



**Response to Ofcom's consultation on  
new procedures for handling content  
standards complaints, investigations and  
sanctions for BBC programmes**

BBC SUBMISSION

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## **I. Introduction**

The BBC welcomes the opportunity to comment on Ofcom's review of its content standards and fairness and privacy complaints procedures. The BBC has identified a number of areas where it would ask Ofcom to clarify or re-consider its proposed procedures. Quotations from the consultation document are in italics.

## **2. 'BBC First' and the proposed procedures**

*1.20 If a complainant is not satisfied with the BBC's final response or considers that the imposition by Ofcom of a sanction may be appropriate, or if the BBC has failed to respond within the timeframe set in its own procedures, the complainant will be able to refer their complaint to Ofcom...*

- 2.1. The BBC appreciates that the phrase "*within the timeframe set in its own procedures*" reflects the wording of the Framework Agreement, but reproducing it in this context is likely to give the impression that Ofcom will regard all complaints as eligible for consideration (against the tests set out in **1.21**) as soon as the target times given in the BBC's complaints procedures are exceeded. The BBC suggests that a less restrictive form of words, such as "*within a reasonable time, bearing in mind the relevant timeframe set in its own procedures*"<sup>1</sup>, would create more realistic expectations on the part of complainants (the timeframes in the BBC's procedures being indicative, rather than intended to apply to 100% of cases) and give Ofcom some protection against demands to consider complaints which the BBC could resolve reasonably soon after the target date. Ofcom could assess such demands against a general test of reasonableness, rather than proceeding to apply the tests in **1.21** in every case. This comment applies also to **A4.16c, 25** and **26**.

*1.21 Ofcom proposes first to consider whether, on its face, a complaint raises potentially substantive issues under the Code that warrant investigation by Ofcom. We propose to do so by reference to the gravity and/or extent of the matter complained of, including, for example, whether it involves ongoing harm, harm to minors and/or financial harm; and whether Ofcom considers the BBC reached an appropriate decision on the matter...*

And:

*1.24 Exceptionally, Ofcom may intervene at an earlier stage if we consider it necessary. Exceptional circumstances may include (but are not limited to) Ofcom having concerns regarding incitement to crime, harm to minors, severe financial or physical harm, the involvement of under 18s in a programme or series, problematic issues of a systemic nature within the broadcasting industry that may affect the BBC or whistleblower complaints related to broadcasting...*

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<sup>1</sup> "relevant" because the timeframes in the BBC's procedures vary from 10 to 35 working days.

- 2.2. The tests for post-BBC consideration in **1.21** are broadly appropriate, and **1.24** rightly sets the bar somewhat higher for early intervention (except that “*harm to minors*”, without a qualifying adjective such as “*ongoing*”, could be taken as meaning that Ofcom would exercise its step-in powers in all cases in which harm to minors was alleged). However, the wording in the corresponding section of the draft Code (**A4.18**) does not include “severe” before “*financial or physical harm*”. We suggest that it should.

*1.24 ...Ofcom may also launch an investigation in the absence of a complaint.*

- 2.3. The BBC expects that Ofcom will launch programme content standards investigations in the absence of a complaint only in exceptional circumstances (as with early interventions, provided for in the preceding part of **1.24**). If that is Ofcom’s intention, it would be helpful if the paragraph were drafted in a way which makes clear that all its contents are governed by “*Exceptionally*”.

### **3. Proposed Fairness and Privacy Procedures**

*A5.8 However, in exceptional circumstances, where Ofcom considers it necessary in order to fulfil its duty under section 3(2)(f) of the 2003 Act to secure the application of standards that provide adequate protection to members of the public (and all other persons) from unfair treatment in programmes and unwarranted infringements of privacy, Ofcom may consider fairness or privacy issues in the absence of a complaint from “the person affected”...*

- 3.1. This is the key point on which the BBC differs from Ofcom’s approach, because we do not accept that the duty set out in section 3(2)(f) of the 2003 Act provides Ofcom with any basis for considering fairness or privacy issues in the absence of a complaint from a person or persons affected. In summary, this is for the following reasons:
- 3.2. From the inception of the Broadcasting Complaints Commission in 1981 up to and including the Broadcasting Act 1996 which created the Broadcasting Standards Commission (BSC), the fairness and privacy jurisdiction in relation to broadcasters has been explicitly confined to complaints by or on behalf of the individual or body of persons affected. Section 111 of the 1996 Act could not be clearer on this point, stating that a fairness (or privacy) complaint cannot be entertained by Ofcom “*unless brought by the person affected or by a person authorised by him*”.
- 3.3. The Communications Act 2003 applies the powers and limitations of section 111 of the 1996 Act to Ofcom. During the passage of the Act through Parliament, it was not mooted that the fairness and privacy jurisdiction be extended to provide for Ofcom to investigate fairness and privacy issues in the absence of a first-party complaint, and the relevant parts of the Parliamentary record clearly suggest that, on the contrary, Parliament intended to carry the remit forward intact.

- 3.4. If, nonetheless, section 3(2)(f) of the 2003 Act is construed as permitting Ofcom to range beyond Section 111 of the 1996 Act, the effect would be to allow Ofcom to set aside the restrictions of Section 111 at will (even if Ofcom chose to do so only “*in exceptional circumstances*”). Among the perverse results of this approach is that Ofcom would be at liberty to consider a fairness or privacy complaint instigated by a third party – precisely the kind of complaint which Section 111 inhibits Ofcom from considering.
- 3.5. Finally, it should be borne in mind that, up to and including the 1996 Act, the sole difference between the scope of the fairness and privacy jurisdiction and that of the jurisdiction for taste and decency/harm and offence lay in the fact that the first was confined to instances where there was a first-party complaint and the second was not. Without that difference, any need to make separate statutory provision for the two remits disappears (though of course it would remain open for Ofcom to maintain separate procedures for considering each, as appropriate). To construe section 3(2)(f) of the 2003 Act as extending the scope of the fairness and privacy remit beyond the consideration of first-party complaints is, in effect, to make the two remits indistinguishable in respect of scope, with the implication that the intention of Parliament was to render ineffectual a distinction which in fact it preserved in all the relevant provisions of the 2003 Act.