matter was not dealt with expeditiously and never because of outside pressure for Ofcom to make a decision. Eight instances where the fast-track procedure may be used are cited in the draft proposed procedures. We have serious concerns about its use in at least four of these instances:

First bullet point – it should be noted that where there may be a risk of material harm including financial loss, Ofcom has the power to issue a direction to a broadcaster to cease certain activities. Obviously, if a broadcaster continues to act in contravention of that direction a fast-track approach may be necessary. However, it should be made clear that the risk of material harm must be an *ongoing* one. If it is a situation where material harm may have occurred but is not continuing then any fast-track procedure would not be appropriate.

Sixth bullet point – as already stated, we are concerned that the proposed procedures contain an element of pre-judgement where Ofcom is prepared to fast-track a sanction because it already believes there is a serious failure in compliance. This is the kind of issue that requires, as a matter of natural justice, proper investigation and analysis before a sanction is considered not a fast-track approach with all the attendant unfairness. It should also be noted that in almost every recent case Ofcom has found that there were serious compliance failures as this is often the basis on which broadcasters are made responsible for the failures of third parties. Therefore, it would seem that the fast-track

process could be used in almost any case Ofcom chose, which is arbitrary and manifestly unfair.

Seventh bullet point – we believe that citing the public interest generally as a justification for a fast-track procedure is questionable. It should be for Ofcom to demonstrate exactly the public interest that needs to be met by further curtailing a broadcaster's Article 6 and common law rights. As previously argued, the speedy resolution of cases that have sparked considerable press interest is not a justification – the public interest lies with the fair disposal of any case in which a sanction is being considered and the rights of the broadcaster under scrutiny and must not be confused with responding to general interest by the public in a case.

Eighth bullet point – this appears to be a catch-all provision where Ofcom wishes to fast-track a case. The test to be applied when deciding whether a fast-track procedure is where Ofcom "considers it proportionate and appropriate". This could fit almost any situation. It may well be in Ofcom's interest for cases to be dealt with as speedily as possible in order to address any wider criticisms about its actions and to be seen to be acting quickly. However, this is unlikely to justify curtailing a broadcaster's rights under Article 6 where Ofcom has such wide powers to impose sanctions. It also does not meet the common law principle that the right to a fair hearing overrides any inconvenience to the regulator. The test should be that the normal timetable will apply in all cases save in those exceptional circumstances where there is a demonstrable and pressing need for the matter to be heard more quickly or where Ofcom and the broadcaster agree to this approach. Outside these very limited and prescribed circumstances we see no justification for a fast-track procedure. Further, we would question the wide-ranging circumstances currently cited in the draft procedures which seem to indicate that Ofcom would use it wherever it felt it appropriate relegating the broadcasters' Article 6 rights as secondary to Ofcom's desire to be seen to be acting quickly.

27. Further, we do not understand the circumstances where 12 working days to respond to Ofcom's sanction paper under the normal procedure needs to be reduced to a one stage, 5 working days response. It seems that the only likely impact of this procedure is to create further unfairness to a broadcaster

in the investigation, preparation and presentation of its case. This is not in the public interest. It is accepted that those cases considered for a fast-track approach are the more difficult and serious, so even less time to prepare a response is manifestly unfair. We believe that as it is proposed to remove a stage in the process, which would obviously speed up the case, it would then be wrong to allow the broadcaster less time to prepare its response than would normally be the case. We advocate that at the very least the broadcaster is given 12 working days to respond.

Responses to the consultation questions and the draft proposed procedure

The responses to the questions posed in the consultation summarise the points made earlier and should be read in conjunction with the whole response.

Question 1 – Do you agree with the new proposed procedure? If not, why not? Please suggest any alternative wording where appropriate.

Response

We believe that the current sanctions procedures and the draft procedures in cases that are not subject to the proposed fast-track system are unfair in a number of material ways. These are highlighted in this response, but in summary they are:

- The timetable for reviewing the case against the broadcaster and for responding to the case Ofcom has mounted against it is often insufficient. We believe in certain cases that this breaches not only Article 6 but also the common law right to have adequate time to consider the allegations against the broadcaster. Both Article 6 and the common law make it clear inconvenience to Ofcom and the rights it seeks to protect are secondary to the right to adequate time to consider and respond to the allegations against the broadcaster.
- The decision that there has been a breach and the notification that a sanction is being considered must be kept separate in the interests of fairness and to ensure that the broadcaster is given an opportunity to request a review pursuant to Ofcom's procedures.

As there is no appeal process in the sanctions procedure the importance of getting the decision right that there has been a breach is that much greater.

- The duty to disclose to the broadcaster all documents used or seen by the decision-making bodies needs to reflect the principles of Article 6 and the common law. Where documents are not disclosed the existence of the documents and the reason for their non-disclosure should, as a matter of natural justice, be made known to the broadcaster.
- Ofcom should provide some details of how it has reached a particular penalty (particularly a fine) and how the Penalty Guidelines have been applied. At present the imposition of fines in particular appear arbitrary and no information is given as to how it is calculated in accordance with Ofcom's published guidelines.
- The hearing procedure is prescriptive and we believe that the broadcaster should be allowed the opportunity to address the Sanctions Committee (prior to the hearing) on any changes to the hearing procedure it thinks would be appropriate in the interests of fairness. Obviously, the Chair of the Committee could do likewise if he/she so wished.
- Additional time to review and comment on the final adjudication would prevent the current unfairness of broadcasters having little real opportunity to deal with issues to which a sanction gives rise. Broadcasters are subject to the most intense press scrutiny and as such should be given some more time to prepare for this where a sanction is imposed.

Question 2 – In particular do you believe it is appropriate, in normal cases where a sanction is being considered, for broadcasters to have two opportunities to make representations to Ofcom (once on the seriousness of the case and once on the nature and level of any recommended sanction)?

Response

- Ofcom has adopted a system where the most junior person on the executive chain decides to invoke the sanctions procedure and prepares the first paper which is then passed to a senior manager. It is absolutely vital that the broadcaster has the opportunity to respond to the document and the case against it each time it is presented to a person or body making a decision. Therefore two opportunities to make representations is the minimum required under the provisions protecting natural justice to ensure that the case against the broadcaster is accurately and fairly presented.
- The decision to invoke a sanction and the nature and level of that sanction are two distinct administrative decisions both of which require different responses from the broadcaster. It may be the case that the broadcaster wishes to argue to the Ofcom executive and the Sanctions Committee that a sanction is inappropriate and unjust. However, in a different case the broadcaster may accept that a sanction is just or inevitable once the senior manager has decided that this is his/her recommendation and that it will make representations to the Committee on the nature and level of the sanction. This approach is not possible unless there is a two stage process allowing representations to be made at each stage.

Question 3 – Do you agree that it is appropriate for Ofcom to introduce the new proposed fast-track sanctions procedure in the circumstances suggested?

Response

- We do not believe Ofcom has made out a case for the fast-track procedure. No evidence has been provided that would justify a fast-track approach and the inherent adverse impact that would have on a broadcaster's ability to present its case. With Ofcom's right to issue a direction we cannot see how the fast-track

procedure would necessarily protect the public or be in the public interest.

- Ofcom must apply the principles of Article 6 and the common law to these proposed procedures. The common law states that the basic principles of natural justice (the right to see information on which the complaint is based and a right to respond to the allegation after adequate time for consideration) must be respected even if they cause inconvenience to the regulator or to the interests which it seeks to protect.
- Even if a case for a fast-track procedure can be made out, the criteria as drafted are too wide and arbitrary and could include any case considered for a sanction. The effect of this would be that Ofcom could pick and chose whichever cases it wanted to fast-track without any reference to a certain and lawful set of criteria. We believe that this approach would be arbitrary and could be open to abuse with the only protection being Judicial Review which is expensive and adversarial.
- It seems illogical to us that in those cases which are deemed so serious as to warrant a fast-track approach, the broadcaster is given less time to prepare and present its case and we would advocate that in the event that some sort of expedited procedure is justified then the amount of time given to the broadcaster to present its case is the same as that in a 'normal' case.

Question 4 – Do you have any other proposals for making the procedure more effective and/or appropriate?

Response

- Our comments and proposals are set out in this response.

September 2007

Channel 4

Five