

UK LAWYERS FOR ISRAEL



**RESPONSE TO OFCOM CONSULTATION ON NEW PROCEDURES
FOR HANDLING CONTENT STANDARD COMPLAINTS,
INVESTIGATIONS AND SANCTIONS FOR BBC PROGRAMMES**

3 Stone Buildings, Lincoln's Inn, London WC2A 3XL
Email: info@uklfi.com Website: www.uklfi.com

Patrons: Lord Carlile CBE QC, Sir Anthony Colman, Lady Cosgrove CBE QC, Baroness Deech DBE QC,
Lord Dyson PC, Sir Bernard Eder, Lord Howard CH PC QC, Sir Ivan Lawrence QC, Sir Gavin Lightman,
Lord Millett PC QC, Lord Pannick QC, Professor Richard Susskind OBE, Lord Trimble PC, Rosalind Wright CB QC

UK Lawyers for Israel is the operating name of UKLFI Limited (Company no. 07396781)
Registered Office: Flat 8, 2 Havana Drive, London NW11 9BB

1. UK Lawyers for Israel is a voluntary association of lawyers who support Israel and seek the proper application of the law and regulation in matters relating to Israel. Our patrons and members include some of the most distinguished lawyers in Britain.
2. We have been deeply concerned that the BBC's coverage of Israel does not comply with its obligations of accuracy, impartiality and quality. This view is shared by an overwhelming majority of Britain's Jewish population. In addition, a number of our members and supporters have had experience of using the BBC's complaints procedures and found them to be thoroughly unsatisfactory. This has allowed the continuation of biased and misleading coverage of Israel with damaging consequences, including the promotion of antisemitism, antisemitic attacks and radicalisation; the undermining of the sense of security of Britain's Jewish population; the misinforming of the public generally about Israel and the Middle East; and a diminution of respect for Britain on the part of Israelis and supporters of Israel around the world.
3. We set out our concerns and the bases for them in our Response to the BBC Charter Review Consultation by the DCMS; a copy of this is attached as Annex 1.
4. We had hoped that our concerns would be addressed by the promises in the White Paper issued following that consultation, that "Ofcom will be able to consider complaints about all BBC content, including accuracy and impartiality in BBC programmes" and that "Where a complainant is unsatisfied with the response, or where the BBC fails to respond in a timely manner, the complainant will then be able to complain to Ofcom".
5. Unfortunately these promises have been significantly retracted by subsequent decisions, that have excluded complaints in respect of major areas of BBC content from consideration by Ofcom and have prejudiced the ability of complainants to appeal to Ofcom where the BBC has not resolved a complaint in a timely manner.
6. Ofcom's proposed procedures for handling content standards complaints, investigations and sanctions for BBC programmes further undermine the prospect of any effective remedy or improvement in the situation, as detailed below.
7. We respectfully urge Ofcom to revise these proposed procedures so as to make the best possible use of such powers as it is being accorded to remedy some of the failings of the BBC and its internal complaints handling procedures. In doing so, we ask Ofcom to take into account our experience of obfuscation in the BBC's handling of complaints, the risk that this conduct will continue unless it is firmly dealt with, and the need for robust processes to overcome it.
8. We comment as follows on specific provisions of the proposed procedures:
9. A4.6, A4.48, A4.49, note 43: We consider that another example where it may be appropriate to depart from the Procedures, in particular to expedite the process, is where there is misleading or biased content that remains available for viewing relating to subject-matter whose coverage is liable to promote racism, including antisemitism. In our view this example should be expressly identified in the Procedures. We emphasise again the seriousness of this problem as discussed in our Response to the DCMS consultation (Annex 1) and the failure of the BBC hitherto to address it.

10. A4.18: We consider that another and important circumstance in which Ofcom may and should intervene prior to completion of the BBC's procedures is where the BBC has failed to resolve the complaint in a timely manner, notwithstanding that the BBC's own time limits have not been exceeded, or where it is unclear whether the BBC's own time limits have been exceeded or not.

As stated in our Response to the DCMS consultation (Annex 1), our members and supporters have experienced massive obfuscation and delay in the handling of complaints on the part of the BBC. We fear that this will continue under the new regime. The existing BBC complaints procedures afford the BBC plenty of opportunities to obfuscate and delay without necessarily exceeding its own time limits. The BBC has not yet published new procedures; we suspect that this may be tactical, so that it can adjust the procedures to afford it maximum opportunity to frustrate effective review by Ofcom.

A particular problem arises where it is unclear whether the BBC's own time limits have been exceeded or not. If the Complainant does not appeal to Ofcom, there is a risk that a subsequent appeal will not be permitted because it will be out of time. On the other hand if the Complainant appeals to Ofcom, the BBC may justify inaction while the appeal to Ofcom is being considered, resulting in further delay if it is concluded that the BBC's time limits had not been exceeded.

In our view Ofcom's Procedures should state explicitly that Ofcom may intervene where the BBC has failed to resolve the complaint in a timely manner, notwithstanding that the BBC's own time limits have not been or may not have been exceeded. This is required to make it clear that obfuscation and delay by the BBC will no longer be tolerated and to justify Ofcom's intervention if and when it occurs. This would accord with the Government's intention expressed in the White Paper.

11. A4.21: Ofcom's complaints forms and accompanying instructions need to be substantially revised for the purpose of appeals from the BBC. In our view determining appeals from the BBC will be a significantly different exercise from handling direct complaints about content on other channels, and will require significantly different forms and instructions. We would wish to be consulted on the revised forms and instructions since these can have a considerable impact on the practicability of submitting a complaint and the fairness and accuracy with which it is addressed.

In our experience the rejection of complaints by the BBC is usually accompanied by very substantial obfuscation and distortion, which needs to be unpicked in some detail if an accurate assessment is to be made. The limit of 1500 characters or fewer in Ofcom's current web form for complaints is likely to be hopelessly inadequate for this purpose in many cases. It would be grossly unfair and unsatisfactory to expect the Complainant to explain in under 1500 characters why several pages of carefully drafted distortion by the BBC's complaints handlers are wrong.

We would recommend separate boxes for description of the complaint and explanation of why the complainant disagrees with the BBC's response to it. The latter, in particular, should permit the Complainant to address fully the points made by the BBC.

Alternatively, or additionally, we would ask Ofcom to permit BBC appeals to be made by email and to provide a dedicated email address for this purpose. This will enable

Complainants to submit appeals in a form appropriate to the particular case and the response that has been provided by the BBC. We appreciate that a postal address is proposed to be provided, but we think that an email address will be more convenient and efficient for both Complainants and Ofcom. Those who have the patience to follow through the BBC procedures to their conclusion are likely to be serious and careful, so Ofcom should not fear that this will result in a torrent of unintelligible screeds.

12. A4.25: The existing BBC complaints procedures do not provide a clear time limit as this paragraph suggests and we have no confidence that new complaints procedures will do so. Ofcom needs to address the possibilities that the BBC complaints procedures will not require complaints to be resolved in a timely manner and/or that the time limits will be unclear.

Para 2.10 of the BBC's current "Procedure no. 1: Editorial complaints and appeals procedures"

http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/protocols/2017/complaints_fr_work_ed_complaints.pdf provides with reference to Stage 1a of the BBC's procedure: "The BBC aims to reply within 10 working days of receipt of your complaint though some complaints may take longer than others to investigate."

The experience of our members and supporters is that complaints of misleading or biased content relating to Israel are regularly treated by the BBC as falling into the category "may take longer than others to investigate" and the BBC does not consider its failure to reply substantively (or at all) within 10 working days as any breach of this time limit - if indeed "aims to reply within" can be characterised as a time limit at all.

Similarly, para 3.4 of this Procedure states with reference to Stage 1b of the BBC's procedure that "The BBC will investigate your complaint and aims to reply within 20 working days of receipt of your complaint though some complaints take longer than others to investigate. A target of 35 working days applies to those complaints that require longer or more complex investigation."

Again, the experience of our members and supporters is that complaints of misleading or biased content relating to Israel are regularly treated by the BBC as falling into the category "some complaints take longer than others to investigate" and thus not subject to the "20 working days" aspiration. And even the "35 working days" is only a "target". In the experience of our members and supporters this "target" is regularly exceeded.

Similarly, para 4.7 of the BBC's current procedure provides with reference to Stage 2 of the BBC's procedure that "The ECU will investigate your complaint and aim to reply within 20 working days of receipt of your complaint though some complaints take longer than others to investigate. A target of 35 working days applies to those complaints that require longer or more complex investigation."

Again, the experience of our members and supporters is that complaints of misleading or biased content relating to Israel are regularly treated by the BBC's ECU as falling into the category "some complaints take longer than others to investigate" and thus not subject to the "20 working days" aspiration. And even the "35 working days" is only a "target". In the experience of our members and supporters this "target" is regularly exceeded.

Similar points would apply to para 4.16, although this procedure is less usual.

Even if the aspirations in the provisions mentioned above are achieved, and allowing Complainants 10 working days to address the BBC's obfuscation at each stage, the process takes 100 (10 + 10 + 35 + 10 + 35) working days, i.e. over 20 weeks (allowing for some public holidays), down to a decision by the ECU (i.e. not including an appeal to the BBC Trust which is to be abolished). In our view this does not constitute resolution in a "timely manner".

13. A4.29: In our view, the proposed requirement that a complaint "raises potentially substantive issues under the Broadcasting Code that warrant investigation by Ofcom", particularly as explained in this paragraph, does not comply with the Government's intention expressed in the White Paper or with the requirements of art 49 of the BBC Charter in conjunction with section 319 of the Communications Act, para 3 of Schedule 3 to the BBC Agreement and clause 57 of the BBC Agreement.

In our view, the only substantive condition that can and should be imposed is that the complaint raises potentially substantive issues under the Broadcasting Code that have not been recognised and remedied by the BBC. Any such complaint, if duly submitted to Ofcom within an appropriate time limit, should be addressed by Ofcom.

Furthermore, if there is to be any assessment of "gravity" as a condition for Ofcom to consider a complaint, it should also take into account the following further factors:

(a) whether the complaint relates to subject-matter whose coverage is liable to promote racism, including antisemitism (for example, subject-matter whose coverage in the media in the past has been associated with a rise in antisemitism); and

(b) the cumulative effect of multiple deficiencies of accuracy or impartiality in different programmes relating to similar subject-matter, which may have limited impact when considered in isolation but a substantial cumulative impact in practice on audiences who typically hear multiple programmes, for example several news bulletins a day relating to an armed conflict which may last several weeks or more.

Point (b) is inconsistent with complaints being considered separately in isolation. Accordingly, if "gravity" is used as a criterion, Ofcom should establish a system which ensures that the cumulative effect is assessed, whether or not the same Complainant has submitted multiple complaints, and whether or not multiple complaints come to Ofcom at different times because they have taken different times to work their way through the BBC's complaints procedure.

14. A4.32: We consider that notification of decisions not to investigate in the Broadcasting and On Demand Bulletin is inadequate. Since a Complainant does not know whether there have been any other complaints about the same programme, he / she cannot tell from the limited information given in this Bulletin that his or her complaint has or has not been dismissed - all he or she is told is that one or more complaints in relation to that programme have been dismissed without investigation. In our view, the outcome could be communicated by Ofcom to the Complainant by email without significant difficulty or expense.

Furthermore, no reasons are given in this Bulletin, so the Complainant has no idea why the complaint was not taken forward. Ofcom must make some record of why the

Complaint was not investigated. In our view that record should be provided to the Complainant as a matter of course.

15. A4.34, A4.40, A4.41: Ofcom's proposed procedure provides for two representations by the BBC (and possibly three, if an oral hearing is granted), as well as additional representations by BBC presenters, producers and independent programme makers, but none in reply by the Complainant.

This is manifestly unfair on Complainants and calculated to result in wrong decisions (with serious consequences as described above and in our DCMS submission, Annex 1), since Ofcom is liable to be persuaded by a submission made by the BBC (or a BBC presenter etc.) which could and would have been shown to be incorrect if the Complainant had seen it.

This unfairness and danger of wrong decisions is compounded by the advantage which the BBC will acquire of much greater familiarity with the Ofcom process and the kinds of point that go down well with Ofcom than is likely to be possessed by any Complainant. As any advocate knows, familiarity with the tribunal is a great advantage. While this asymmetry cannot wholly be avoided, it is increased by the fact that (under Ofcom's currently proposed procedure) the BBC will see all of the submissions whereas the Complainant will only see the complaint that he/she made. Therefore even if the Complainant makes a subsequent complaint or communicates his experience of the system to others, he and other Complainants do not have the advantage obtained by the BBC of seeing all of the submissions on both sides and comparing them with the decision.

There is also the basic injustice of decisions being made on material which the Complainant is not permitted to see.

In our view, for the procedure to be fair and balanced, Complainants should be permitted to see and comment on all representations by the BBC or other parties and on Ofcom's preliminary view.

It would be entirely legitimate and reasonable to require replies by the Complainant to be limited to addressing new points raised by the BBC or Ofcom. The same should apply to the BBC (and associated parties), which should be limited to addressing new points raised by the Complainant or Ofcom. Insistence on this requirement would both enable the process to be kept under control and force the BBC to address complaints fully in the first place.

This aspect of Ofcom's proposed process is blatantly unfair and unsatisfactory. We urge Ofcom to reconsider it.

16. A4.38, A6.19: As mentioned above and in our Response to the DCMS Consultation (Annex 1), we are concerned that there has been a deeply entrenched bias at the BBC against Israel, and this view is shared by an overwhelming majority of Britain Jewish population. In addition, the BBC's treatment of complaints has been a disgrace. In these circumstances, the objectivity of former BBC personnel in considering complaints relating to the BBC, and particularly its coverage of Israel, is bound to be suspect.

We appreciate that all of Ofcom's staff and Content Board members are bound by Ofcom's Code of Conduct. Nevertheless, in order to restore and then maintain public

confidence in the handling of BBC complaints, we urge Ofcom to avoid using executive staff and members of the Content Board who were formerly BBC personnel for the consideration of BBC complaints.

17. A4.44, A6.32: The provision of an advance copy of the decision to the BBC but not to the Complainant is unfair and, based on our experience, it is liable to be abused by the BBC to undermine significant Ofcom decisions by spinning the media coverage of them.

The BBC already has major advantages over the Complainant in relation to news management through its vast knowledge, experience and contacts in the media. In addition, the BBC will have the advantage, under Ofcom's currently proposed procedure, of having seen Ofcom's preliminary view and thus knowing in advance what the decision is likely to be, whereas the Complainant will not have seen the preliminary view.

With the additional benefit of advance sight of the decision, the BBC will be able to prepare a media strategy and press releases in the crucial period before publication, whereas the Complainant will not. In our experience, the BBC has done precisely that in the past and Ofcom should not underestimate the BBC's ruthlessness in this regard.

We consider that advance copies of the decision should be provided to both the BBC and the Complainant under embargo conditions.

18. A6.10: It is wrong in principle and deeply unsatisfactory to treat directions not to repeat a programme, or to include a correction and/or statement of Ofcom's findings, or to restrict access or provide additional information, as "sanctions".

In the first place, there is a basic category error. Including a correction etc. is not a sanction for failure to perform the primary obligation of compliance with the standards; it is performing the primary obligation itself. This is recognised in para 3.24 of the BBC's Editorial Guidelines, which provides that "We should normally acknowledge serious factual errors and correct them quickly, clearly and appropriately". Remedies such as correction are fundamentally different from fines, which are properly regarded as sanctions for non-compliance with the standards.

Secondly, this categorisation has the absurd consequence under the proposed procedure that Ofcom will only require correction etc. where the BBC seriously, deliberately, repeatedly or recklessly breached a requirement of the Broadcasting Code (see A6.9 and A6.22). On the contrary, corrections should normally be required whenever the BBC has broadcast content that is significantly misleading or lacking due impartiality, whether or not this was deliberate or anyone was culpable. The need for correction with similar prominence to the offending broadcast should only be waived in exceptional cases.

Thirdly, this categorisation will result in inordinate delay before correction, etc, even if correction is directed. As stated above, even if one treats the BBC's "targets" or "aims" as time limits, the BBC complaints process is liable to take 100 working days. Allowing 10 working days for the Complainant to submit his/her appeal to Ofcom, the decision of Ofcom on breach will be reached within 175 working days of the offending broadcast, assuming the "aims" in paras A4.33 and A4.36 are achieved, and that the 50 working days in para A4.36 is additional to the 15 working days in para A4.33 (this is unclear). The decision on whether to require a correction will then take up to 60 working days or longer (A6.22). It is therefore likely to take 235 working days (11 months) or more for

the misleading or biased content to be corrected. During this period, the false narrative will go uncorrected and lodge firmly in the minds of the public.

19. A6.26-A6.28: Ofcom's proposed procedure provides for further written and possibly secret oral representations by the BBC with no opportunity for the Complainant to reply to points made or further material provided by the BBC or by Ofcom, or even to see them. This is unfair and liable to result in wrong decisions where Ofcom is persuaded by a submission made by the BBC which would have been shown to be incorrect if the Complainant had seen it (or heard it).

This is of particular importance in so far as it applies to remedies such as directions for corrections and/or statements of findings. The Complainant has a direct interest in proper correction of content that is misleading or lacking in due impartiality and should be afforded the opportunity to see and comment on any new material that bears on this aspect of the determination of the complaint.



Jonathan Turner
Chair
6 March 2017