

Summary

The Consultation

The draft Ofcom Broadcasting Code (“draft code”) was published for consultation on 14 July 2004. The consultation formally closed on 5 October 2004 although some further submissions were received after that date. Overall, we received over 950 responses and we also received a campaign from **mediamarch** of over 1500 postcards

The quality and quantity of the responses demonstrates the importance that standards in broadcasting have to citizen-consumers and to those who work in the industry and other stakeholders. Of the non postcard responses 35 were from broadcasters, 96 were from other stakeholders and 819 from members of the public. A full list of non confidential respondents is included in this statement and is available on the web site¹.

Publication of the Broadcasting Code

Because of the very high number of responses received and the very significant level of interest in Ofcom’s new Broadcasting Code (“the Broadcasting Code”), publication was delayed until 25 May 2005. The final Broadcasting Code reflects the many suggestions and considered views expressed by respondents.

Ofcom’s philosophy in setting the Code

In drafting this Broadcasting Code we have sought to target regulation where it is required, to be proportionate and consistent and to create regulation which is achievable. We have had regard to our duties to promote choice and competition, to further the interests of citizens-consumers and to support innovation, creativity and investment.

As listeners and viewers exercise choice in a digital and multi-channel environment, it is important to allow broadcasters as much freedom of expression as is consistent with the law as well as the flexibility to differentiate between services and enable their audiences to make informed choices.

The Communications Act 2003 (“the Act”) clearly envisages both audiences and broadcasters taking more responsibility for what is broadcast on the one hand and what is received on the other. The regulation that Ofcom provides in this Broadcasting Code should include the minimum standards required by law. We have only set more restrictive rules for specific descriptions of services where we believe this can be justified.

In particular:

- We wanted to draft a code that would not simply rewrite previous codes but would be a genuinely new code, rooted in the new broadcasting legislation – in particular the

¹ We have also published on the website on an anonymous basis approximately 250 responses which failed to state whether or not they should be confidential, despite being requested to make this clear.

Act and the Broadcasting Act 1996 as amended (“the 1996 Act”) whilst also incorporating, where relevant, the provisions of the EU Television Without Frontiers Directive (“TWF Directive”), and in the light of the Human Rights Act 1998, in particular the right to Freedom of Expression.

- Driven by section 319 (4) of the Act, we wanted to create a code that recognised the rapidly changing broadcasting environment and increased levels of media literacy. This enables us to ensure that children can be protected and adults are given the information to make informed choices.
- Research indicates that the public believe that the primary purpose of standards regulation in broadcasting is to protect the young and we have reflected that by creating a separate section for the protection of the under-eighteens and by taking, where appropriate, a precautionary approach to the protection of children (defined in the Broadcasting Code as those under fifteen). This is also in line with the first standards objective in the Act that those under eighteen should be protected (section 319 (2)(a)).
- As a corollary to the necessary protection of children, Parliament has required that generally accepted standards should be applied to television and radio services so that adequate protection is provided to prevent the inclusion of harmful or offensive material. This is more qualified than in previous legislation which required that nothing should be included that would offend against good taste and decency. This means that rules in Section Two of the Broadcasting Code regarding Harm and Offence accept that where broadcasters can editorially justify content and provide appropriate information, they should be able to include more challenging material even though that material may be considered offensive by some. This freedom is however limited at times when children may be particularly expected to be listening or viewing (in television terms pre-watershed).
- We wished to clarify and simplify the amount of standards regulation in broadcasting so that the Broadcasting Code could easily read and understood by those who work in the industry as well as members of the public. We have reduced the six codes of the legacy regulators (Radio Authority, Broadcasting Standards Commission and Independent Television Commission) to a single code with appendixes.
- Finally we wanted to create a code that acknowledged the reality of convergence and so united radio and television regulation wherever possible without imposing a heavier regulatory burden on either medium. In general respondents agreed with the single code approach with break out rules where necessary for different services.

The statement

This statement summarises the responses to Ofcom’s consultation on its draft code and Ofcom’s response to the points raised. It explains our reasons for changes we have made to the draft code resulting in Ofcom’s Broadcasting Code².

² This document is not a legal document nor is it part of the Broadcasting Code nor is it an exhaustive account of all the rationale there may be for each and every rule.

Respondents have in some cases commented on every proposed rule and many have suggested changes to the wording, reflecting the very different perspectives involved.

This statement contains a summary of respondents' views prepared for Ofcom by an independent company which seeks to capture the majority of the comments made. It also contains Ofcom's response to those comments.

This document could not cover each and every point that has been raised by respondents to the consultation; instead it summarises the most significant issues and Ofcom's response to them.

However, it should be made clear that, in considering the final wording of the Broadcasting Code, Ofcom has considered each and every response received in its full form (whether confidential or not).

Besides the **mediamarch** postcard campaign (and a linked campaign to encourage MPs to write to Ofcom), we are aware that there have been three other campaigns running. One is by those in favour of the broadcasting of R18 material (commonly known as hard core pornography) and the other by those opposed to it. There has also been a campaign by those in the adult sex shop industry, who are opposed to the broadcast of R18s, to encourage MPs to write to Ofcom.

Linked publications

Guidance to the Broadcasting Code is being published on Ofcom's website to accompany the Broadcasting Code. Members of the public without access to the web may request a copy of the guidance by post. This guidance is advisory rather than binding and will be reviewed and updated as necessary.

As an evidence based regulator, Ofcom has also commissioned research to inform the drafting of and the guidance to this Broadcasting Code. Ofcom plans to publish this research on its website at the same time as the Broadcasting Code.

The research includes:

- A safe viewing environment for children – key findings from the qualitative research
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- Consultation Among Young People on the Proposed Ofcom Broadcasting Code: A Research Consultation with U18s
- R18 material and its potential impact on people under eighteen: an overview of the available literature
- Religious Programmes: a report on the key findings of a qualitative research study
- Research into the effectiveness of PIN protection systems in the UK
- Smoking, alcohol and drugs on television- A content analysis
- Offensive Language and Imagery in Broadcasting: A contextual Investigation

Some of these projects were quantitative in their nature (larger sample sizes, more structured questioning, statistically reliable findings); some were qualitative (smaller numbers of respondents, more open discussions, results to be used directionally or as guidance) and some were a mixture of the two.

Issues which will be subject to further consultation

In preparing the Broadcasting Code three issues have emerged which we consider should be the subject of further and separate consultation.

Product Placement

Against the backdrop of an apparent threat to the traditional spot advertising funding model of commercial broadcasting, Ofcom is keen to examine and explore new potential funding sources. These include product placement possibilities in the light of what the TWF Directive may allow, both now and when it is reviewed. The EU has stated that it will reach a provisional position on product placement as part of the re-drafting of the TWF Directive by the end of year. However, there are mixed views over whether the prohibition should remain and relaxing the rule on product placement immediately could have implications for the overall ecology of television funding. Ofcom has therefore decided that the Broadcasting Code should retain the prohibition on product placement, but that the issue should be specifically consulted upon in the context of a separate consultation later this year which will examine programme funding options.

Appealing for Funds

The second issue is whether television services, like radio services, may appeal for funds on air to support programmes and services. Whilst we are aware that this would be supported by specialist religious services and those interested in providing community services there was a strong request from other respondents that this matter should be the subject of a further consultation. Because of the importance of this issue and its potential to change the economic ecology of broadcasting we will look at this in our consultation on the future funding of programmes and also within the consultation on "local" (community) television both of which are anticipated later this year.

Channel Sponsorship

Sponsorship of a whole television channel or radio station is currently not permitted. It has been considered unacceptable because of the way in which the regulator interpreted the TWF Directive and the ITC Code of Programme Sponsorship. Overall, the concern was over a sponsor's possible influence on the editorial content of a whole service and the possibility that many services may carry unsponsorable content e.g. news.

However, under current rules commercial companies can become licensees and name the broadcast service after the brand. From the audience perspective, channel sponsorship may not be any different.

Ofcom has re-examined the TWF Directive and notes that it does not appear to explicitly prohibit or approve of channel sponsorship. The Commission's Interpretative Communication indicates that if in doubt about the TWF then it will tend towards a more liberal approach.

The general thrust of the responses suggests that channel sponsorship would be welcomed. Subject to further internal consideration, Ofcom therefore intends to permit channel sponsorship. However, it may be necessary to develop some further rules around this specific area to ensure compatibility with the TWF Directive.

Ofcom aims to start a consultation as soon as possible on what rules, if any, are necessary. Until Ofcom has concluded this consultation and taken all necessary

consequent decisions, its present interpretation of the Directive and sponsorship rules remain unchanged i.e. sponsorship of whole channels is prohibited.

Changes to Code

We have made many changes in response to the consultation which aid clarity or which appear to be closer in line to the requirements of the Act and other relevant legislation.

We have also identified other substantive issues which have resulted in more fundamental change. We have signalled some of the key changes below under individual section headings in the order in which the issue is dealt with in the Broadcasting Code, or if it is no longer in the Broadcasting Code, in the order in which it was dealt with in the consultation document.

Principles

We received many suggestions as to what the principles should contain. We decided that it was most logical to return where possible to the wording of the legislation.

Some respondents queried why it was necessary to incorporate within the rules the wording of the principles. This is because it is important that the rules fully reflect the objectives which Ofcom is seeking to secure.

Section One: Protecting the Under-Eighteens

This section attracted a large and very varied response.

• Scheduling

Scheduling issues raised most comment in this section. The rules relating to scheduling have therefore been clarified to assist interpretation. We have dealt at length with the reasoning here in the under-eighteens section of this document.

In making these changes we have also been aware of the very large number of responses from members of the public and from viewer and listener groups, which have urged clarity and respect for the watershed and times when children are particularly likely to be listening in the case of radio and voiced concern that these scheduling restrictions are ignored. We believe these changes will help meet these concerns as well as the more technical concerns of the broadcasters.

We have not, however, chosen to adopt suggestions that, in particular, the watershed be moved to later or earlier in the evening. We consider that the present system is well understood. It provides protection for children before 2100 whilst accepting that, after this time, parents/responsible adults must take more responsibility for television viewing in the household. We have maintained the watershed and other restriction in the case of radio, but Ofcom recognises that as technology and market changes increase (such as the use of time-shifting devices e.g. PVRs) there will be a long-term impact upon the watershed's effectiveness as a tool to protect children.

• Substance abuse

We accept that society is concerned about the attractions of abusing both legal and illegal substances and have therefore extended the draft rule to programmes likely to

attract a wide under-eighteen audience. However, this is not an extra regulatory burden since this is in line with what was required by the legacy codes. Ofcom commissioned content analysis in this area. It indicates that under the current rules broadcasters act responsibly.

- **The scheduling of paranormal programmes on television**

Under current television regulation certain paranormal programmes (which are for entertainment purposes) are prohibited from broadcast on terrestrial channels pre-watershed. The regulatory impact assessment (“RIA”) to this consultation asked whether these channels should be regulated in the same way as satellite channels. The responses show a split between the broadcasters and, in general, those representing religious groups. The broadcasters largely believed that a level playing field should prevail whilst religious groups believed a precautionary approach was the way forward. Given our duty to protect the under-eighteens, we believe it is proportionate and correct to adopt option two from the RIA which allows certain paranormal programming, which is for entertainment, to be transmitted on all television services. However, the Broadcasting Code retains the limitation that this material should only be shown when significant numbers of children are not available to view e.g. school time.

- **Premium subscription film services**

Current rules prohibit premium subscription film channels from transmitting British Board of Film Classification (“BBFC”) 12-rated (or higher) films before 2000. In effect this means that those who subscribe to such channels can only watch PG-and U-rated films during the day. We consider that those viewers that subscribe to premium subscription film services have accepted a greater share of responsibility for what is broadcast into the home. We have therefore decided that if such channels can provide sufficient protection (e.g. a mandatory PIN), they should be allowed to broadcast higher BBFC-rated films (i.e. up to 15-rated films or their equivalent) than previously permitted.

We believe this will be a real benefit to viewers, while ensuring that children can still be protected.

- **Adult sex material**

Rules regarding services that transmit adult sex-material remain as before.

- **R18**

It was decided not to allow the broadcast of R18 or equivalent material.

Responses to this issue were polarised. We assessed the arguments carefully, with particular reference to our statutory duties, the need to balance competing interests between the protection of children and freedom of expression and the available evidence. This includes the recent research we have commissioned into the effectiveness of prevailing security mechanisms in the UK.

Ofcom considers there is a significant risk, that a least a proportion of children would be able to access R18 material if it were to be broadcast under current security mechanisms. Given the strength of the material and in the absence of evidence that children could be effectively protected, Ofcom considers a prohibition of this material, for

the time being, consistent with its objective to set standards to protect the under-eighteens.

We have dealt with these arguments and our reasoning is set out in more detail later in the full statement that follows.

We believe that we would be failing in our duty under the Communications Act 2003 if we were to remove the current prohibition on the broadcast of R18 material at this time. We consider that retaining the prohibition is necessary, appropriate, proportionate and targeted to an area where it is necessary, in all the circumstances.

We are willing to review this issue again in the light of relevant developments.

Section Two: Harm and Offence

- **Respect for the Truth**

The proposed rule regarding respect for the truth has been the subject of concern for some broadcasters but in particular the BBC. The BBC felt that Ofcom was proposing to regulate in an area that was the prerogative of the BBC. Ofcom has no intention of regulating the BBC on matters where Ofcom has no jurisdiction to do so.

Ofcom has accepted that the regulation of “respect for the truth” within Section Two: Harm and Offence of the Broadcasting Code as set out in the draft rule would be better expressed in terms of ensuring that audiences are not misled. Therefore the rule has been changed to require that:

“Factual programmes or items or portrayals of factual matters must not materially mislead the audience.”

This rule is necessary to prevent potential or actual harm and/or offence and as such applies to all broadcasters.

It has also been explained that News is regulated under Section Five: Due Impartiality, Due Accuracy, and Undue Prominence of Views and Opinions of the Broadcasting Code, (and in the case of the BBC by the Governors on this issue).

- **Offence**

Following representations by the Commission for Racial Equality (“CRE”) Ligali and others we have, in Rule 2.3 regarding offence, incorporated, as examples, the six areas of equality (age, disability, gender, race, religion and sexual orientation) which are or will be subject to legislation.

Section Three: Crime

- **Payments to criminals and their associates**

The draft code proposed that payments made to criminals in relation to their crime(s) must be in the public interest and declared on air.

However, following further consideration we have removed the requirement for a declaration, but maintained “the public interest test”. We consider an on air declaration

not sufficiently linked to the standards objective “that material likely to encourage or to incite the commission of crime or to lead to disorder is not included in television and radio services”. However we would encourage such declarations for the sake of transparency and this is made clear in the guidance to this section.

Section Four: Religion

- **Belief**

The draft code described a “religious programme” as a “programme which deals with matters of religion or belief, as the central subject, or as a significant part, of the programme”.

Respondents took differing views as to whether it was appropriate to include beliefs which were not religious beliefs. Having considered this matter carefully we believe that a correct reading of the Act is that religious programmes should be interpreted as programmes involving *religious* views and *religious* beliefs only. This section therefore does not apply to beliefs which are not religious. Of course, those beliefs which are not religious will be subject to the other provisions within the Broadcasting Code. We have therefore amended the meaning accordingly.

- **Recruitment and fund raising**

Following audience research we have decided to maintain the status quo regarding recruitment – that is radio and specialist religious television services may recruit but programmes on services which are not specialist may not recruit.

Separately, we have decided to consult further on the issue of allowing television services to appeal directly to viewers for funds to support programmes or services (including those that are religious). Until that is concluded the status quo prevails including for those services which are religious services. See above under issues which will be subject to further consultation.

Section Five: Due impartiality

- **Due impartiality**

The most significant issue raised by respondents to this section was the meaning of “due impartiality”. The draft code referred to fairness, accuracy, objectivity, dispassion and even-handedness as requirements for impartiality. Many of the respondents point out that these requirements are not essential to achieving “due impartiality” and in particular some of these terms have specific legal meanings. We accept that while these attributes may contribute to “due impartiality” none of them necessarily equates with it or is a necessary condition for it. A re-drafted meaning for “due impartiality” has therefore been included in the Broadcasting Code which we believe is clearer and simple to understand.

- **Labelling of foreign news**

The Consultation asked whether foreign retransmitted news services should be labelled to assist the audience.

Ofcom has no doubt that, in principle, viewers and listeners should have easy access to clear information about the nature, origin and content of all services. It is particularly

important in the light of an ever-expanding number of channels and the growing availability of trans-frontier broadcasting. However, this is important in all services and Ofcom questioned why news should be any different in this respect to other services.

The development of labelling – either on screen or via EPGs – should be part of a more positive form of regulation involving all channels. If possible it should not be used on a piecemeal basis. The concept of labelling should ideally be developed through consultation, and be universal.

Section Six: Election and referendum broadcasting

- **Listing all candidates in a constituency in elections**

We received representation from radio broadcasters that the requirement in the draft code that all candidates be listed following a constituency report was more onerous than the requirement under the Radio Authority Code. The Electoral Commission however wished to retain this proposal.

However, we believe retaining this draft rule would mean unnecessarily imposing a heavier regulatory burden on radio.

Section Seven: Fairness

- **Practices to be followed**

Broadcasters argued that this section and the following one on privacy contained guidance rather than rules. This is because the draft rules in these sections were in effect only practices to be followed by broadcasters so as to avoid either unfairness or unwarranted infringements of privacy.

We agree that these two sections are different from the rest of the Broadcasting Code and have therefore re-drafted these sections to reflect this. We have explained this in greater detail in the Forewords to Sections: Seven and Eight.

- **Young People**

Several respondents proposed that in this and the following section the age at which an adult's consent is required for a person to feature in a programme be reduced from eighteen to sixteen.

They argue that young people at sixteen can join the army, smoke, live away from home and have children: they should therefore be able to decide for themselves whether or not they can participate in a programme. Their right to freedom of expression also means that using eighteen as the age at which a person can give consent is unduly restrictive.

In preparing the consultation document we have taken into account the Standards Objective, in section 319(2)(a) of the Act, which requires that persons under the age of eighteen are protected.

However we consider that the arguments presented are persuasive and are in line with the increased rights of young people in society and the previous regulatory framework. We have therefore changed these two sections.

Section Eight: Privacy

- **Please see comments under “Practices to be followed” and “Young People” under Section Seven above**
- **Gathering material – news emergencies**

Some respondents would like this section to spell out more explicitly the difference between the considerations that apply in relation to privacy when gathering material as opposed to broadcasting material. Many broadcasters were particularly concerned about the issue of news gathering and in particular major news stories. Some suggest that in such circumstances there should be no restriction on filming/recording people suffering, or in distress, in emergencies as long as there is no infringement of privacy in the broadcast itself or consent to broadcast is obtained. They were concerned that the pressures on camera/sound operators at the scene of disasters and emergencies would make it difficult for them to judge at the time whether filming or recording was an unwarrantable infringement of privacy. They also argued that sensitive editorial judgements about whether the material can be broadcast can be more made easily afterwards. At its worst, some argued, these pressures could inhibit news gathering and could create a “chilling effect” on newsgathering.

The Act requires Ofcom to consider complaints about unwarranted infringements of privacy in connection with the obtaining of material included in a programme, as well as in the broadcast. Therefore it is not possible, even in news, for Ofcom to fetter its jurisdiction and not consider issues about privacy in the making of programmes.

Nevertheless, we recognise that it is essential that news organisations do not feel that they are inhibited in gathering news material. We have therefore explicitly stated in the Foreword to this section that, when considering complaints in this area, Ofcom will take into account the pressures on broadcasting crews filming/recording in emergency situations and the strong public interest in broadcasting material regarding disasters in the news.

Section Nine: Sponsorship

We have removed a large amount of unnecessary regulation in this section. For instance:

- **Whether the sponsorship of whole channels/stations should be permitted**

This has been addressed above under “issues which will be subject to further consultation”.

- **Sponsorship credits that are separated from the programme by spatial means e.g. split screen**

The European Commission has advised that a split screen technique may be used to identify a programme sponsor. However, this may not be done in a way that compromises the integrity of a programme. We now therefore require that sponsorship credits must be clearly separated from programmes by temporal or spatial means.

- **Sponsor references within programmes on television**

The draft code proposed that non-promotional, editorially justified references to a sponsor should be permitted on television as they are in radio. After consultation this proposal has been confirmed.

- **Coverage of events**

The detailed rules around events and event sponsorship have been removed.

- **Consumer advice programmes**

The restriction on television consumer advice programmes being sponsored was included in the draft code. Some respondents questioned the need to retain such a rule believing that other rules offered sufficient safeguards.

Having given further consideration, we agree that the other rules in the sponsorship section provide adequate protection to the citizen-consumer. So long as there is transparency and the audience is aware of who is sponsoring a programme the audience are in a position to judge for themselves. We have removed this prohibition for television to bring it in line with radio, since in this area of activity we see no reason for the regulation to be different.

Section Ten: Commercial References and Other Matters

- **Product Placement**

This has been addressed above under “issues which will be subject to further consultation”. For the present the status quo, preventing product placement, prevails.

- **Cross promotion**

Ofcom is currently reviewing its Rules on the Promotion of Programmes, Channels and Related Services on Commercial Television, and will be consulting separately on this matter later in the year. We have therefore included a reference to cross-promotion in Section Ten of the Broadcasting Code to alert broadcasters to the possibility that changes in this area may be made in the near future.

In other areas, we have also removed a large amount of unnecessary regulation. For instance:

- **Undue Prominence**

We have noted the responses requesting clarification and have now reworded both Rule 10.4 and a note concerning “undue prominence”. It now says that undue prominence may arise either where there is no editorial justification or from the manner in which the reference is made.

- **Competitions outside programmes**

As a result of the consultation, we have removed the rule restricting competitions containing brand mentions to within programmes only. This will allow branded competitions in programme trailers as well as in presentation time. However, to prevent undue prominence for commercial products or services, Rule 10.11 requires any brand mentions within competitions to be brief and secondary.

- **Investment recommendations**

Following further legislation Rule 10.17 has been adjusted to include investment recommendations and the appropriate appendix has also been amended. *This rule will come into effect on 1 July 2005* (when the Investment Recommendation (Media) Regulations come into force).

- **Merchandising**

The majority of responses felt no additional rules were required regarding merchandising.

In considering what rules are necessary in this area, Ofcom has to balance the commercial interests of sponsors with safeguarding the editorial independence of the broadcaster and protecting the viewer/listener from surreptitious advertising. Taking into account all these matters, Ofcom has decided to remove the merchandising rules. Broadcasters are required to maintain editorial control over programme content (Rule 10.1). In addition, products and services must not be promoted in programmes (Rule 10.3) and no undue prominence may be given in any programme to a product or service (Rule 10.4). These rules are intended to prevent programmes from being used merely as advertising platforms for merchandise and we therefore believe that separate, specific rules on merchandising arrangements are not required.

Conclusion

As the Foreword to this Broadcasting Code explains, the Code has been developed at a time of rapid expansion in choice for the citizen-consumer and rapid change for the broadcast industry. The extensive consultation with viewers, listeners, broadcasters and others, summarised in this document, has enabled us to create a code which we believe will set a framework for the future. Of course, the application of the rules will evolve as society, and broadcasting itself, develops.