

# **Ofcom Broadcast Bulletin**

**Issue number 192  
24 October 2011**

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## Introduction

Under the Communications Act 2003, Ofcom has a duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives<sup>1</sup>, Ofcom must include these standards in a code or codes. These are listed below.

The Broadcast Bulletin reports on the outcome of investigations into alleged breaches of those Ofcom codes, as well as licence conditions with which broadcasters regulated by Ofcom are required to comply. These include:

- a) Ofcom's Broadcasting Code ("the Code"), which, can be found at: <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/>.
- b) the Code on the Scheduling of Television Advertising ("COSTA") which contains rules on how much advertising and teleshopping may be scheduled in programmes, how many breaks are allowed and when they may be taken. COSTA can be found at: <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/advert-code/>.
- c) certain sections of the BCAP Code: the UK Code of Broadcast Advertising, which relate to those areas of the BCAP Code for which Ofcom retains regulatory responsibility. These include:
  - the prohibition on 'political' advertising;
  - sponsorship and product placement on television (see Rules 9.13, 9.16 and 9.17 of the Code) and all commercial communications in radio programming (see Rules 10.6 to 10.8 of the Code);
  - 'participation TV' advertising. This includes long-form advertising predicated on premium rate telephone services – most notably chat (including 'adult' chat), 'psychic' readings and dedicated quiz TV (Call TV quiz services). Ofcom is also responsible for regulating gambling, dating and 'message board' material where these are broadcast as advertising<sup>2</sup>.

The BCAP Code is at: [www.bcap.org.uk/The-Codes/BCAP-Code.aspx](http://www.bcap.org.uk/The-Codes/BCAP-Code.aspx)

- d) other licence conditions which broadcasters must comply with, such as requirements to pay fees and submit information which enables Ofcom to carry out its statutory duties. Further information on television and radio licences can be found at: <http://licensing.ofcom.org.uk/tv-broadcast-licences/> and <http://licensing.ofcom.org.uk/radio-broadcast-licensing/>.

Other codes and requirements may also apply to broadcasters, depending on their circumstances. These include the Code on Television Access Services (which sets out how much subtitling, signing and audio description relevant licensees must provide), the Code on Electronic Programme Guides, the Code on Listed Events, and the Cross Promotion Code. Links to all these codes can be found at: <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/>

It is Ofcom's policy to describe fully the content in television and radio programmes that is subject to broadcast investigations. Some of the language and descriptions used in Ofcom's Broadcast Bulletin may therefore cause offence.

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<sup>1</sup> The relevant legislation is set out in detail in Annex 1 of the Code.

<sup>2</sup> BCAP and ASA continue to regulate conventional teleshopping content and spot advertising for these types of services where it is permitted. Ofcom remains responsible for statutory sanctions in all advertising cases

## Notice of Revocation

**Licence number:** TLCS-628  
**Service name:** Babeworld  
**Licensee:** Babeworld TV Limited

**Licence number:** TLCS-700  
**Service name:** House of Fun  
**Licensee:** House of Fun Television Limited

**Licence number:** TLCS-1139  
**Service name:** The Other Side  
**Licensee:** Forenzquick UK Limited

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### Introduction

Babeworld TV Limited, House of Fun Television Limited and Forenzquick UK Limited held TLCS licences under the Broadcasting Act 1990 for the television services Babeworld, House of Fun and The Other Side respectively.

The Communications Act 2003, The Broadcasting Act 1990 and the Broadcasting Act 1996 require that any person who provides a television service in the UK must be authorised to do so under a licence granted by Ofcom or another appropriate European regulatory authority. Under section 13(1) of the Broadcasting Act 1990 it is a criminal offence to provide a television service without a licence.

Section 362(2) of the Act, sets out who should be treated as the provider of the service for the purposes of holding the licence<sup>1</sup>.

Ofcom's "Guidance regarding the 'provider of a broadcasting service' and 'sub-letting of capacity'" dated 21 May 2010<sup>2</sup> states that Ofcom considers:

"a person will normally have general control if that person exercises effective control over the selection of programmes that comprise the service and their organisation into a programme schedule. It is that person who will normally be treated as being the provider of the service and who will need to hold a broadcasting licence authorising its provision."

Condition 29(2)(a) of all TLCS Licences provide that Ofcom may revoke the licence by notice in writing served on the Licensee and taking effect from the time of service if Ofcom is satisfied that the Licensee has ceased to provide the Licensed Service and it is appropriate to revoke the Licence.

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<sup>1</sup> Section 362 (2) state "the person with general control over which programmes and other services and facilities comprised in the service (whether or not he has control of the content of the individual programmes or the broadcasting or distribution of the service".

<sup>2</sup> The full guidance regarding licensing position of the provider of the service can be found at <http://licensing.ofcom.org.uk/binaries/tv/service-provider.pdf>

## **Decision**

In the course of correspondence and meetings with Ofcom, statements made by Babeworld Television Limited, House of Fun Television Limited and Forenzquick UK Limited about the operation of the Licensed Services failed to satisfy Ofcom that these Licensees had general control over which programmes and other services were comprised in the Service. Ofcom therefore concluded that Babeworld Television Limited, House of Fun Television Limited and Forenzquick UK Limited were not the “providers” of the Licensed Services in accordance with section 362(2) of the Communications Act 2003 and that, accordingly, it was appropriate to revoke the TLCS Licences 628; 700 and 1139 under Condition 29(2)(a) of those Licences.

**Revocation of the Licences under Licence Condition 29(2)(a) of the Licences.**

## Standards cases

### In Breach

#### Believe TV

25 June 2011, 11:00 to 12:00

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#### Introduction

Believe TV is a service which broadcasts Christian programming and is located in the religious section of the Sky electronic programme guide. The channel broadcasts programmes which include “testimony” where members of the churches featured, including the VPA, proclaim how health problems, financial issues or other personal matters have been alleviated through healing from a pastor or other religious leader and their faith in God. All of the content on Believe TV is religious programming, being programmes which deal with matters of religion as the central subject, or a significant part, of the programme. The licence for Believe TV is held by The Light Academy Limited (“LAL” or “the Licensee”).

A complainant alerted Ofcom to two alleged claims of serious illnesses being cured. These were broadcast on Believe TV on 25 June 2011. The claims were included in a programme which lasted around 20 minutes promoting the work of the church known as the Victorious Pentecostal Assembly (“VPA”). The claims appeared as onscreen text while images of the pastor of VPA, Alex Omokodu, were shown giving “healing” to followers at the church. The onscreen text claims referred to by the complainant were shown on the bottom third of the screen in white lettering on a black background: “HIV IS HEALED” and “CANCER IS HEALED”.

Ofcom considered the material raised issues warranting investigation under the following rules of the Code:

- Rule 2.1: “Generally accepted standards must be applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive material.”
- Rule 4.6: “Religious programmes must not improperly exploit any susceptibilities of the audience.”

Ofcom therefore asked the Licensee how the content complied with these rules.

#### Response

LAL did not provide a formal response to the issues raised by Ofcom.

However, the Licensee did send Ofcom a general statement regarding the compliance arrangements overall for Believe TV.

In this statement the Licensee explained that it considered itself to be a “very responsible broadcaster” and took these matters very seriously. Consequently, the Licensee highlighted that it had enlarged its compliance team “who diligently now go through each and every programme and any commercial matter sent, as well as thoroughly test the schedules.”

## Decision

Under the Communications Act 2003 (“the Act”), Ofcom has a statutory duty to require the application of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material.

Ofcom also has a duty to set such standards for the content of programmes to secure the standards objectives, including that: “generally accepted standards” are applied so as to provide adequate protection for members of the public from the inclusion of harmful material; “broadcasters exercise the proper degree of responsibility with respect to the content of programmes which are religious programmes”; and that religious programmes do not involve “any improper exploitation of any susceptibilities of the audience for such a programme”.

In reaching this decision Ofcom has taken account of the broadcaster’s and audience’s right to freedom of expression. This is set out in Article 10 of the European Convention on Human Rights. Article 10 provides for the right of freedom of expression, which encompasses the right to hold opinions and to receive and impart information and ideas without interference by public authority.

Ofcom has also had regard to Article 9 of the ECHR which states that everyone “has the right to freedom of thought, conscience and religion.” This Article goes on to make clear that freedom to “manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of ... health ... or for the protection of the rights and freedoms of others.”

Broadcast content may include material in which individuals express their experiences of healing through prayer and belief in miracles, and which includes religious preaching where prayer is presented as a means of supporting individuals through illness and personal difficulties. In considering this case, Ofcom has also taken into account that a number of people find comfort and solace from prayer or a belief in faith healing when ill or encountering personal difficulties. Prayer and faith have been reported by some to be factors in the recovery of a number of individual illnesses.

It is not within Ofcom’s remit to question or investigate the validity of religious belief or its consequences but to require broadcasters to comply with the standards in the Code.

When investigating the issues that may arise from the broadcast of content that makes explicit claims to healing serious illnesses, Ofcom has regard to the right to freedom of expression and freedom of religion of the broadcaster and audience. However Ofcom must balance the exercise of that right against the need to provide adequate protection for the public. Issues may arise under the Code where such content has the potential to lead to harm or where there is any likelihood for the content to exploit improperly any susceptibilities of the audience.

### Rule 2.1

Rule 2.1 states that generally accepted standards must be applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive material. This rule is specifically concerned with the protection of viewers from harm.



In assessing whether there was a breach of Rule 2.1, Ofcom therefore had to consider whether the claims broadcast could have encouraged viewers to believe that the serious illnesses featured, in particular cancer and HIV, could be cured through the work of the VPA (without orthodox medication). If this were the case, there was a potential for harm because some viewers with serious illnesses – who may therefore be more vulnerable – might have understood on the basis of what they saw on Believe TV that they could be cured by the work of the VPA, and as result either not sought medical advice or stopped following a course of recommended medical treatment. This clearly could be very harmful.

First Ofcom examined the claims about healing that to assess their potential for harm.

The claims were made in a programme – which lasted about 20 minutes overall – promoting the VPA, and its founder and pastor Alex Omokodu. Around two minutes into the programme it showed images of attendees at the church receiving “healing” from Pastor Omokudo as a voiceover stated:

*“Victorious Pentecostal Assembly is a church regularly in communion with the power of the Holy Spirit and has been witness to scores of miraculous testimonies, breakthroughs, healing and what can only be described as divine intervention – a second nature at this mountain of God. This centre of excellence is committed to building up a people of purpose, power and praise, nursing the afflicted to deliverance, the downtrodden are restored to a royal priesthood, from many other afflictions of the righteous, but the Lord delivered them from them all. And He will do the same for you.”*

Ofcom noted that as these images were broadcast various graphics were laid over a black segment filling the bottom third of the screen. Each separate graphic was on screen for around 10 seconds. Four of the graphics stated consecutively: “*THE LAME WALK AGAIN*”; “*CANCER IS HEALED*”; “*WAS PRONOUNCED DEAD BUT RESTORED AT V.P.A*”; and “*HIV IS HEALED*”.

Taking into account :

- the juxtaposition of the images of “healing” and the claims contained in the graphics; and
- the voiceover stating that VPA had been witness “to scores of miraculous” testimonies and healing,

Ofcom considered that viewers would have reasonably understood from the onscreen claims that the healing and testimony at the church could include the curing of HIV and cancer through attendance at the VPA alone.

Given that some viewers who may have watched this material may have been suffering from serious medical conditions, and may therefore have been in a vulnerable state, Ofcom concluded that this material had the potential to cause harm. Ofcom therefore reviewed if adequate protection to viewers was provided, for example by providing information to continue to seek medical treatment.

Ofcom considered this was especially important when considering cancer healing claims because Section 4 of the Cancer Act 1939 makes it a criminal offence for anyone to publish an “advertisement” offering to treat anyone with cancer or give any advice with the connection or treatment of cancer. While the editorial content on Believe TV may not be interpreted strictly as an “advertisement”, the existence of

such a crime on the statute book highlights that Parliament considered the public provision of any advice on how to treat cancer to be in a special category, and therefore, that it should be tightly regulated in the public interest and only made by those specially authorised to do so.

Before the start of the promotional style programme the following three onscreen graphics were broadcast while the text was read in voiceover:

*“The following programme includes testimonies of true stories from people who have received divine healing through the ministry of the VPA.”*

*“They gave these voluntarily without any directives from VPA.”*

*“We advise you to always seek your medical practitioner advise [sic] before making any decision based on this programme [sic].”*

This statement provided some protection to viewers, by warning them to seek medical advice. But Ofcom noted that:

- these statements were broadcast before the promotional style programme began;
- they were separated from the claims of healing by about two and a half minutes; and
- no warning or information was broadcast immediately before, during or after the four claims for healing highlighted above.

These factors limited the protection afforded to viewers by the statement.

In addition, the claims to heal cancer and HIV were made in the context of programming which actively solicited viewers to attend the VPA (see Rule 4.6 below), and were made without any form of objectively verifiable evidence to support them.

Ofcom concluded that, taking all these factors into account, viewers were not provided with adequate protection from harm. Some members of the audience – especially those with serious illnesses – could have been left with the impression that the healing of HIV and cancer could, and would, take place if the viewer attended the church.

In view of the fact that the Licensee did not take steps to provide viewers with adequate protection from the claims made, Ofcom concluded that the Licensee did not apply generally accepted standards. This was a breach of Rule 2.1.

#### Rule 4.6

Rule 4.6 states that religious programmes must not improperly exploit any susceptibilities of the audience. The Ofcom guidance on this Code rule makes clear to broadcasters that when “they are soliciting an actual response from their audience”, they must take care and recognise the possible risk to audience members, particularly the vulnerable.

In this case, Ofcom first considered whether the content was “soliciting a response” from the viewer. Ofcom noted that the content concluded by advising viewers to: *“prepare yourself to receive this mantle of God and expect your testimony because your time has come”*. The reference to “testimony” refers to where members of the

church proclaim to the congregation how health or personal problems have been alleviated through healing from a pastor or other leader and their faith in God. Ofcom considered that this content was clearly soliciting a response because it invited viewers to attend the VPA where they could expect in return an alleviation of their personal problems, which in this case according to the health claims broadcast, could include the healing of serious illnesses such as HIV and cancer.

Ofcom therefore assessed whether LAL had properly recognised the possible risk, particularly to the susceptible, of including such claims of healing of serious illnesses, and whether the Licensee therefore presented these claims with appropriate care. The warning presented was outside the programme and two and a half minutes before the claims were made (as set out above). In Ofcom's view, and taking into account the seriousness of the claims made, the warning was not in itself sufficient to provide adequate protection from harm to the audience. Ofcom also noted that there was no objectively verifiable evidence to support the claims made. Therefore, Ofcom concluded that the broadcaster did not appropriately recognise and mitigate the risk to vulnerable viewers, and that the susceptibilities of members of the audience (some of whom might be experiencing a life threatening illness) were improperly exploited by the claims of healing of cancer and HIV broadcast on Believe TV. This was a breach of Rule 4.6.

Ofcom has recently recorded breaches of Rules 2.1 and 4.6 against the Licensee in relation to the promotion of products as cures for serious illnesses and other medical claims made in various broadcasts between 21 December 2010 and 1 February 2011<sup>1</sup>. Ofcom regarded these contraventions of the Code as so serious and also repeated that we put the Licensee on notice that it was being considered for the imposition of a statutory sanction.

In Ofcom's view the breaches of the Code recorded in this current decision are not as serious as any of those recorded in Broadcast Bulletin 188 concerning health claims. For example, in the 25 June 2011 broadcast the Licensee provided some – albeit limited and inadequate – guidance to viewers before the programme about seeking medical advice, whereas no guidance at all was provided in the earlier cases. Nonetheless the Code breaches recorded here are further examples of the Licensee's poor compliance arrangements. These have placed vulnerable viewers at risk of harm and exploitation, and this will be taken into account by Ofcom when considering the Licensee's ability to ensure compliance with the Code.

### **Breaches of Rules 2.1 and 4.6**

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<sup>1</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb188/obb188.pdf>

## In Breach

### Being Erica

E4, 11 August 2011, 07:35

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#### Introduction

*Being Erica* is a Canadian comedy drama series about a woman who begins seeing a therapist to deal with regrets in her life, only to discover the therapist has the ability to send her back in time to re-live and change events in her life.

A complainant alerted Ofcom to a scene in this programme which featured a large sculpture made out of ice clearly shaped as a penis. The programme was broadcast at a time when children were likely to be viewing (during the early morning in the school holidays).

In the scene in question, at the beginning of the programme, two characters discussed a large ice sculpture of an erect penis and scrotum, which had been placed on the counter in a bar, as decoration for a party. There is then the following exchange between Ivan, the bar owner, and his partner, Dave, who had obtained the 'penis' ice sculpture:

Ivan: *"Why is this an ice penis?"*

Dave: *"That's what you told me to order."*

Ivan: *"No, I asked you to order an ice 'Venus'."*

Dave: *"Like the planet?"*

Ivan: *"No, like the Venus de Milo, the Goddess of Love - she without arms - not this phallic monstrosity"*

A few moments later, Ivan addressed Dave and the staff in the bar, as follows:

*"Well, I hate to be a drill sergeant, David, but the parade starts in T minus two hours and I'm looking at a pile of decorations and a melting penis."*

In the rest of the 50 minute programme, there were four further scenes in which the 'penis' ice sculpture appeared either as background to the dramatic action, or was referred to by characters in the programme.

Ofcom considered the material raised issues warranting investigation under Rule 1.3 of the Code, which states:

*"Children must ... be protected by appropriate scheduling from material that is unsuitable for them."*

We therefore asked Channel 4 for its comments as to how this content complied with this Code rule.

## Response

Channel 4 assured Ofcom that it takes its obligations in respect of child welfare very seriously. It said that careful consideration is given to scheduling appropriate programmes at times when children are expected to be viewing so as to minimise any potential to offend and to protect children from unsuitable content. In addition, the broadcaster said that it has “stringent processes in place to ensure that all repeat programming intended for daytime and morning scheduling is reviewed and edited appropriately”.

Channel 4 said that during the scene in question and in several subsequent ones, the ‘ice penis’ sculpture is referred to in “a comedic way” and “it is mostly background and incidental”. It added that it considered the ice sculpture to be an “an abstraction of a phallic image that is made of ice, rather than a facsimile of an ‘erect’ penis”.

Channel 4 said that the programme had been “substantially edited” to make it suitable for its scheduled transmission time. However, the broadcaster said that “in retrospect some of the edits didn’t go far enough, particularly in view of the fact that it coincided with school holidays”. Specifically, the broadcaster said that it considered “in retrospect ... that the inclusion of the ice sculpture itself as a narrative element... may not have been appropriate at 07:35 on E4”.

Given these points, Channel 4 said that “this programme has been re-classified and will not be repeated at this or a similar time of day”.

## Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, one of which is that “persons under the age of eighteen are protected”.

Rule 1.3 states that children must be protected by appropriate scheduling from material that is unsuitable for them.

Firstly, we considered that this programme included a number of scenes in which the penis ice sculpture was either the focus of, or background to, the programme’s narrative, with characters using the terms “*penis*” or “*phallic*” in relation to the ice sculpture. Under the Code, there is no prohibition on depictions or descriptions of human genitalia appearing in programming before the watershed. However, in Ofcom’s view, in this case the cumulative effect of the repeated appearance of, and references to, a large erect penis ice sculpture, was to convey a sexualised theme, even though the primary purpose of the programme was not necessarily to convey a sexual theme, but rather to provide a comedic narrative

We noted Channel 4’s submission that it considered the ice sculpture to be an “an abstraction of a phallic image that is made of ice, rather than a facsimile of an ‘erect’ penis”. We disagreed. In our view, the appearance and relative dimensions of the penis and scrotum depicted in the ice sculpture were highly likely to mean the ice sculpture would be perceived by members of the audience as being a depiction of an erect penis.

Given the above, it is Ofcom’s view that this content was not suitable for children. Ofcom therefore went on to consider whether this material was appropriately scheduled so as to provide adequate protection to children from viewing this material.

As part of our consideration, we took into account: that this content was broadcast at 07:35 during the school holidays; the sexualised nature of this editorial content; and the material chance that there would have been children in the audience – some unaccompanied – at this time of day. On balance we did not consider this material was appropriately scheduled.

We noted that Channel 4 has: accepted that “in retrospect” that the scheduling of the scenes including the penis ice sculpture may not have been appropriate for the early morning during school holidays; and, reclassified this programme and undertaken not to repeat it at “this or a similar time of day”.

We took into account a recent case<sup>1</sup> involving the broadcast of content on Channel 4 that was unsuitable for children in the morning during school holidays. We were therefore concerned that such a similar issue should arise so soon after this previous compliance failure.

Ofcom concluded that the material was in breach of Rule 1.3.

Broadcasters should be aware that Ofcom has recently published Guidance<sup>2</sup> on Rule 1.6 and other issues relating to the watershed.

### **Breach of Rule 1.3**

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<sup>1</sup> See: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb189/obb189.pdf>

<sup>2</sup> See <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/watershed-on-tv.pdf>

## In Breach

### OnFM

18 June 2011, 07:30

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#### Introduction

OnFM is a community radio station broadcasting to the Hammersmith area in West London. In its key commitments, the station said its programmes will seek to “enhance the identities of the diverse ethnic groups, will encourage respect, interest and knowledge each of the other, and will entertain, inform and educate the whole community.”

During routine monitoring of OnFM’s output, Ofcom identified the broadcast of several instances of the word “fuck” during a music track. At approximately 07:30 on Saturday 18 June 2011, the station broadcast the song “Star 69” by Fatboy Slim which contained 41 instances of the phrase “*what the fuck*”. The song was approximately six minutes in length.

Ofcom considered the material raised issues warranting investigation under Rules 1.14 and 2.3 of the Code.

Rule 1.14: “The most offensive language must not be broadcast ... when children are particularly likely to be listening (in the case of radio).”

Rule 2.3: “In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context”

Ofcom therefore requested formal comments from OnFM (or “the Licensee”) on how the programme material complied with the above rules.

#### Response

OnFM acknowledged that the incident “flies in the face of OnFM’s strict policy of family broadcasting” and offered its “deepest and most sincere apologies”. After an internal investigation, the Licensee concluded that the song in question had been inserted in the playlist intentionally. It said that “even before the offence was made known to us, an individual had had his pass and key removed and had been shut out of the building”.

Having been made aware of the issue, the Licensee implemented new measures to prevent a similar occurrence. It had “completely deleted all music tracks and other audio material” from its play out system and loaded “a new playlist that has been vetted again by management.” OnFM added that there had now been an “IT up-grade” preventing any one from having access to the playlist apart from the station manager.

The Licensee said that it was training more duty managers to support its team. All duty managers have been trained to intervene in a live show if a presenter or a guest does not “adhere to our [the Licensee’s] policies and they are authorised to stop the show at once and issue a live apology.”

## Decision

Under the Communications Act 2003, Ofcom has a duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, including that “persons under the age of eighteen are protected” and that “generally accepted standards” are applied so as to provide adequate protection for members of the public from the inclusion of offensive and harmful material.

### Rule 1.14

Rule 1.14 states that the most offensive language must not be broadcast on radio when children are particularly likely to be listening. Ofcom research on offensive language<sup>1</sup> clearly notes that the word “fuck” and its derivatives are considered by audiences to be among the most offensive language.

The Code states that the phrase “when children are particularly likely to be listening” particularly refers to “the school run and breakfast time, but might include other times”. Given the early morning weekend broadcast of this song, Ofcom considered it was particularly likely that children would have been listening.

The broadcast of this material was therefore in breach of Rule 1.14 of the Code.

### Rule 2.3

Ofcom considered first whether the repeated offensive language in this song was potentially offensive; and, if so, whether the offence was justified by the context. Context includes for example: the editorial content of the programme, the service on which it is broadcast, the time of broadcast and the likely size and composition of the potential audience and the likely expectation of the audience.

As stated above, Ofcom’s research on offensive language indicates that the word “fuck” and its derivatives are considered by audiences to be among the most offensive language. Therefore, Ofcom considered that the repeated use of this word clearly had a significant potential to cause offence to the audience.

Ofcom noted that the station sought to “entertain, inform and educate the whole community.” In view of the station’s likely appeal to a broad range of listeners, we concluded that a general audience of this type was unlikely to expect the broadcast of the most offensive language 41 times in a song lasting under six minutes, transmitted at 07:30. Ofcom also noted that the broadcaster did not provide any information about the content of this song to listeners prior to broadcast.

Ofcom concluded that the context was insufficient to justify the repeated broadcast of the most offensive language and that OnFM did not apply generally accepted standards. Consequently, Ofcom is recording a breach of Rule 2.3 of the Code.

Ofcom noted the extraordinary circumstances that resulted in the broadcast of the most offensive language in this instance, and recognised that the actions of the individual responsible did not represent the Licensee’s policies on offensive language. Nonetheless, Ofcom has serious concerns that a song containing such a

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<sup>1</sup> Audience attitudes towards offensive language on television and radio, August 2010 (<http://stakeholders.ofcom.org.uk/binaries/research/tv-research/offensive-lang.pdf>)



significant number of instances of the most offensive language was allowed to be broadcast in its entirety without interruption.

In Broadcast Bulletin 147<sup>2</sup>, Ofcom recorded a breach of Rule 1.14 for the broadcast of a song by OnFM that contained two instances of the most offensive language. Ofcom is therefore putting OnFM on notice that we will consider taking further regulatory action in the event of a similar incident.

### **Breaches of Rules 1.14 and 2.3**

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<sup>2</sup> Ofcom Broadcast Bulletin 147, 7 December 2009  
(<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb147/Issue147.pdf>)

## In Breach

### Rinse FM

9 August 2011, 18:00

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#### Introduction

Rinse FM is a community radio station that broadcasts to the Inner London area. The licence for this service is held by Rinse FM ("Rinse FM" or the "Licensee"). Aimed at 15 to 24 year olds, its output is based around London's urban music scene. In its key commitments, the station pledged to place "particular emphasis on the needs and aspirations of young people."

A complainant alerted Ofcom to the broadcast of a song by an unidentified performer. The song lasted about four minutes and contained 30 uses of the word "motherfucker" or a derivative, as well as other examples of offensive language and explicit sexual phrases. For example:

- *"a freaky motherfucker would take saliva and put the fuck on the tip of his dick, stick it in your ass, girl."*
- *"a freaky motherfucker would take whipped cream, squeeze that shit all on your pussy clit."*

Ofcom considered the material raised issues warranting investigation under the following Code rules:

Rule 1.3 "Children must ... be protected by appropriate scheduling from material that is unsuitable for them."

Rule 1.5 "Radio broadcasters must have particular regard to times when children are particularly likely to be listening."

Rule 1.14 "The most offensive language must not be broadcast ... when children are particularly likely to be listening."

Rule 2.3 "In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context."

#### Response

Rinse FM said that "the circumstances surrounding the entire incident were both remarkable and extremely rare". It explained that as a result of the riots taking place in London at that time it was "compelled to evacuate [its] studio (with 10 minutes notice) on the particular day requested, by our landlord and the police." Rinse FM added that it was "physically unable to gain access into the studio from 4pm on the Monday until 8am on the Wednesday".

The Licensee said the presenter who was on-air at the time of the evacuation "correctly arranged for daytime podcasts to be played" (while the building was to be unoccupied) but "was unable ... to ensure that ONLY the day time podcasts were played" during this time. Rinse FM added that the presenter "could not have known that [it] would be unable to regain entry for a period amounting to over 40 hours" but

agreed that “he did not have the programming skills to set up over 40 hours of appropriate programming in the 10 minutes that he had to secure and evacuate the studio and office.”

The Licensee said as a result of the incident, it has “taken immediate steps to identify funding opportunities to purchase a ... playback system” and that “once the funding has been secured [it] will embark upon a training course for all presenters in the use of [its] playback system just in case they have to leave the studio due to an emergency situation.”

The Licensee offered its “unreserved apologies for the unfortunate broadcast of inappropriate material”. However, it believed “the contextual situation that [it] faced on the night of 8 August was so unpredictable as to warrant exceptional dispensation.

## **Decision**

Under the Communications Act 2003, Ofcom has a duty to set such standards for broadcast content as appear to it best calculated to secure the standards objectives, including that that “persons under the age of eighteen are protected” and that “generally accepted standards” are applied so as to provide adequate protection for members of the public from the inclusion of offensive and harmful material.

### Rules 1.3 and 1.5

Rule 1.3 states that children must be protected by appropriate scheduling from material that is harmful to them. Rule 1.5 requires radio broadcasters to have particular regard to times when children are particularly likely to be listening. The Code states that the phrase “when children are particularly likely to be listening” refers to “the school run and breakfast time, but might include other times.”

The strong and sexually explicit language used in this song clearly made it unsuitable for children.

Appropriate scheduling is judged according to factors such as the nature of the content, the number and age range of children in the audience taking into account school time, weekends and holidays, and the likely expectations of the audience for a particular station at a particular time. In Ofcom’s view, the material was capable of causing a considerable degree of offence, and given the early evening broadcast of this material at 18:00 and target age range of the station’s audience, Ofcom considered it likely that children were listening. In view of the strong and sexually explicit language, it is clear that this material would have exceeded the expectations of the audience. Notwithstanding the exceptional circumstances that resulted in the broadcast of this material, Ofcom considered this material was not appropriately scheduled by the broadcaster and it was in breach of Rules 1.3 and 1.5 of the Code.

### Rule 1.14

Rule 1.14 states that the most offensive language must not be broadcast on radio when children are particularly likely to be listening. Ofcom research on offensive language<sup>1</sup> clearly notes that the word “fuck” and its derivatives are considered by

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<sup>1</sup> Audience attitudes towards offensive language on television and radio, August 2010 (<http://stakeholders.ofcom.org.uk/binaries/research/tv-research/offensive-lang.pdf>)

audiences to be among the most offensive language. Similarly, the research notes that the word “pussy” is also considered to be an example of the most offensive language when used in a sexual context. This was clearly the case in this instance.

As stated, Ofcom considered it likely that children were in the audience. The broadcast of this material was therefore in breach of Rule 1.14 of the Code.

### Rule 2.3

Rule 2.3 of the Code requires that potentially offensive material must be justified by the context.

Based on Ofcom's research, it is clear that the repeated use of offensive and sexually explicit language in this material had the potential to cause offence. Ofcom therefore went on to consider whether the potential offence was justified by the context. Context includes for example: the editorial content of the programme, the service on which it is broadcast, the time of broadcast and the likely size and composition of the potential audience, and the likely expectation of the audience.

Ofcom noted that the station specialised in “UK urban and dance music” and sought to place “particular emphasis on the needs and aspirations of young people.” While recognising the likely expectations of this audience, we concluded that listeners were unlikely to expect explicit sexual references and 30 uses of the most offensive language in a song broadcast at 18:00 on this station. We also noted that the broadcaster did not provide any warning about the content of this song to listeners prior to its broadcast.

Therefore, Ofcom did not consider there was sufficient contextual justification for the material to be broadcast and that Rinse FM did not apply generally accepted standards.

We noted the very unusual circumstances that resulted in the transmission of this material. However, in view of the strong and sexually explicit language repeatedly broadcast on air in the early evening in this case, Ofcom is recording a breach of Rule 2.3 of the Code.

In Broadcast Bulletin 185 dated 4 July 2011<sup>2</sup>, Ofcom recorded against Rinse FM a breach of Rule 1.14 because of the broadcast of the most offensive language on the station. Ofcom noted in that decision that it “was concerned that Rinse FM management had not detected these incidents before Ofcom brought them to their attention” and “considered that the matter was particularly unfortunate in view of the station’s target audience.” Given this recent breach by the Licensee, Ofcom does not expect any further Code breaches of a similar nature. Should there be any similar breaches, Ofcom may consider taking further regulatory action.

### **Breaches of Rules 1.3, 1.5, 1.14 and 2.3**

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<sup>2</sup> Ofcom Broadcast Bulletin 185  
<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb185/obb185.pdf>

## Note to Broadcasters

### Offensive language in radio programming

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Issue 189 of the Broadcast Bulletin<sup>1</sup> contained a number of findings about the use of offensive language in radio programming.

The current issue of the Broadcast Bulletin contains a further two findings involving the use of offensive language in radio programming.

As stated in issue 189, in view of our concerns about the material in the cases – especially those broadcast when children were particularly likely to have been listening – we are requesting that a number of radio broadcasters across the industry who transmit such programming attend a meeting at Ofcom to discuss issues relating to offensive language.

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<sup>1</sup> Issue 189 of the Broadcast Bulletin, published on 12 September 2011, is available to view at: <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb189/>.

## In Breach

### This Morning

ITV1, 29 July 2011, 10:30

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#### Introduction

*This Morning* is ITV's weekday morning topical magazine programme.

This programme featured an interview with Amanda Holden about her roles in *Britain's Got Talent* and 'Shrek the Musical'. The interview concluded with a discussion about a group of law firms, QualitySolicitors.

A viewer contacted Ofcom to complain about this broadcast but Ofcom judged that the complaint did not raise issues warranting investigation. However, on assessing the material, Ofcom identified a separate issue.

A presenter introduced the final section of the interview by asking Ms Holden:

*"What else have you got on at the moment?"*

During the discussion Ms Holden said:

*"Well, I'm part of this new campaign as well that I wanted to come and talk to you about. It's called QualitySolicitors. Basically, if you need a solicitor ... you can walk into WH Smith. It's on the high street now. There are a hundred WH Smiths in the country and there is a list that's now recommended by the public, for the public, of solicitors who are kosher, who are not going to rip you off and who can help you and it's completely free – you get advice free..."*

After some further discussion, she then explained that solicitors' clients had been surveyed to establish the "cream of the crop", and one of the presenters added:

*"I think it's good having something like that 'cos there's a culture now where you put the telly on in the morning and there's all these adverts – all these words of blame and claim – and I think ... you know, they're sort of like vultures really, and so get, you know, a decent firm..."*

Ms Holden then concluded:

*"So yes, I'm launching that today and from Monday if you go onto the QualitySolicitors' website ... you will get the list of the hundred WH Smiths near you..."*

ITV Broadcasting Limited ("ITV" or "the Licensee"), which complied the programme on behalf of the ITV Network for ITV1, confirmed that none of the references to QualitySolicitors or WH Smith were broadcast as part of a product placement arrangement.

Ofcom therefore considered that the material raised issues warranting investigation under the following Code rules:

Rule 9.4 “Products, services and trade marks must not be promoted in programming”; and

Rule 9.5 “No undue prominence may be given in programming to a product, service or trade mark. Undue prominence may result from:

- the presence of, or reference to, a product, service or trade mark in programming where there is no editorial justification; or
- the manner in which a product, service or trade mark appears or is referred to in programming.”

We sought the Licensee’s comments under these rules.

## Response

ITV said that *This Morning* commonly featured interviews with well known entertainers, which were of “a similar format to many other daytime magazine programmes, in that they tend to seek to cover a range of topics with the guest in a relatively short time, including their current projects, whether creative, charitable, or sometimes commercial.” The broadcaster added that, for ITV, this was “always driven by the imperative of editorial justification and interest for the viewer, rather than any commercial interests of the guest.” It added that the primary focus of this interview was to discuss Ms Holden’s roles in ‘Shrek the Musical’ and *Britain’s Got Talent*.

Nevertheless, ITV believed the broadcast references to QualitySolicitors were editorially justified, as it considered that Ms Holden’s recent involvement with the organisation was of interest to viewers. The broadcaster said it had ceded no editorial control “as to how or for exactly how long this would be discussed”, adding that the presenters simply asked her what else she had been doing, in response to which Ms Holden began to describe her involvement with QualitySolicitors and its recent launch of a marketing campaign in WH Smith outlets. ITV said the presenters then asked some questions “primarily to clarify or comment humorously on what she was talking about”, and noted that “they then “wrapped up” the interview with reference back to Shrek.”

The broadcaster said it was extremely mindful of its compliance obligations, having in place specific procedures for live programming, with items such as this interview being discussed in advance with a dedicated compliance manager and/or a legal advisor, “to ensure that the production team can suitably brief presenters and guests that references to products and services are not promotional, and that such references are justified in the editorial context and do not exceed the bounds of editorial relevance.”

ITV added that, as in this case, guests and their managements are routinely briefed before live interviews, to ensure they understand the regulatory constraints of any on-air discussion about their commercial interests. It said that, “from the outset the production team had made it clear to Ms Holden’s management that her role with QualitySolicitors was going to be only one of several topics discussed and that any reference to it would be brief”, adding that “the reference to it was introduced towards the end of the interview for this purpose.” Further, ITV said it was confident that, as a regular television guest and entertainer, Ms Holden would have understood the limits of what she could say.

The broadcaster acknowledged that Ms Holden “certainly referred to the benefits of the list of firms promoted under the QualitySolicitors scheme” but considered such comments “were not excessively promotional and did not exceed the editorial requirements of the programme.”

With regards to the prominence of commercial references in the interview, ITV said it was not always possible either to foresee exactly how a guest would describe a commercial project or to terminate a discussion too abruptly, adding that, “given the relative shortness of the discussion [in this instance], as opposed to the longer discussion of the television and stage projects, [it did] not feel that the interview gave undue prominence to QualitySolicitors.” The broadcaster again noted that it considered there was editorial justification in Ms Holden talking about her role with Quality Solicitors, as one of the many projects in which she was currently involved.

Nevertheless, ITV said that it kept under review, with the programme production team, the procedures it had in place when preparing interviews with celebrity guests, to ensure that any anticipated references to commercial activities remain within the parameters of the Code, adding that it was “currently providing compliance training refreshers to production teams of live programming across ITV, including this programme, attendance at which is obligatory.”

ITV concluded that, in the context of Ms Holden’s interview, “her comments [concerning QualitySolicitors] were not overly promotional or presented in such a way that made them unduly prominent.”

## Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure specific standards objectives, one of which is “that the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with.”

Article 19 of the EU Audiovisual Media Services (AVMS) Directive requires, among other things, that:

“Television advertising ... shall be readily recognisable and distinguishable from editorial content ... and ... shall be kept quite distinct from other parts of the programme by optical and/or acoustic and/or spatial means.”

The purpose of this distinction is to prevent programmes becoming vehicles for advertising and to protect viewers from surreptitious advertising. The above requirement is therefore reflected in, among other Code rules, Rules 9.4 and 9.5, which prohibit both the promotion and undue prominence of products, services or trade marks in programming.

Ofcom acknowledges that *This Morning* viewers are clearly likely to have an interest in the life and work of celebrity guests. However, where a guest has some form of involvement or arrangement with a commercial product or service, particularly where there appears to be no particular link to their profession or experience, there may be less editorial justification for interviews to feature these topics in detail.

In this case, during a discussion with Amanda Holden about her current projects, including her stage and television roles, the guest went on to focus on her involvement with a group of law firms, QualitySolicitors.



QualitySolicitors' website states that the organisation is "a group of law firms all across the country chosen to become part of the QualitySolicitors brand" on the basis of customers' opinion of their services. It claims to provide "the very highest standards of client service in the legal market" and offers "a 'Free First Consultation' for all issues."

In introducing her involvement with QualitySolicitors, Ms Holden focussed on the positive aspects of its campaign and the group itself, describing QualitySolicitors-branded law firms as "...solicitors who are kosher, who are not going to rip you off and who can help you and it's completely free – you get advice free..." She also explained that, for viewers who wished to acquire the details of such firms "...you can walk into WH Smith. It's on the high street now. There are a hundred WH Smiths in the country".

These positive comments promoted QualitySolicitors' services as being reliable, free and widely available to viewers through 100 branches of WH Smith on the high street.

Further, while Ofcom accepts that the presenters may have attempted to clarify what Ms Holden said, we do not agree that they appeared to "comment humorously on what she was talking about". In fact, one of the presenters appeared to endorse QualitySolicitors, when he said:

*"I think it's good having something like that 'cos there's a culture now where you put the telly on in the morning and there's all these adverts – all these words of blame and claim – and I think ... you know, they're sort of like vultures really, and so get, you know, a decent firm..."*

The broadcast therefore promoted services (i.e. QualitySolicitors, its law firms and WH Smith) in programming, in breach of Rule 9.4 of the Code.

The undue prominence of products services or trade marks can arise from a lack of editorial justification for referring to them and/or from the manner in which they are referred to. As noted above, where a celebrity guest's work or venture does not appear to be related to their work or profession, there may be less editorial justification for featuring details of it.

In this case, no explanation was offered as to why Ms Holden was working with QualitySolicitors and, as its area of business had no obvious link to her entertainment career, there appeared to be insufficient editorial justification for the extent of the discussion of it in the interview.

In particular, we considered Ms Holden gave the impression that a key part of the purpose of her interview was to discuss QualitySolicitors, when she said, *"Well, I'm part of this new campaign as well that I wanted to come and talk to you about. It's called QualitySolicitors..."*, and concluded the discussion by saying: *"So yes, I'm launching that today..."*

Ms Holden's involvement with QualitySolicitors therefore appeared to Ofcom to be as the promoter of its latest service. As such, we considered that viewers were likely to conclude that the interview provided her with an opportunity to promote such law firms and their latest service, and the availability of details about it in 100 branches of WH Smith throughout the UK.

The programme therefore gave undue prominence to services (i.e. QualitySolicitors, its law firms and WH Smith) in programming, in breach of Rule 9.5 of the Code.

Ofcom therefore welcomed the fact that ITV was currently providing compliance training refreshers to production teams of live programming across its network.

### **Breaches of Rules 9.4 and 9.5**

## In Breach

### Le Tour de France Live

*ITV4, 19 July 2011, 16:00*

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#### Introduction

ITV4 broadcast three weeks of coverage of the 2011 Tour De France cycling tournament. In each week, the channel also broadcast a viewer competition. The prizes were particular models of bicycle. Entrants for all three competitions were also automatically entered into a wider draw to win two places on the Etape du Tour 2012, an amateur cycling event. All winning entrants were chosen at random.

The competitions offered viewers three routes of entry using premium rate services ("PRS"): telephone call, 'red button' (for Sky and Virgin cable customers) and text message, and one free entry route via ITV's website. Telephone and 'red button' entrants were charged £1.03 and text messages were charged at £1 plus users' standard network rate.

A complainant alerted Ofcom to the programme broadcast on 19 July 2011 (in the third week of coverage) which invited viewers to participate in that week's competition but gave the closing time for telephone, text message and red button entries as 16:00 on 18 July 2011 both in the voiceover and on-screen. This date had been the closing date of the second week's competition.

As the programme invited viewers to enter a closed PRS-based competition, Ofcom considered that it raised substantive issues under the following Code rule.

Rule 2.14 "Broadcasters must ensure viewers and listeners are not materially misled about any broadcast competition or voting."

We therefore sought comments from ITV2 Ltd ("ITV4" or "the Licensee"), the licensee responsible for compliance of the programme on behalf of ITV4, with regard to this rule.

#### Response

ITV4 acknowledged that owing to "an unfortunate human error on the part of the producers...", the promotion "for the previous week 2 competition instead of the current week 3 competition" was broadcast.

ITV4 said that having been made aware of the mistake by the producers of the programme, it "immediately reviewed what this error meant for those viewers who had responded ... via the various methods promoted."

ITV4 said that it received 66 entries via telephone in the time between the broadcast of this competition and 19:00 the same day. ITV4 explained that "[S]ince the same telephone number was used for both the week 2 and week 3 competitions, entrants via telephone had been automatically entered for the current week 3 competition."

The Licensee said that, in the same period from the broadcast to 19:00, it received 425 text message entries for the closed competition. However, ITV4 explained that because the 'keyword' (the word entrants were required to include in their text

message along with their answer) differed with each competition, these entrants received a 'bounceback' message stating that the competition they had attempted to enter had now closed. ITV4 said that these entrants were not charged for the PRS element of the text message but would have incurred their standard network charge and that the bounceback message included details about how to obtain a refund.

ITV4 said that the entrants using the 'red button' route "would have seen the prize details for the current week 3 competition displayed prior to entry" which "would not have matched" the prize details in the competition promotion.

The broadcaster explained that free online entry to both competitions was open at the time of the promotion and as such, visitors to ITV's website could select which competition they wished to enter.

ITV4 accepted that "it was possible that some viewers had sought to enter the week 2 competition but would instead have been entered into the week 3 competition pool from which the week 3 winner would be picked." ITV4 said "it was agreed that the appropriate remedy was to make viewers who had sought to enter and provide a full refund for those viewers who had sought to enter." It therefore "broadcast an on-air apology on 20 July twice during the Tour De France live programme, with details of refund procedures." ITV4 also posted these details and a refund form on the ITV website.

The Licensee added that to "avoid disappointment to an entrant who had been entered into the week 3 competition, but had understood themselves to be entering to win the prize for the week 2 competition, we offered the picked winner a choice of prizes i.e. either the week 3 prize or the week 2 prize."

To avoid this type of incident reoccurring, the Licensee said it had agreed some process changes with the producers including specifically labelling each week's competition promotion and removing each one from the system in the gallery after its final scheduled broadcast.

ITV4 said that it regretted "the error led to some viewers attempting to enter a closed competition, and that SMS entrants were sent a "closed" message, creating some potential confusion and inconvenience." However, it believed the "issue raised by the erroneous V/T [videotape] was mitigated to the greatest degree possible, by informing affected customers promptly, allowing them the choice of re-entering and/or claiming a full refund." ITV4 did not therefore "consider viewers were materially misled."

The Licensee wished to emphasise that it took its obligations with regard to PRS services "extremely seriously and always [sought] to meet the high expectations of [its] viewers...when conducting audience competitions and voting."

## **Decision**

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, one of which is that "generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material".

These objectives are reflected in, among other rules, Rule 2.14, which serves to prevent broadcast competitions and voting schemes from misleading the audience in such a way as to cause material harm, such as financial loss.

Ofcom noted the prompt action taken by the Licensee as soon as the error was brought to its attention and the extent to which it made viewers aware of the issue and how entrants could obtain a refund. We also recognised that owing to ITV4's decision to give the winner the choice of either competition's prize, viewers entering the competition by telephone would still have had a chance of winning the prize featured in the promotion that was in fact broadcast, and was the basis on which viewers decided to pay to enter that competition.

In Broadcast Bulletin 190<sup>1</sup> Ofcom published its decision on the promotion of a PRS competition containing incorrect information regarding the text message entry route during a programme, *Popstar to Operastar*, broadcast on another ITV channel. That finding reiterated that Ofcom expects broadcasters to exercise the utmost care in the conduct of audience competitions in particular those which invite viewers or listeners to pay to participate.

In this case, while acknowledging the refund procedures put in place, we noted that 425 text message entrants were nevertheless charged their standard network rate but were not included in either the competition or the wider prize draw.

Therefore, notwithstanding ITV4's remedial action, Ofcom considered that the Licensee had failed to take appropriate measures to ensure viewers were not materially misled by the promotion of this competition.

### **Breach of Rule 2.14**

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<sup>1</sup> Ofcom Broadcast Bulletin 190 – <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb190/>

## In Breach

### Sikh Channel Youth Show

*Sikh Channel, 28 May 2011, 19:30*

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#### Introduction

The Sikh Channel is in the religious section of the Sky Electronic Programme Guide (EPG), and the channel is aimed at the Sikh community in the UK. The *Sikh Channel Youth Show* was a weekly live programme broadcast in Punjabi. The licence for the Sikh Channel is held by TV Legal Limited ("TV Legal" or "the Licensee"). This programme consisted of a live discussion programme, consisting of a panel of guests and a live studio audience. The discussion touched on a range of subjects including: a Sikh demonstration that had taken place in Dudley on the day of the broadcast (28 May 2011); and various reported actions taken by the Indian Government towards the Sikh community in India, including Operation Blue Star<sup>1</sup>.

Two viewers alerted Ofcom to the programme, objecting to the manner in which the programme had referred to the Hindu community. On assessing the content, Ofcom noted the following statements made within the programme:

*"In India there is one law for the majority and another law for the Sikh minority".*

*"The Sikhs should realize that they are slaves".*

*"In genocide, people are physically eliminated. But you can also eliminate them mentally by making them subservient and slavish. That is being done to the Sikhs in India".*

*"This is a message to the oppressors that you have done what you did and you can do more but we are ready to seek a homeland for ourselves".*

*"We want to rule ourselves. If there is any other solution, tell us. There isn't any".*

*"India is democracy, it's a secular nation...[people] confuse these two things for respect for human rights".*

*"The Indian Government had committed "genocide" against the Sikhs."*

*"India: the world's largest hypocrisy".*

Ofcom considered the material raised issues warranting investigation under Rule 5.5 of the Code which states that:

*"Due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved on the part of any person providing a service. This may be achieved within a programme or over a series of programmes taken as a whole".*

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<sup>1</sup> Operation Blue Star was the name given to the Indian military action in June 1984 against Sikh separatists occupying the Golden Temple in Amritsar, a Sikh holy place.

We therefore sought the Licensee's comments as to how this material complied with this Rule.

## **Response**

TV Legal said that the programme was "highlighting human rights abuses from recent years" and that "The Indian High Commission have been invited many times to our studio both formally and informally and have yet to participate in programming". The Licensee added that the Sikh Channel operates "an open platform policy allowing all to participate and contribute to programming...As such we cannot shy away from difficult or distressing programming which is required in the interest of human rights and awareness". In addition, TV Legal said that "extended invitations were made during the programming for participants with an alternative viewpoint" on the matters discussed during the programme.

## **Decision**

Under the special impartiality requirements of the Communications Act 2003, Ofcom has a duty to ensure that due impartiality is preserved within television and national radio services on matters of political or industrial controversy and matters relating to current public policy. Rule 5.5 therefore states that: "Due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved on the part of any person providing a service."

In reaching its decisions, Ofcom must take into account the broadcaster's and audience's right to freedom of expression. This is set out in Article 10 of the European Convention on Human Rights. Article 10 provides for the right of freedom of expression, which encompasses the right to hold opinions and to receive and impart information and ideas without interference by public authority. Applied to broadcasting, Article 10 therefore protects the broadcaster's right to transmit material as well as the audience's right to receive it as long as the broadcaster ensures compliance with the Code and the requirements of statutory and common law.

The broadcaster's right to freedom of expression is therefore not absolute. In carrying out its duties, Ofcom must balance the right to freedom of expression on one hand, with the need (in cases such as the present one), to preserve "due impartiality" on matters relating to political or industrial controversy or matters relating to current public policy. Therefore, while any Ofcom licensee should have the freedom to discuss any controversial subject or include particular points of view in its programming, in doing so broadcasters must always comply with the Code. Ofcom recognises that Section Five of the Code, which sets out how due impartiality must be preserved, acts to limit, to some extent, freedom of expression. This is because its application necessarily requires broadcasters to ensure that neither side of a debate relating to matters of political or industrial controversy and matters relating to current public policy is unduly favoured.

Ofcom first considered whether the requirements of Section Five of the Code should be applied. That is, whether the subject matter of the documentary concerned matters of political or industrial controversy or a matter relating to current public policy. This programme consisted of a live discussion programme that covered a series of topics of interest to the Sikh community. We noted that at various times during the programmes, both the panel guests and audience members referred to the policies of the Indian Government towards the Sikh community in India.

We noted that some of the discussion in the programme dealt with the historic conflict between the Indian Government and elements of the Sikh Community, and focused on particular events in that conflict, such as Operation Blue Star. However, we considered that there were various references, as outlined in the Introduction, which could be interpreted as dealing with: the current policies of the Indian Government towards the Sikh community in India, and in particular, the Punjab; and the political controversy surrounding the demands for an independent homeland for the Sikh community in India. Ofcom therefore considered that the programme dealt with a matter of political controversy and matter relating to current public policy. Rule 5.5 was therefore applicable.

In assessing whether due impartiality has been applied in this case, the term “due” is important. Under the Code, it means adequate or appropriate to the subject and nature of the programme. Therefore, “due impartiality” does not mean an equal division of time has to be given to every view, or that every argument and every facet of every argument has to be represented. Due impartiality may be preserved in a number of ways and it is an editorial decision for the broadcaster as to how it ensures due impartiality is maintained.

In this case, Ofcom considered that the programme included a number of viewpoints, but all of them were: either critical of the Indian state’s policy in relation to its treatment to the Sikh community in India; or could be interpreted as arguing the case for an independent homeland for the Sikh community in India. For example, within the programme, the Indian Government was accused, variously, of committing “*genocide*” against the Sikh community; and imposing “*one law for the majority and another law for the Sikh minority*”. In addition, there were views expressed demanding a “*homeland*” for the Sikh community in India.

We considered that the programme did not contain any alternative views, which could be reasonably and adequately classed as supportive of, or which sought to explain: either the actions of the Indian State in relation to the Sikh community within India, and in particular, the Punjab; or the arguments against an independent homeland for the Sikh community within India.

Ofcom recognises that there may be a number of ways that broadcasters can ensure that alternative viewpoints are included within its programming. For example, they could: summarise, within the programme, what those alternative points of view are; or include interviewees to express alternative views. However, ultimately, how due impartiality is maintained is an editorial matter for the broadcaster. Overall, in this case, the programme gave a one-sided view on this matter of political controversy and current public policy. Further, and importantly, the broadcaster did not provide any evidence of alternative views on this issue in a series of programmes taken as a whole (i.e. more than one programme in the same service, editorially linked, dealing with the same or related issues within an appropriate period and aimed at a like audience).

We noted the Licensee’s submission that it had “The Indian High Commission have been invited many times to our studio both formally and informally and have yet to participate in programming”. By attempting to obtain the participation within the Programmes of an organisation to provide an alternative viewpoint, the broadcaster did not discharge its obligations under Section Five of the Code. In such circumstances, if a broadcaster cannot obtain, for example an interview or statement laying out a particular viewpoint on a matter of political or industrial controversy and matter of current public policy, then the broadcaster must find other methods of



ensuring that due impartiality is maintained. These might include some of the editorial techniques outlined in the paragraph above.

In addition, we noted TV Legal's submission that the Sikh Channel operates "an open platform policy allowing all to participate and contribute to programming...As such we cannot shy away from difficult or distressing programming which is required in the interest of human rights and awareness". It is important to note that the broadcasting of highly critical comments concerning the policies and actions of any state (such as happened here) is not, in itself, a breach of due impartiality. It is essential that current affairs programmes are able to explore and examine these issues and contributors are able to take robust and highly critical positions. However, depending on the specifics of the issue, it may be necessary, in order to fulfil the requirements of due impartiality as set out in the Act as well as the Code to ensure that alternative viewpoints are broadcast.

Ofcom concluded the programme was in breach of Rule 5.5 of the Code.

### **Breach of Rule 5.5**

## In Breach

### Provision of recordings

*Sikh Channel, Various dates and times*

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#### Introduction

The Sikh Channel is in the religious section of the Sky Electronic Programme Guide (EPG). The channel is aimed at the Sikh community in the UK. The licence for the service is held by TV Legal Limited ("TV Legal" or "the Licensee").

Three complainants alerted Ofcom to content on the Sikh Channel, objecting to the manner in which the following programmes had referred to the Hindu community:

- two programmes broadcast on the Sikh Channel on 9 and 10 May 2011 at 19:00 ("the 9 and 10 May Programmes"); and
- the *Sikh Youth Channel Show*, broadcast on the Sikh Channel on 28 May 2011 at 19:30 ("the 28 May Programme").

In order to assess the complaints, Ofcom requested recordings of the programmes from the Licensee, as outlined below.

#### 9 and 10 May Programmes

Ofcom requested recordings of these programmes from the Licensee. These recordings were received in DVD format on 20 May 2011.

When assessing the content, faults with both recordings were identified by Ofcom. Both DVDs became unreadable after approximately two minutes of playing time. On 4 July 2011, Ofcom informed the Licensee of the problem and requested new copies of the recordings. The Licensee explained to Ofcom that there were "some issues in the recording from the server while extracting the file" and as such, it "didn't know how long it would take".

Having received no further communication, on 21 July 2011, Ofcom contacted the Licensee again to request the recordings. The Licensee responded by explaining that as it was "launching [its] London Studio," the engineer was "not available" until the following week.

On 25 July 2011, Ofcom gave the broadcaster a further 48 hours to provide the recordings. However, the recordings were not sent to Ofcom by the Licensee until 19 August 2011.

Given the Licensee's failure to provide recordings as requested, Ofcom considered the case raised issues warranting investigation under Condition 11(2)(b) of Sikh Channel's Television Licensable Content Service ("TLCS") licence, which states that:

"11(2) In particular the Licensee shall:

- (a) Make and retain or arrange for the retention of a recording in sound and vision of every Licensed service for a period of 60 days from the date of its inclusion therein; and

- (b) At the request of Ofcom forthwith produce to Ofcom any such recording for examination or reproduction.”

Ofcom sought comments from TV Legal with regard to licence Condition 11(2)(b).

### 28 May Programme

Ofcom requested a recording of this programme from the Licensee, but did not receive the recordings from TV Legal Limited by the specified deadline of 10 June 2011. On 7 July 2011, Ofcom contacted the Licensee again, but the Licensee stated it had already sent the recording to Ofcom.

On 22 July 2011, Ofcom wrote to confirm it had not received the recording and that this must be provided no later than by 26 July 2011. On 22 July TV Legal advised its engineer was on location and the recording may be delayed. Ofcom did not receive the recording and made a further request for the recording on 28 July 2011 to be provided no later than 11 August 2011. On 28 July 2011 the Licensee said that the recording would be supplied when its engineer had returned from installing studio equipment. Ofcom did not receive the recording and made a further request for the recording on 25 August 2011 to be provided no later than 30 August 2011.

The recording was not received by Ofcom until 31 August 2011 (“the 31 August Recording”).

Given the Licensee's failure to provide recordings as requested, Ofcom considered the case raised issues warranting investigation under licence Condition 11(2)(a) and 11(2)(b) of Sikh Channel's TLCS licence. Ofcom sought comments from TV Legal with regard to licence Condition 11(2)(b).

When assessing the 31 August Recording, we had concerns that the Sikh Channel had not provided a complete recording of the 28 May Programme. We noted that during the 28 May Programme, at several times, the presenter highlighted to viewers that a “video” would be transmitted during the programme. For example, we noted the following statements in the first 100 minutes of the programme:

*“Of all the videos we’ve shown you so far, this video has to be shown after the 9pm watershed”;*

*“There is a reason for which we have to show this video after 9:00 and I request you that you must watch this video and tell everybody to watch it”;*

*“...there’s going to be a video shown, and we’re coming close to the time when the watershed, when we will show that video in the next 20 minutes”;*

*“The videos and pictures I am going to show you can shake an average person”;* and

*“A lot of demand for this video now.....the video will be shown in the next few minutes, I promise you this”.*

At time-code 1:51.00, we noted that the presenter appeared to introduce the video, with the following statement: *“This video is of Joga Singh, and what happened to his family, viewers’ discretion is strongly advised, on this video”.*

We then noted that at 01:51:11, there was a sudden jump in the recording, and no video was played. There then followed a number of statements to indicate that a

video had been transmitted because there were a number of statements by the presenter and members of the studio audience which referred to a video having been broadcast, as follows:

*“You saw this with your own eyes what was done to the family of Joga Singh. How the police massacred them in their home. They took these pictures for the police report...you have watched the video”;*

*“Does anyone want to comment after what you’ve seen in the video?”;*

*“We’ve just seen one of the most emotional videos that I have seen in a very long time”;* and

*“After seeing this video...”.*

Given the above, on 7 September 2011 we asked the Licensee to: confirm whether the 31 August Recording supplied by the Sikh Channel was the complete 28 May Programme as broadcast; and, if the 31 August Recording was not the complete programme as broadcast, to supply the complete recording of the 28 May Programme.

## **Response**

TV Legal did not provide any formal comments under Licence Condition 11(2)(b) with regard to: the 9 and 10 May Programmes; or the 28 May Programme.

With regard to the 31 August Recording, on 21 September 2011 the Sikh Channel provided a further recording of the 28 May Programme<sup>1</sup>, but gave no explanation why the 31 August Recording did not contain the complete 28 May Programme as broadcast.

## **Decision**

TV Legal was required under Licence Condition 11 (2)(b), to produce recordings forthwith on request by Ofcom.

Ofcom noted that with regards to both the 9 and 10 May Programmes, and the 28 May Programme, it gave the Licensee a number of opportunities to provide the recordings but the Licensee failed to produce them within any of Ofcom’s deadlines or provide a reasonable explanation for the extended delay. Ofcom does not consider the availability of staff to be a reasonable explanation for broadcasters failing to meet the requirements of their Ofcom licences.

Ofcom was concerned that: in the case of the 9 and 10 May Programmes, it took three and a half months for the Licensee to provide the correct recordings; and that in the case of the 28 May, it took nearly four months for the Licensee to provide the correct recording.

We were particularly concerned that with regard to the 28 May Programme, the Licensee provided an incomplete recording, and when asked to provide further information about this to the regulator, was unable to do so.

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<sup>1</sup> On assessment, Ofcom considered the material contained in the video that had been omitted from the 31 August Recording did not present any issues under the Code.

The Licensee's repeated failure to provide Ofcom with the recordings forthwith is a serious and significant breach of Condition 11(2)(b) of its licence.

In Ofcom Broadcast Bulletin 185<sup>2</sup>, we published a Note to Broadcasters, which outlined Ofcom's policy on deadline extensions. In that Note to Broadcasters, we stated that: "Broadcasters should note that in cases where a broadcaster fails to meet a deadline for the provision to Ofcom of a recording and/or information requested by Ofcom, it is likely to proceed as a matter of course to investigate the matter under the relevant licence condition and record a breach of that licence condition and, if appropriate, consider taking further regulatory action".

Ofcom notes that in Broadcast Bulletin 191<sup>3</sup>, Ofcom recorded a breach of Condition 12 (provision of information) of the TLCS licence for Brit Asia TV<sup>4</sup>.

In the event of any further breaches of Licence Conditions 11 and 12 being recorded in respect of licences held by TV Legal, either Sikh Channel or Brit Asia TV, Ofcom will proceed to consider further regulatory action, including consideration of the imposition of a statutory sanction.

### **Breaches of Licence Condition 11(2)(b)**

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<sup>2</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb185/obb185.pdf>

<sup>3</sup> Issue 191 of Ofcom's Broadcast Bulletin, available to view at:  
<http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb191/>

<sup>4</sup> Brit Asia TV and the Sikh Channel have common ownership. The licence for Brit Asia TV is held by Mr DS Bal. The licence for the Sikh Channel is held by TV Legal Limited of which Mr DS Bal is the sole director and shareholder.

## In Breach

### Encrypted material broadcast free to air

*Adult Channel, 2 August 2011, 22:50 to 23:00 and 23:50 to 00:00*

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#### Introduction

Adult Channel is a channel broadcast under a licence held by Playboy TV UK/Benelux Limited ("Playboy" or "the Licensee") in the 'adult' section of the Sky Electronic Programme Guide ("Sky EPG") on Sky channel 901.

The service comprises: advertising for telecommunications based sexual entertainment services predicated on premium rate numbers, channel ids, and between the hours of 22:00 and 05:30 subscription services for editorial 'adult' material subject to mandatory restricted access with measures in place to ensure the subscriber is an adult. The channel however includes some sections broadcast without mandatory restricted access (sometimes referred to as 'freeview') to promote the channel and encourage viewers to subscribe.

On 8 August 2011 Playboy alerted Ofcom to a scheduling error which had resulted in content normally shown only with mandatory access restrictions being broadcast without these restrictions for ten minutes on two separate occasions after 22:00 on 2 August 2011.

On assessing the content, Ofcom noted the material broadcast at 22:50 started with about 30 seconds of non-explicit but strong images of a man and woman appearing to have sexual intercourse. This was followed by some advertisements, channel ids and channel promotions to encourage viewers to subscribe to the service. The last seven minutes of the material showed a woman in a garden performing a striptease set to music.

The second piece of material broadcast at 23:50 started with about 30 seconds of a film including a brief image of a topless woman. This was followed by some advertisements, channel ids and promotions to encourage viewers to subscribe to the service. The last seven minutes of the material showed a woman in a photographer's studio performing a slow striptease set to music. This material included a close-up shot of the woman naked and stroking her genitals that lasted approximately eight seconds, and included close-up images of the woman's genitals.

Ofcom considered the material raised issues warranting investigation under the following rule of the Code:

Rule 1.18 "Adult sex material" - material that contains images and/or language of a strong sexual nature which is broadcast for the primary purpose of sexual arousal or stimulation - must not be broadcast at any time other than between 2200 and 0530 on premium subscription services and pay per view/night services which operate with mandatory restricted access.

In addition, measures must be in place to ensure that the subscriber is an adult.

Meaning of "mandatory restricted access":

Mandatory restricted access means there is a PIN protected system (or other

equivalent protection) which cannot be removed by the user, that restricts access solely to those authorised to view.”

Ofcom therefore requested formal comments from the Licensee on how the material complied with the above rule.

## **Response**

The Licensee declined the opportunity to provide formal comments in response to Ofcom’s Decision. However it provided unsolicited comments at the start of the investigation. It explained that “after immediate investigation we have established that an employee at ... our listings company, incorrectly lengthened the freeview events to fill gaps in the schedule which were purposely left by our scheduling team for filler material to be added during presentation. This occurred after we issued some changes to our schedules mid-month, and therefore they were not reflected in the listings documents we receive back from [the listings company], which had the freeview times correctly listed.”

It added: “[the listings company] have since put in more stringent checks to make sure that incidents like this do not reoccur. The Editorial and Schedules Manager at [the listings company] has also re-stated to his team the importance of getting freeview timings correct, and to never move them without specific instructions from Playboy.”

## **Decision**

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, one of which is that “generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material”.

When setting and applying standards to provide adequate protection to members of the public from serious or widespread offence, Ofcom must have regard to the need for standards to be applied in a manner that best guarantees an appropriate level of freedom of expression in accordance with Article 10 of the European Convention of Human Rights, as incorporated in the Human Rights Act 1998.

Rule 1.18 requires that ‘adult sex material’ is only permitted to be broadcast between the hours of 22:00 and 05:30. Additionally Rule 1.18 requires such material must be broadcast on premium subscription services and pay per view/night services with mandatory restricted access and the Licensee should have adequate measures in place to ensure subscribers are adults.

Ofcom considered the material broadcast at:

- 22:50 showing strong but not explicit images of a man and woman appearing to have sexual intercourse; and
- 23:50 that included clear images of the woman masturbating and close ups of her genitals,

was ‘adult sex material’, i.e. contained images of a strong sexual nature which were broadcast for the primary purpose of sexual arousal or stimulation. Being broadcast between 22:00 and 05:30 but without mandatory restricted access, it was therefore in breach of Rule 1.18.

This is not the first occasion when Playboy has mistakenly broadcast 'adult sex material' without mandatory restricted access<sup>1</sup>. Ofcom considers this latest breach raises serious questions about the robustness of Playboy TV's compliance procedures and expects the Licensee to review them thoroughly as a result of this incident to ensure there are no further contraventions of a similar nature.

In Ofcom's view, given the nature of the material and that it involved a compliance failure that had occurred previously, Ofcom considered whether to take further regulatory action in this case. However, given that Playboy TV reported this error to us in a proactive and timely fashion, we do not consider further regulatory action is necessary on this occasion.

### **Breach of Rule 1.18**

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<sup>1</sup> *Channel Climax 3-3, Climax 3-3*  
<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb175/issue175.pdf> published 7 February 2011.



## In Breach

### Bluebird TV

*SportXXXGirls, 10 August 2011, 18:20*

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#### Introduction

*Bluebird TV* is interactive daytime chat advertising content broadcast on the service SportXXXGirls (Sky channel number 967). The service is available freely without mandatory restricted access and is situated in the 'adult' section of the Sky electronic programme guide ("Sky EPG"). The licence for the service is held by Satellite Entertainment Limited ("SEL" or "the Licensee").

Viewers are invited to contact onscreen female presenters via premium rate telephony services ("PRS"). The presenters generally dress and behave in a flirtatious manner and occasionally talk directly to the audience to attract PRS calls. For much of the time, and when the presenter is talking to a caller, the studio sound is muted and music is played over images of the female presenter.

A complainant alerted Ofcom to the broadcast of offensive language during *Bluebird TV* at 18:30 on 10 August 2011.

After inviting viewers to contact the studio, the female presenter placed the microphone beside her but it was not then muted. As a result, her conversation with three callers and a woman off-screen was broadcast over a 20 minute period.

During the three telephone conversations with callers only the presenter's side of the conversation could be heard and her speech was not always clearly audible. At other times however her words were clearly audible. For example, at approximately 16 minutes into the broadcast during one conversation with a caller, the presenter stated the following sexually explicit phrases:

*"get your big dick out ... slide it in inch by fucking inch into my pussy aren't you?"*

*"push it right into my wet pussy"*

*"yeah go on baby fuck me with that fat dick"*

*"it feels so fucking good, filling me up"*

*"fuck me in my tight pussy, right over the fucking desk"*

*"fuck me fucking hard"*

Between telephone calls, a conversation between the presenter and a woman off-screen was also clearly audible. That conversation included the following phrases:

*"...and to get money out of him is fucking hard as fuck"*

*"fucking hell"*

*"...fucking in here now"*

Ofcom considered the material raised issues warranting investigation under the following BCAP Code rules.

- Rule 4.2            “Advertisements must not cause serious or widespread offence against generally accepted moral, social or cultural standards.”
- Rule 32.3          “Relevant timing restrictions must be applied to advertisements that, through their content, might harm or distress children of particular ages or that are otherwise unsuitable for them.”

Ofcom therefore requested formal comments from the Licensee on how the material complied with the above BCAP Code rules.

## Response

The Licensee apologised for any offence caused and stated: “...there was a specific technical fault which did occur with one of our microphones at this specific time. Upon investigation ... it has been confirmed that there were audio problems with this specific microphone. Additional equipment checks have also been introduced to minimise [the] risk” of this problem occurring again. It explained that the broadcast was being simulcast across two separate channels at the time but the fault resulted in the inappropriate material being audible on one channel only. SEL added: “Unfortunately faults in equipment happen which may cause a fail from time to time. [We] can confirm that the microphone has now been replaced”.

## Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, one of which is that “the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented” and another is that “persons under the age of eighteen are protected.” In the case of advertising content, these standards objectives are contained in the BCAP Code.

The BCAP Code contains rules which permit ‘adult chat’ services to be advertised (and so broadcast) within prescribed times and on free-to-air channels that are specifically licensed by Ofcom for that purpose. When setting and applying standards in the BCAP Code to provide adequate protection to members of the public from serious or widespread offence, Ofcom must have regard to the need for standards to be applied in a manner that best guarantees an appropriate level of freedom of expression in accordance with Article 10 of the European Convention of Human Rights, as incorporated in the Human Rights Act 1998. However, the advertising content of ‘adult chat’ services has much less latitude than is typically available to editorial material in respect of context and narrative. The primary intent of advertising is to sell products and services, and consideration of acceptable standards will take that context into account.

On 27 July 2011, Ofcom published revised and detailed guidance<sup>1</sup> on the advertising of telecommunications-based sexual entertainment services and PRS daytime chat services (the “Chat Service Guidance”). This clearly sets out what Ofcom considers to be acceptable to broadcast on these services pre-watershed.

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<sup>1</sup> Ofcom guidance on the advertising of telecommunications-based entertainment services: <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/bcap-guidance.pdf>

### BCAP Code Rule 32.3

This states: “Relevant timing restrictions must be applied to advertisements that, through their content, might harm or distress children of particular ages or that are otherwise unsuitable for them.”

BCAP Code Rule 32.3 makes clear that children should be protected by relevant timing (and so appropriate scheduling) restrictions from material which is unsuitable for them. Appropriate timing restrictions are judged according to factors such as: the nature of the content; the likely number of children in the audience; the likely age of those children; the time of the broadcast; the position of the channel in the relevant electronic programme guide (e.g. the ‘adult’ section); any warnings; and mandatory restricted access. The Chat Service Guidance clearly states that daytime chat broadcasters should ensure that: “The presentation of daytime chat should always be suitable for wide audiences, that is for audiences including children and young persons. Therefore, the content should be suitable for children should they come across it unawares.”

Ofcom’s research<sup>2</sup> indicates that the word “fuck” and its derivatives, and “pussy” (when referring to a woman’s sexual organs) are considered to be examples of the most offensive language. Ofcom therefore considered the broadcast of such language – especially as here in a sexually graphic context – when children may be watching was clearly unsuitable.

Ofcom then considered under BCAP Code Rule 32.3 whether relevant timing or scheduling restrictions were applied to these broadcasts by the Licensee. In Ofcom’s view this material clearly exceeded the expectations of the audience for this daytime chat channel at 18:30. SportXXXGirls is situated in the ‘adult’ section of the Sky EPG. However, the material was transmitted without a mandatory access restriction at 18:30, during the summer holidays when children may have been watching television, some unaccompanied by an adult. Taking these factors into account, Ofcom concluded that relevant timing and scheduling restrictions were not applied to the broadcasts so as to offer adequate protection to children and therefore the material was in breach of Rule 32.3.

### BCAP Code Rule 4.2

This states that: “Advertisements must not cause serious or widespread offence against generally accepted moral, social or cultural standards.”

In Ofcom’s view – for the reasons set out immediately above – this content was clearly capable of causing serious or widespread offence against generally accepted moral, social or cultural standards.

Under BCAP Code Rule 4.2, in order to assess whether serious or widespread offence was caused against generally accepted standards, Ofcom then considered whether suitable scheduling restrictions were applied to this content by the Licensee.

Ofcom took into account that the language used was amongst the most offensive, and that the degree of offence was increased because some of the language was used in the sexually graphic context of ‘adult sex chat’ conversations. The potential

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<sup>2</sup> Audience attitudes towards offensive language on television and radio:  
<http://stakeholders.ofcom.org.uk/binaries/research/tv-research/offensive-lang.pdf>

for offence was further increased because the service is supposed to broadcast only daytime chat content compliant with the Chat Service Guidance (and so suitable for daytime audiences). Audiences would clearly not expect to come across such language before the watershed. Ofcom was particularly concerned at the degree of offence likely to be caused to viewers who might come across this material unawares. Ofcom noted that SportXXXGirls is positioned in the 'adult' section of the Sky EPG. However, in this case, given the material included examples of the most offensive language broadcast at 18:30, the location of the channel in the 'adult' section of the EPG was not sufficient to ensure that serious or widespread offence against generally accepted standards was not caused by this content.

Taking into account the factors above, Ofcom concluded that relevant scheduling restrictions were not applied so as to ensure that the material which was broadcast was not capable of causing serious or widespread offence against generally accepted moral, social or cultural standards. The material was therefore in breach of BCAP Code Rule 4.2.

Ofcom was very concerned that this broadcast of the most offensive language appeared to go undetected by the broadcaster for approximately 20 minutes. Ofcom considered this raised serious questions about the robustness of the Licensee's existing compliance procedures and expects SEL to review its compliance arrangements thoroughly as a result of this incident to ensure there are no further contraventions of a similar nature.

Ofcom has recently recorded a number of serious and repeated breaches of the BCAP Code<sup>3</sup> against SEL. These are being considered for the imposition of a statutory sanction. This present contravention of the BCAP Code is another example of very poor compliance by the Licensee and may be taken into account as part of its compliance record when Ofcom considers the imposition of a sanction against SEL.

### **Breach of BCAP Code Rules 4.2, 32.3**

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<sup>3</sup> Broadcast Bulletin 186, 18 July 2011:  
<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb186/obb186.pdf>

## Not in Breach

### Sri Lanka's Killing Fields

Channel 4, 14 June 2011, 23:05

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#### Introduction

The documentary *Sri Lanka's Killing Fields*, which presented evidence of alleged war crimes in the final stage of the Sri Lankan civil war, generated 118 complaints and alerted Ofcom to a range of potential issues including impartiality, offensiveness and the broadcast of misleading material.

*Sri Lanka's Killing Fields* was a documentary which focused on: the conclusions of the UN report by the Secretary-General's Panel of Experts on Accountability in Sri Lanka ("UN Panel Report") into the Sri Lankan civil war in 2008/2009; the actions and policies of the armed forces of the Sri Lankan Government and of the Tamil Tigers ("LTTE"<sup>1</sup>) towards the civilian population at this time; and the call, by the survivors of the conflict, on the international community to investigate the potential war crimes set out in the programme.

The information about potential war crimes presented in the programme, which supported the UN Panel Report findings, was drawn from a dossier of evidence including film (such as mobile phone footage), photographs and eye witness accounts collected by Channel 4 in the previous two years.

#### Due impartiality

Regarding the issue of whether Channel 4 presented the policies, arguments and actions of the sides involved in the conflict in a balanced way, Ofcom considered the rules on due impartiality in Section 5 of the Code were applicable. Ofcom therefore asked the broadcaster to provide formal comments as to how the programme complied with the following Rule:

Rule 5.5: "Due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved on the part of any person providing a service."

#### Misleading material

Another issue raised was whether the footage and eyewitness accounts obtained by Channel 4 (which was presented in the programme as the evidence that war crimes were committed) may have misled viewers through the broadcast of faked or manipulated material, and was presented in such a way that materially misled the audience.

Ofcom therefore requested comments under the following Rule:

Rule 2.2: "Factual programmes or items or portrayals of factual matters must not materially mislead the audience."

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<sup>1</sup> Standing for the Liberation Tigers of Tamil Eelam, the separatist militant organization formerly based in northern Sri Lanka. The LTTE was defeated by the Sri Lankan armed forces in 2009 after a bloody conflict.

### Offensive material

The programme included a number of images of murdered and tortured bodies, and also of partially clothed women who, it was suggested in the documentary, had been sexually abused prior to their death. Ofcom considered this material was potentially offensive. We therefore requested comments from the broadcaster on how this content complied with the following Rule:

Rule 2.3: “In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context.”

### **Response**

Channel 4 responded as follows:

#### Due impartiality

Channel 4 argued that this documentary did not raise issues under Section Five of the Code because the programme set out: that there was evidence of war crimes during the final weeks of the civil war in 2009; that the guilty (both the Sri Lankan Government and the LTTE) should be brought to justice; and, that the survivors are looking to the international community for justice.

According to Channel 4 these were neither matters of public controversy nor a matter of current public policy, therefore requiring Rule 5.5 to be applied. Channel 4 considered that: Ofcom, in its request for comments, had not adequately identified how Section Five had been engaged in this case; and, “there is no political controversy in the UK Parliament and public policy on the international community’s role [concerning alleged war crimes in Sri Lanka] is settled policy at the UK Parliament”.

Nonetheless, if Ofcom decided that Rule 5.5 was applicable, Channel 4 did address the issue of due impartiality in its response. In this case, Channel 4 stated that the subject of this documentary was a dossier of evidence including film, photographs and eye witness accounts compiled by Channel 4 in the past two years. Channel 4 explained that the documentary covered “the same terrain as the UN Panel Report and the two reports by the UN Special Rapporteurs on Extrajudicial, Summary or Arbitrary Executions, produced since the end of the conflict”. These reports and the documentary all presented evidence of credible allegations of war crimes committed by the both the Sri Lankan Government and the LTTE in the final stages of the civil war.

Consequently, in response to the potential issue that the documentary may have underplayed the atrocities perpetrated by the LTTE and focussed more on the actions of the Sri Lankan Government, Channel 4 argued that in presenting the dossier of evidence in the documentary, it was not necessary for due impartiality purposes to refer to the actions of the LTTE.

Further, as this documentary was primarily concerned with an examination of the final offensive by the Sri Lankan Government against the LTTE in the last months of the conflict, a full history of the Sri Lankan civil war was not required. Channel 4 explained “it was not necessary to artificially manufacture false equivalence between the actions of the Sri Lankan Government and the LTTE within the programme especially when one of the main issues addressed was the effect of this conflict on the innocent civilian population.” In the interests of fairness, however, the

broadcaster did include information relating to the actions of the LTTE to provide context for the audience and to reflect any evidence that had been obtained regarding any crimes committed by the LTTE in the last months of the conflict.

Channel 4 provided a number of examples included within the programme to demonstrate that it did not ignore the actions of the LTTE. For example:

- The programme reported that the UN had recently published a report which found credible allegations of war crimes and crimes against humanity committed by both the Sri Lankan Government and the LTTE.
- The programme also contained the following comments about the LTTE:

*“The Tigers themselves were a brutal army – often conscripting child soldiers and pioneering the use of suicide bombing.”*

*“But the Tigers too showed little respect for civilians, increasingly prepared to use them as pawns or human shields in his battle to the end...”*

*“Over the next four months these hundreds of thousands of innocent civilians would be bombed, herded and corralled into an ever decreasing area of land.”*

*“But Government forces were not the only ones showing a brutal disregard for civilians. On the 9 February a female Tiger suicide bomber killed a large number of soldiers and Tamil civilians in this government centre for the displaced.”*

(This was accompanied by a particularly strong image of a deceased child victim of this bomb attack)

*“Tamil Tigers were responsible for using this large civilian population as a shield, we know from available evidence that the Tamil Tigers were killing people in order to stop them from leaving,...there were more reports of cornered Tiger fighters firing on civilians who tried to escape, and the government released this footage, which they showed Tigers firing into the ground to prevent civilians from escaping...”*

In conclusion, Channel 4 argued that the programme did preserve due impartiality by ensuring it informed the audience about the role of the LTTE and the atrocities it perpetrated in the final period of the conflict. The broadcaster stated: “we do not accept that the role of the LTTE was underplayed in any way”.

In response to the potential issue that in focusing on the actions and policies of the Sri Lankan Government the programme may have potentially vilified and overplayed the role of government forces compared to those of the LTTE, the broadcaster stated that the commentary took care to avoid vilification and remained factual at all times.

Finally, Channel 4 stated all of the allegations relating to the atrocities were put to the Sri Lankan Government in detail in advance of the broadcast to give the Sri Lankan Government a right to reply<sup>2</sup>. In Channel 4’s view the Sri Lankan Government did not

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<sup>2</sup> Channel 4 provided to Ofcom a copy of the letter from the producer and director of *Sri Lanka’s Killing Fields*, Callum Macrae, to the President of Sri Lanka, Mahinda Rajapaksa, sent on 25 May 2011 documenting each of the allegations of war crimes presented in the

respond “in any meaningful way” to the allegations presented. Nonetheless, the response made by the Sri Lankan Government to Channel 4’s letter sent in advance of the broadcast was included in full in the programme:

*“As the conduct of Channel 4 with regard to this matter has consistently fallen well short of the “standards and fairness” expected of a responsible TV channel the Government of Sri Lanka does not wish to be associated with the Channel at any time and until a suitable retraction is made to the satisfaction of the Government.”*

Channel 4 therefore concluded its arguments by stating that due impartiality had been maintained and that the programme did not materially mislead the audience.

### Misleading material

The dossier of evidence presented in the documentary included film (such as mobile phone footage), photographs and eyewitness accounts which allegedly supported the allegations of atrocities committed in the final stage of the Sri Lankan civil war. As to whether Channel 4 may have misled viewers with regard to this evidence by presenting faked or manipulated material, Channel 4 categorically rejected any suggestion that the material was faked or manipulated either by the broadcaster or others to vilify the Sri Lankan Government.

The programme referred to the accusation by the Sri Lankan Government that the material Channel 4 had obtained and broadcast was faked. Channel 4 explained that great care was taken to verify all of the material received before it was broadcast in order not to mislead the audience, and the audience were advised of the expert assistance obtained to ensure the material had not been manipulated. All sources and material had been subjected to rigorous journalistic scrutiny. The broadcaster set out in detail the supporting evidence, corroboration and independent verification by well respected experts of the material presented. This, according to Channel 4, showed that the material broadcast showed no sign of manipulation or fakery and that genuine executions and therefore systemic war crimes by the Sri Lankan Government were shown.

- In the case of the principal execution video included in the programme, the conclusions of Channel 4’s analysis were consistent with findings of the UN’s Special Rapporteurs on Extrajudicial Killings. The UN’s Special Rapporteurs had engaged experts to carry out analysis on the original video broadcast last year on Channel 4 News and the extended version as shown during this documentary. Their conclusions that this was genuine were consistent with the independent analysis received by Channel 4.
- The film of the execution of bound prisoners which was broadcast was also subject to independent analysis. Experts advised that there were no signs of manipulation and appeared to depict genuine executions. Metadata indicated that it was recorded on 15 May 2009 in the last days of the conflict.
- The video evidence of the maltreatment of female corpses was examined by a forensic pathologist and video analysts, and their advice supported the conclusion that the material was authentic.

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programme and inviting a written response to these from the Sri Lankan Government. This letter was sent in advance of the programme which was broadcast on 14 June 2011.



- The photographs broadcast of many executed individuals surrounded by Sri Lankan Government forces were corroborated by other evidence of occasions where prisoners were executed.
- The film of hospitals and civilians in the no fire zones was checked and corroborated by eyewitnesses.

Channel 4 concluded its arguments by stating that the overwhelming weight of the evidence, including that contained in the UN reports, pointed to the material being genuine and therefore it did not mislead the audience.

### Offensive material

Regarding the broadcast of images of murdered and tortured bodies and those of partially clothed women who may have been sexually abused being offensive, the broadcaster stated that the broadcast of this content was justified by the context.

In terms of scheduling, the programme was broadcast well after the watershed at 23:05 with the most disturbing images shown during part three which started at 23:43. The material was preceded by a clear warning to viewers at the start of the programme and immediately after each advertising break. In addition, the broadcaster provided information to viewers by means of various comments made by the presenter Jon Snow during the programme itself. Channel 4 stated the warnings were clear and unambiguous and gave sufficient information to viewers about the strength of the material featured.

In terms of editorial content, Channel 4 explained that the programme was a forensic examination of first-hand evidence of war crimes recorded by soldiers and Tamils in the midst of conflict when the world's media were prevented from entering the country. The broadcaster commented: "whilst the images are stark and shocking, they are the only directly recorded evidence of the atrocities committed on both sides and as such directly contradict the claims made by both the Government and Tamil Tigers that such atrocities were ever committed." Further, given the insistence by the Sri Lankan Government that the footage was faked and that these events did not occur, there was a strong editorial justification for including these images at length to refute such allegations.

### **Decision**

Under the special impartiality requirements of the Communications Act 2003, Ofcom has a duty to ensure that due impartiality is preserved within television and national radio services on matters of political or industrial controversy and matters relating to current public policy. Under the Act Ofcom also has a duty to ensure generally accepted standards are applied to provide adequate protection for members of the public from harmful and/or offensive material.

### Due impartiality

Rule 5.5 of the Code states: "Due impartiality on matters of political or industrial controversy and matter relating to current public policy must be preserved on the part of any person providing a service".

When interpreting due impartiality, Ofcom must take into account the broadcaster's and audience's right to freedom of expression. This is set out in Article 10 of the European Convention on Human Rights. Article 10 provides for the right of freedom

of expression, which encompasses the right to hold opinions and to receive and impart information and ideas without interference by public authority.

The broadcaster's right to freedom of expression is therefore not absolute. In carrying out its duties, Ofcom must balance the right to freedom of expression on one hand, with the requirement in the Code to preserve "due impartiality" on matters relating to political or industrial controversy or matters relating to current public policy. Ofcom recognises that this requirement acts to limit, to some extent, freedom of expression. This is because its application necessarily requires broadcasters to ensure that neither side of a debate relating to matters of political or industrial controversy and matters relating to current public policy is unduly favoured.

Ofcom first considered whether the requirements of Section Five of the Code should be applied. That is, whether the subject matter of the documentary concerned matters of political or industrial controversy or a matter relating to current public policy.

Ofcom noted that the documentary examined the allegations that there was evidence that the Sri Lankan Government and the LTTE committed war crimes and that it reflected the similar concerns to those set out in the UN Panel Report published in April 2011.

Ofcom noted that the subject matter - the dossier - presented *prima facie* evidence regarding the actions and policies of the Sri Lankan Government during its offensive against the LTTE, who had *de facto* control over a substantial area of northern Sri Lanka and its civilian population in 2009. Given that the Sri Lankan Government has publicly rejected the findings made by the UN Panel Report (published only two months prior to the broadcast of this programme) and any evidence that it was responsible for any atrocities or war crimes including those presented in this programme, Ofcom concluded that the actions and policies of the Sri Lankan Government during its offensive against the LTTE and the appropriate response of the international community was, and still remained, a matter of political controversy at the time of this broadcast. Further, given that the international community, including the UN, has publicly called on the Sri Lankan Government to investigate the atrocities committed this was also a matter relating to current public policy. Due impartiality therefore needed to be maintained in accordance with Section Five of the Code.

For these reasons, Ofcom did not accept the argument advanced by Channel 4 that *Sri Lanka's Killing Fields* was not subject to Rule 5.5. In particular, there is no requirement that there should be any political controversy in the UK's Parliament about an issue for its treatment in a broadcast to be subject to Section Five; nor necessarily in all cases that if the UK Parliament has a "settled policy" on the international community's role in relation to a particular matter that the matter is no longer a "matter of current public policy." The meaning of "matters of political or industrial controversy and matters relating to current public policy" set out in the Code potentially is broad. In deciding whether Section Five applies in any case, Ofcom will reach its decision taking account of the individual circumstances.

Having established that Section Five of the Code applied, Ofcom then went on to consider in this case whether due impartiality had been preserved.

It is important to note that the broadcasting of highly critical comments concerning the policies and actions of any state or government (such as happened here concerning the Sri Lankan Government's military forces) is not in itself a breach of

the Code. It is, in fact, essential that current affairs programmes are able to explore and examine such issues and take a position even if that position is highly critical.

However, it is the responsibility of the broadcaster, when the subject matter of the programme raises a matter of political controversy, to ensure that “due” impartiality is maintained. Under the Code, the term “due” means adequate or appropriate to the subject matter. Therefore “due impartiality” does not mean an equal division of time has to be given to every view, or that every argument and every facet of the argument has to be represented. Due impartiality may be preserved in a number of ways and it is an editorial decision for the broadcaster as to how it ensures due impartiality is maintained.

In this case, Ofcom noted that:

- Channel 4 did seek to include the viewpoints of the Sri Lankan Government and produced evidence that it had put all of the significant allegations included in the programme to them for a response in advance of the programme. As the Sri Lankan Government chose not to respond in full, Channel 4 could only broadcast the limited statement provided;
- the programme included - when the relevant evidence was presented - several official statements previously made by the Sri Lankan Government regarding the events in the final stage of the civil war. The narration at various points referred to the Government’s official position. The programme also included clips of Government officials setting out that position stating for example that: there had been “zero civilian casualties”; it was engaged in a “humanitarian rescue operation”; all the civilians inside the no fire zones were rescued by government forces; and, that the first video of an execution shown in the programme was a fake. The programme also explicitly referred to the Sri Lankan Government’s rejection of the UN Panel Report;
- the subject matter of this documentary was clearly presented as being about the final stages of the Sri Lankan civil war, and in particular, the serious effects on many in the civilian population of the offensive of the Sri Lankan Government against the LTTE-held areas of Sri Lanka. It was never intended to be an analysis of the entire conflict or the actions of the LTTE and Sri Lankan Government during the duration of the civil war as a whole. Consequently, the programme was only required to maintain due impartiality of the specific subject matter presented - which detailed the Sri Lankan Government offensive against the LTTE held areas at the final stage of the conflict. While the subject matter did present evidence which predominantly covered the actions of the Sri Lankan Government offensive, the documentary included explicit references to the LTTE activities at this time where this was relevant.

Ofcom therefore concluded that overall Channel 4 preserved due impartiality in its examination of the Sri Lankan Government’s actions and policies during its offensive and there was no breach of Rule 5.5.

### Misleading material

Rule 2.2 states that: “Factual programmes or items or portrayals of factual matters must not materially mislead the audience”. Guidance to this rule underlines that it is “designed to deal with content that **materially misleads the audience so as to cause harm or offence** [emphasis in original]” and not “with issues of inaccuracy in

non-news programmes.” Whether a programme “materially” misleads an audience so as to cause harm or offence is a high test and depends on a number of factors such as the editorial context, the nature of the misleading material and, above all, either what the potential effect could be, or what actual harm or offence has occurred.

Ofcom considered the issue of whether the footage, photographs and eyewitness accounts obtained by Channel 4 (which led to the conclusions that systemic war crimes were committed by the Sri Lankan Government) may have misled viewers about the actions of the Sri Lankan Government because it was faked or manipulated material.

We assessed first the measures taken by Channel 4 *before* the broadcast to verify the material. Ofcom noted that the broadcaster took numerous and detailed steps to check whether the material had been faked or manipulated. These included in particular submitting the material for independent analysis (for example by video analysts and a forensic pathologist) and checking for corroboration supporting mobile phone, video and photographic evidence.

We went on to consider the steps taken by Channel 4 *during* the broadcast to ensure the audience was not materially misled by material alleged to be faked or manipulated. These included providing viewers with editorial context and information relating to the nature of the material. While the decision for Ofcom in this case was not to determine whether as a matter of fact the material broadcast was faked or manipulated, it is Ofcom’s role, in applying Rule 2.2, to determine if the broadcaster included sufficient context to ensure viewers were not materially misled.

We noted that:

- with regard to the overall editorial context, before the alleged faked footage was broadcast, the presenter Jon Snow explained that no international observers were allowed to enter the conflict zone and the “official footage” from the Government of Sri Lanka suggested its activities were humanitarian only. Therefore, the alleged footage of executions and torture, filmed on the mobile phones of Sri Lankan Government soldiers, according to Jon Snow represented “public evidence of war crimes which demand proper investigation”. Ofcom therefore concluded that the broadcaster provided viewers with this editorial justification for the inclusion of the mobile phone material and other supporting evidence;
- the broadcaster took steps to ensure the view of the Sri Lankan Government – that the footage was faked – was made clear to viewers. With regard to the first clip shown, the presenter Jon Snow explained that the same footage had been shown previously on Channel 4 and it had been “denounced as fake by the Sri Lankan Government”. He then explained: “the footage has since been authenticated by the UN although the Sri Lankan Government refuses to accept that”. With regard to the second clip Jon Snow highlighted this was “*shocking new video evidence*” of the shooting of three bound prisoners filmed on a mobile phone. He also advised: “*we have had this footage analysed by experts who say it shows no signs of manipulation and appears to depict genuine executions. Metadata encoded within the video indicates it was recorded on 15 May 2009 in the last few days of the civil war*”; and
- the programme included eyewitness accounts and photographs to corroborate that the incidents of torture and sexual abuse recorded on the

mobile phones were not isolated, as well as other footage which the programme therefore claimed depicted “systematic” war crimes.

It is Ofcom’s view that the broadcaster therefore ensured that the audience was not materially misled regarding the nature of the content by taking reasonable steps before the broadcast to establish that the material was not faked or manipulated, and informing the audience of those steps during the programme. Ofcom also took into account that the programme (as already detailed previously) set out the views of the Sri Lankan Government to some extent, referred to the actions of the LTTE, and included in full the official statement from the Sri Lankan Government on the issues raised by Channel 4 in this programme (Channel 4 having offered the Sri Lankan Government the opportunity to be interviewed about the allegedly faked footage, which the Government declined). Taking all these factors into account, the audience would not have been materially misled in this case so as to cause harm or offence through the broadcast of allegedly faked or manipulated footage of war crimes.

We also concluded that the audience was not materially misled through the way in which the material was presented. In reaching this view we had regard to: all the factors set out above which led us to conclude that due impartiality was preserved (and in particular that the programme did refer to the actions and policies of the LTTE, focussed on the final stages of the conflict, and that the viewpoint of the Sri Lankan Government was represented to some extent in the programme); the various points made above as to why the audience was not materially misled concerning the issue of allegedly faked or manipulated footage; the Ofcom Guidance on Rule 2.2 which makes clear that the Rule is not designed to deal with issues of inaccuracy in non-news programmes.

### Offensive material

Rule 2.3 of the Code states: “In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context”.

Ofcom acknowledges that some viewers may have been very offended by the graphic images depicting executions of bound prisoners, mutilated corpses, the maltreatment of women and the victims of bombings included in this programme.

The Code requires Ofcom to consider the *context* in which the content was presented in order to assess if this considerable potential offence was justified by the context. Context includes, but is not limited to, the editorial content of the programme, warnings given to viewers, the time of broadcast and the service the material was broadcast on. Given the brutal nature of the images shown and the level of potential offence which may have been generated by these images, Ofcom considered that Channel 4 had to ensure a correspondingly high level of contextual justification.

With reference to the editorial content, Ofcom noted that the broadcast was presented as a serious documentary investigating important issues that had only recently before been the subject of the UN Panel Report and that it commenced very late in the schedule at 23:05 when viewers understand that they should expect more adult material.

Nonetheless, the strength of the images broadcast required in Ofcom’s view, clear guidance to viewers about what they may expect to view. Ofcom noted that, the broadcaster clearly set out from before the start of the programme that the content included disturbing images. For example, the pre-programme information stated:

*“Next a disturbing investigation with Jon Snow about the brutal conclusion of the Sri Lankan civil war with disturbing and distressing descriptions and film of executions and atrocities.”*

Further warnings followed each advertising break:

Part 2 announcement:

*“With disturbing and distressing descriptions and film of the shelling of civilians”*

Part 3 announcement:

*“In the concluding part of this film we feature disturbing and distressing descriptions and film of executions and atrocities”*

In addition, presenter Jon Snow gave further onscreen warnings both during his introduction (*“this film contains very disturbing images depicting death injury execution and evidence of sexual abuse and murder”*) and immediately before particularly disturbing images were shown (*“The images that follow – showing the execution of bound prisoners and the aftermath of what appears to be systemic sexual abuse and murder are extremely distressing...”*).

In Ofcom’s view these warnings were explicit and helped provide viewers with the information to decide if they wished to continue to view.

Ofcom also considered the nature of the channel on which this programme was broadcast and audience expectations. Channel 4 has a unique public service remit to provide programming that is challenging, diverse and likely to provoke debate. Consequently, the broadcaster has a history of broadcasting very challenging material from war zones (including graphic footage) and seeking out the voices and views of those who may not be represented. The images included in this programme, whilst brutal and shocking, would not have exceeded the expectations of the audience for this Channel 4 documentary scheduled well after the watershed with very clear warnings about the nature of the content.

Taking into consideration the context overall, Ofcom therefore concluded there was no breach of Rule 2.3.

**Not in Breach of Rules 2.2, 2.3 and 5.5**

## Advertising Scheduling cases

### In Breach

#### Advertising scheduling

*ESPN and ESPN Classic, 28 April to 30 June 2011, various dates and times*

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#### Introduction

Rule 17 of the Code on the Scheduling of Television Advertising (“COSTA”) stipulates the maximum number of advertising breaks programmes may contain:

| Scheduled duration of programme<br>(on non-PSB channels) | Number of breaks |
|--|------------------|
| < 26 minutes   | One              |
| 26 – 45 minutes  | Two              |
| 46 – 65 minutes  | Three            |
| 66 – 85 minutes  | Four             |
| 86 – 105 minutes   | Five             |
| 106 – 125 minutes*                                       | Six              |

\*for every additional 20 minutes of programming, a further break is permitted.

Rule 16 of COSTA lists the following exceptions (amongst others) to the restrictions on the insertion of advertising breaks:

- f) “in programmes of live events, more breaks may be taken than are indicated...provided that:
  - i) the timing of the event and its constituent parts are outside the control of the programme provider; and
  - ii) there would not be sufficient time within the number of permitted breaks which are also natural breaks to schedule the permitted amount of advertising.
- g) live programme feeds from an overseas broadcaster may take the break pattern of the originating broadcaster. The broadcaster retransmitting the feed from the UK remains responsible for ensuring compliance with other relevant parts of this Code ...”

During monitoring, Ofcom identified the following on channels licensed by ESPN Ltd between 28 April and 30 June 2011:

- ESPN broadcast two programmes<sup>1</sup> that contained more than the number of internal breaks permitted by Rule 17; and

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<sup>1</sup> Rules 16(f) and 16(g) of COSTA allow the broadcast of live events to feature more internal advertising breaks than indicated in Rule 17. However, in this case these programmes contained recordings of sports events and as such were not permitted to feature more than the number of internal breaks stipulated in Rule 17.

- ESPN Classic broadcast eight programmes<sup>2</sup> that contained more than the number of internal breaks permitted by Rule 17.

Ofcom considered these cases raised issues warranting investigation under Rules 16 and 17 of COSTA and therefore sought formal comments from ESPN Ltd (“ESPN” or “the Licensee”) about the above incidents with regard to these rules

## Response

### ESPN:

The Licensee explained that the two breaches on ESPN related to “content recorded early in the morning, fed in from a US broadcaster with durations that differed from the original schedule formats.” One programme “arrived with more segments than expected” and “was placed into the playlist incorrectly”. The end break was “mistakenly moved to an internal break and another break [was] broken in two.” Therefore, this broadcast, which had a scheduled duration of 180 minutes, contained ten internal breaks – one more than permitted by Rule 17 of COSTA.

The broadcaster explained that the other breach on ESPN occurred because the 120 minute scheduled programme in question “was 30 minutes longer than anticipated, and therefore the following programme was removed from the plan.” However, the following programme’s two breaks were still aired within the final 30 minutes of the broadcast. This resulted in this programme containing 7 internal breaks – one more than permitted by Rule 17 of COSTA.

### ESPN Classic:

The Licensee explained that the breaches on ESPN Classic were “primarily attributed to a flawed structure within the break formatting facility of our scheduling software...and a transitional period in our [its] staffing in the sales department.” It said that four of the breaches on ESPN Classic were caused by a “sales scheduling oversight, and were caught and correct for later airings.” It added that the remaining four breaches occurred because “unfortunately, a last minute call was made by a scheduler to insert one too many breaks in the show”.

The Licensee said that it was in the process of implementing new procedures to “prevent future transgressions”. These included increasing staffing and human checking at various stages of the scheduling process and extra training for all its channels. It added that it “was working on new scheduling templates” in its software programme “that do not allow any erroneous formats to be inserted...which will eliminate the problems on ESPN Classic.”

The broadcast said that the action it had taken, “hopefully demonstrates the thoroughness of our investigation and that we should now have robust systems re-established.”

## Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content which it considers are best calculated to secure a number of standards objectives. One of these objectives is that “the international obligations of

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<sup>2</sup> See footnote 1



the United Kingdom with respect to advertising included in television and radio services are complied with”.

Articles 20 and 23 of the EU Audiovisual Media Services (AVMS) Directive set out strict limits on the amount and scheduling of television advertising. Ofcom has transposed these requirements by means of key rules in COSTA. Ofcom undertakes routine monitoring of all of its licensees’ compliance with COSTA.

In this case, Ofcom found that the ten programmes in question contained more than the permitted number of advertising breaks stipulated in Rule 17 of COSTA. was in breach of Rule 17 of COSTA.

Ofcom noted that Broadcast Bulletins 158 and 173<sup>3</sup> contained details of six separate breaches of Rule 4 of COSTA (concerning advertising minutage) by services belonging to and complied by ESPN demonstrating the broadcaster’s previous compliance failures in respect of COSTA, albeit in relation to a different rule.

Ofcom was also concerned that these ten breaches appeared to be largely the result of human error.

Ofcom also noted the new procedures implemented by the Licensee to improve future compliance with COSTA and its prompt action to correct scheduling errors when alerted to them. Therefore, Ofcom does not expect to see any further breaches of COSTA on channels owned by ESPN Ltd. Any future infractions may result in Ofcom taking further regulatory action.

### **Breaches of Rule 17 of COSTA**

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<sup>3</sup> Please see Ofcom’s Broadcast Bulletins 158 and 173 at:  
<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb158/Issue158.pdf>  
and  
<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/817960/issue173.pdf>

## In Breach

### Breach findings table

*Code on the Scheduling of Television Advertising compliance reports*

Rule 4 of the Code on the Scheduling of Television Advertising (“COSTA”) states:

“... time devoted to television advertising and teleshopping spots on any channel must not exceed 12 minutes.”

| Channel         | Transmission date and time                  | Code and rule / licence condition | Summary finding  |
|-----------------|---|-----------------------------------|--|
| Liverpool FC TV | 16 June 2011, 15:00 and 20 July 2011, 16:00 | COSTA Rule 4                      | Ofcom noted, during monitoring, that Liverpool FC TV exceeded the permitted advertising allowance by 28 seconds on 16 June and by 30 seconds on 20 July.<br><br><b>Finding: Breach</b> |

Rule 17 of COSTA stipulates the maximum number of internal breaks programmes (other than those exceptions in Rule 15) may contain:

| Scheduled duration of programme (on non-PSB channels) | Number of breaks |
|---|------------------|
| < 26 minutes  | One              |
| 26 – 45 minutes                                       | Two              |
| 46 – 65 minutes                                       | Three            |
| 66 – 85 minutes                                       | Four             |
| 86 – 105 minutes                                      | Five             |
| 106 – 125 minutes*                                    | Six              |

\*for every additional 20 minutes of programming, a further break is permitted.

| Channel   | Transmission date and time                   | Code and rule / licence condition | Summary finding  |
|---|--|-----------------------------------|--|
| Sky Sports 2, Sky Sports 3, Sky Sports 4, Sky Sports News | 25 June 2011, 26 June 2011, and 27 June 2011 | COSTA Rule 17                     | Ofcom noted that, during monitoring, eight programmes were broadcast that contained more internal breaks than permitted by Rule 17 of COSTA.<br><br><b>Finding: Breach</b> |

## Fairness and Privacy Cases

### Not Upheld

#### Complaint by Mr Mark Groves

*Cowboy Builders, Channel 5, 27 October 2010*

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**Summary:** Ofcom has not upheld this complaint of unjust or unfair treatment made by Mr Mark Groves.

*Cowboy Builders* is a programme that seeks to expose builders who leave works incomplete or defective. This edition focused on a builder called Mr Mark Groves. At the beginning of the programme the presenter Mr Dominic Littlewood said that he had tried to interview Mr Groves for a previous series but that Mr Groves had refused to speak to him. Mr Groves had written to him and stated that the only people who were unhappy with his work were those featured on the programme. Mr Littlewood said that he had since met someone else *“whose life has been wrecked by this cowboy”*. Mr Littlewood said that when he heard the name again his *“stomach turned”* because *“he destroys people’s houses, he destroys people’s lives”*.

The programme visited the homes of: Ms Jackie Smith, who contracted with Mr Groves to build an extension to her home (the programme also referred to another builder from a different company, Mr Brendan Mitchell, who subsequently carried out some works to the foundations of Ms Smith’s home); Mr and Mrs Warwick, who had hired Mr Groves to perform structural work; and, Ms Julie Morgan, who had hired Mr Groves in 2005 to modernise and extend her house. The programme also interviewed Mr Kevin Tatum who claimed that Mr Groves had appointed him as a Director of a company.

Fullagar Brooks Millikin Solicitors (“FBM”) complained to Ofcom on behalf of Mr Groves that he was treated unfairly in the programme as broadcast.

In summary, Ofcom found that:

- it was reasonable for the broadcaster to assert that Ms Smith had given Mr Groves money to build an extension to her house.
- the programme did not suggest that Mr Groves had a working relationship with Mr Mitchell at the time of the building works carried out on Ms Smith’s home.
- the programme makers had taken reasonable steps in presenting the material facts regarding Ms Morgan’s building works and that the programme was fair in its presentation of this issue.
- it was reasonable for the broadcaster to suggest that Mr Groves was responsible for Ms Morgan’s building works.
- because Mr Groves did not make the broadcaster aware of his contention that another Director of the building company with which he was involved Kingswood (Mr Roberts) was responsible for Ms Morgan’s building works, and Mr Groves had sought to respond to the substantive allegations about the sub-standard nature of these works, that it was reasonable for the broadcaster not to include any reference to Mr Roberts.

## Introduction

On 27 October 2010, Channel 5 broadcast an edition of *Cowboy Builders*, a programme which seeks to expose builders who leave works incomplete or defective. This edition focused on a builder called Mr Mark Groves.

At the beginning of the programme the presenter Mr Dominic Littlewood said that he had tried to interview Mr Groves for a previous series but that Mr Groves had refused to speak to him. Mr Groves had written to him and stated that the only people who were unhappy with his work were those featured on the programme. Mr Littlewood said that he had since met someone else *“whose life has been wrecked by this cowboy”*. Mr Littlewood said that when he heard the name again his *“stomach turned”* because *“he destroys people’s houses, he destroys people’s lives”*.

Mr Littlewood and co-presenter Ms Sheree Murphy then visited Ms Jackie Smith’s home, where Mr Groves had been due to build an extension. Mr Littlewood said:

*“After satisfactorily completing some major structural repairs to her existing property, he took 26 grand to build the extension. The problem was he took the money but never started the work”.*

As the presenters inspected the house, they saw that the windows and doors at the back of the house had been boarded up, leaving the house open to *“the elements”*.

After their visit, Mr Littlewood said:

*“I’ve had dealings with Mark Groves before – it’s a name I wouldn’t forget. This time I’ve got to make sure I get him and if possible, try to put him in prison because that’s where he belongs”.*

Mr Littlewood then investigated Mr Groves further and said that several more unhappy customers were surfacing. He visited Ms Julie Morgan, who had hired Mr Groves in 2005 to modernise and extend her house. The programme said that local building control found 10 faults with the property and Ms Morgan said that she was suffering from regular mice infestations. The programme included Mr Groves’ denial that he was responsible for the problems.

Mr Littlewood then visited the home of Mr and Mrs Warwick, who had hired Mr Groves to perform structural work. The programme said that Mr Groves did not complete the brickwork and that the house was still supported by bricks which the building authority no longer considered adequate. Mr Littlewood said:

*“I can see a disturbing pattern here, bodged ex-council houses and vulnerable people with limited means – coincidence? Guess the only way I’ll find out is to flush out Mr Groves and ask him in person”.*

Mr Littlewood said that Mr Groves used to run a company called Kingswood Group Limited (“Kingswood”), but that the money Ms Smith paid for her extension went to Lifestyle Design and Build (“Lifestyle”). He said that the Companies House website listed Lifestyle as liquidated, that Mr Groves’ name did not appear and that Mr Kevin Tatum was listed as a Director. Mr Tatum agreed to meet with Mr Littlewood to discuss Lifestyle and said that he was aware that Ms Smith’s extension was not completed. He said that a year earlier he was working as a bricklayer for Mr Groves, who had asked him to become a director of a company. The programme then said:

*“Groves was banned from running a business for one year after he was made bankrupt in May 2008. But by using Kevin as a front man he was able to continue and when things started going pear-shaped, Kevin Tatum was left carrying the can”.*

The programme said that Mr Groves had claimed that Mr Tatum ran the business and that he was an employee who Mr Tatum had sacked before the company went into liquidation. Mr Tatum said that he was now on the brink of personal bankruptcy.

Back at Ms Smith’s house the programme makers had arranged for a building team to complete the unfinished work. During this work it was discovered that the main house did not have any foundations at one of its corners. The presenters said that responsibility for this lay not with Mr Groves but with a *“second builder”* that Ms Smith had hired, Mr Brendan Mitchell.

The programme makers then doorstepped Mr Groves and, after he had agreed to speak to Mr Littlewood, he said that the agreement with Ms Smith was for him to build an extension at the back of her house and that this was *“signed off by the engineer”*. Mr Littlewood then said:

*“Groves claims he and Jackie were close and she lent him 26 grand as a favour”.*

Mr Littlewood produced a letter signed by Mr Groves that detailed the agreement for building works with Ms Smith. Mr Groves accepted that he had signed the letter but maintained that the money was a personal loan. Mr Groves refuted the allegation that he targeted vulnerable people and asserted that Kingswood had built 400 houses.

Mr Littlewood then asked whether Mr Groves had used Mr Tatum as a front for Lifestyle, which Mr Groves denied. As Mr Groves walked away, Mr Littlewood said:

*“Mark Groves: do not forget that face because you will end up getting seriously, seriously affected by him. Your life and your house will be ruined...Groves later wrote to me saying past difficulties and the recession had lost him everything and is now just an employee. He claims he didn’t ruin Kevin Tatum’s life and says five out of Ms Smith’s 26 grand went to Lifestyle, not him. He also sent a letter from a former employee saying he had never heard a bad word said about Kingswood. Groves said he is hampered by not having access to all the documents but now claims the receipt I showed him was a fake he’d written at Jackie’s request to show her father. He claims Jackie agreed to delay starting her extension while he did another job but then decided to use another builder, preventing him from doing the work. He also claims he didn’t know how seriously ill Liz [the person for whom Ms Smith intended to live in the extension] was or that Jackie planned to care for her in the new extension. At Julie Morgan’s house, he told me there were no serious defects. He says he never saw a list of problems but would have fixed them only Jackie couldn’t afford to pay. Groves says Cath and Bill Warwick were happy with his building methods and claims he used a legitimate technique so there would be no problem selling the house. He cites the fact that an independent engineer signed off both jobs as proof they were done correctly, but I’ve seen the work with my own eyes and I know it wasn’t right”.*

Fullagar Brooks Millikin Solicitors (“FBM”) complained to Ofcom on behalf of Mr Groves that he was treated unfairly in the programme as broadcast.

## The Complaint

In summary, FMB complained that Mr Groves was treated unfairly in the programme as broadcast in that:

- a) It was wrongly and unfairly alleged that he had taken Ms Smith's money to carry out extension works which he never started.

Mr Groves said that the money was a personal loan, given to him five months before the planning application, which demonstrated that the money and the building works were not connected. He also said that he was in a relationship with Ms Smith which would have supported his assertion that the money was a loan but the programme failed to mention this, merely stating that they were "close".

- b) It wrongly and unfairly stated that:

- Mr Groves and Mr Mitchell had a working relationship at the time of Ms Smith's build.
- Ms Morgan could not get a mortgage because of the work Mr Groves had done, when, in fact, it was because Ms Morgan could not get a mortgage that building work had to stop.

- c) It unfairly omitted the material fact that Mr Paul Roberts, another Director of Kingswood, was responsible for both Ms Morgan's and Mr and Mrs Warwick's construction, not Mr Groves.

## Channel 5's response

- a) In response to Mr Grove's complaint that the programme wrongly and unfairly alleged that he had taken Ms Smith's money to carry out extension works which he never started, in summary, Channel 5 said that the programme contained an accurate portrayal of the circumstances surrounding the payment of £26,000 to Mr Groves by Ms Smith. It also fairly reflected Mr Groves' own version of events (namely that it was a personal loan lent before work commenced when Ms Smith did not even have planning permission and Ms Smith and Mr Groves were close i.e. their relationship was one that was closer than the average builder and client). This was in spite of the fact that Mr Groves gave Channel 5 no evidence to support his claims while there was clear evidence to support Ms Smith's version of events, including a receipt from Mr Groves for £26,000 and a witness statement given by Mr Groves himself in court confirming that at least £21,000 from the £26,000 was intended to be deducted from the price of the extension.

Channel 5 said that, furthermore, when completing the prior, structural works to Ms Smith's house in June 2008, Mr Groves left the back of the house unfinished and unsealed because he was going to build the extension a date in the near future. Channel 5 said that it is difficult to believe that Ms Smith, a single mother with 4 children, would choose to leave her property insecure and unsealed in order to spend the money she had raised for home improvement on anything other than building the extension.

Channel 5 said that Ms Smith is clear that she paid Ms Groves £26,000 as a deposit for an extension to her property. Channel 5 said that Ms Smith paid £20,000 in two tranches initially (because the bank would not allow her to transfer £20,000 in one payment) and then two further payments of £1,000 and £5,000 on Mr Groves' request because he needed additional funds for the build. The first

three payments totaling £21,000 were made to Jack Groves because Mr Groves was bankrupt at the time and Mr Groves told Ms Smith that Lifestyle Design and Build Limited ("LDBL"), the company that would contract to build the extension, was a new company and, therefore, did not yet have a bank account. The first three payments were made on the following dates: £10,000 on 15 August 2008, £10,000 on 20 August 2008, and £1,000 on 20 October 2008. The final £5,000 payment was made to LDBL in January 2009.

To be in a position to make these payments, Ms Smith had to take out a loan of £26,000, the reason for which was "home improvements". Channel 5 said that this supported Ms Smith's assertion that the £26,000 was a deposit for the extension.

Channel 5 said that following receipt of the above four payments, Mr Groves provided Ms Smith with a letter confirming that £26,000 had been paid in advance for building works at her home.

Channel 5 said that, although Mr Groves did not start work on the extension, he instructed Kevin Turner of Archway Design to visit Ms Smith's property, draw up plans for the extension, and act as agent in respect of the planning application.

Channel 5 said that in a letter dated 27 June 2008 Mr Turner confirmed that he had visited Ms Smith's property on 5 June 2008 (i.e. prior to Ms Smith's payment of the deposit for the extension), prepared an architectural survey drawing and a preliminary drawing, and had written to Woking Borough Council. Mr Turner set out his fee for the project, estimated at £1,500 plus VAT, to include work completed already and also further work such as preparing drawings and construction notices for the Planning and Building Regulation applications and acting as an agent for the applications. Channel 5 said that Mr Turner's letter makes clear that he was working for Mr Groves direct and that his invoice would be issued to Kingswood Limited for settlement (not to Ms Smith). Channel 5 said that this proves that Mr Groves was clearly intending to build the extension and had already incurred costs in respect of the extension prior to Ms Smith's payment of the deposit. Channel 5 said that Jack Groves' bank statement shows that £1,796.67 was to Mr Turner from the money transferred by Ms Smith on 22 August 2008 in settlement of his fee.

Channel 5 said that planning permission was then applied for by Mr Turner. It said that as part of this application, a cheque from LDBL was submitted to cover the Local Authority Fee of £150. Channel 5 said that this is a further cost incurred by Mr Groves in respect of the extension.

Channel 5 said that planning permission was granted on 9 January 2009. However, Mr Groves did not return to the property to start work on the extension. According to Mr Groves, the works did not commence because Ms Smith told LDBL that she did not want them to do the work. Channel 5 said that this is denied by Ms Smith; however, Mr Groves' response in this regard was included in the programme at 10:50:26.

Channel 5 said that Ms Smith subsequently issued proceedings against Jack Groves to recover the £21,000 paid into his bank account as a deposit for the extension. Ms Smith was advised by her solicitors to issue proceedings against Jack Groves as opposed to Mark Groves as Jack Groves was the trustee of the money. By this time, LDBL had gone into administration so Ms Smith was unable

to pursue the additional £5,000 from LDBL. Ms Smith's claim against Jack Groves was successful and she was awarded £21,000 damages and costs.

Channel 5 said that Mr Groves then stated that at around the same time (i.e. August or September 2008) the director of Kingswood closed down the company leaving him without a job. Mr Groves said he wanted to help a business contact start up a new business, LDBL, but needed to pay subcontractors for previous work they had carried out for his previous business before they would agree to work with LDBL. Mr Groves' statement then said that Ms Smith offered to help, initially by lending him £20,000, then a further £1,000 on the same terms.

Channel 5 said that Ms Smith denies that these payments were made to help Mr Groves to pay off subcontractors. Furthermore, Mr Groves' statement to this effect contradicts the letters from his solicitors to Ricochet dated 18 December 2009 and 16 April 2010 in which his solicitors state that the initial loan of £20,000 was "to help him out as he was attempting to save his house at the time" and £26,000 was a loan "a small gift to assist him trying to sort out his personal affairs". Channel 5 said that Ms Smith also denies that the payment was made for these reasons; the payment was made as a deposit for her extension.

Channel 5 said that Mr Groves' statement regarding the payment of £1,000 (i.e. that Ms Smith paid this sum to Jack Groves without Mr Groves asking for it, following Mr Groves telling Ms Smith he had spent the £20,000 and was "about £1,000 short of what I had actually needed") also contradicts his explanation in his solicitors' letter of 16 April 2010. Channel 5 said that in this letter, Mr Groves' solicitors explained that the £1,000 was a gift for Christmas presents and that he did not even know about the gift until "some time later". Channel 5 said that the withdrawals in the seven days that followed the £1,000 payment suggest Mr Groves did know about this payment as they are all detailed as "cash for father" or words to that effect.

Channel 5 said that, most importantly, in his witness statement Mr Groves clearly sets out the basis upon which the payment was made, namely:

*"The terms agreed were that she [Ms Smith] would contract LDBL to build the extension and £20,000 would be deducted from the price (which I had previously estimated at £45,000). ... Although nothing was discussed regarding the repayment of the £1,000 ... I considered the £1,000 to be a loan on the same terms as the £20,000 she had already advanced me."*

Channel 5 said that, therefore, the money was clearly paid as a deposit against building works (regardless of whether it was advanced by Ms Smith to assist with LDBL or for any other reason given by Mr Groves in his solicitors' correspondence with Ricochet prior to transmission, all of which Ms Smith deny in any event). Channel 5 said that there is also a suggestion of this in Mr Groves' solicitors' letter to Ricochet of 16 April 2010, which stated: "in fact the only connection with the extension is that some of the monies might have been repaid by a discount of free labour provided by Mr Groves when he built the extension".

Channel 5 said that, according to his statement, Mr Groves then arranged with his son and Ms Smith for this sum to be paid into Jack Groves' account and after Jack Groves wrote out the first cheque for Mr Groves, gave Mr Groves the cheque book so he could write cheques out in Jack Groves' name himself.



Channel 5 said that Mr Groves then goes on to explain in his statement that Ms Smith subsequently paid a further £5,000 to LDBL's account to finance the start of another job. Mr Groves' solicitors' letter to Ricochet of 16 April 2010 also pointed out that this amount was paid to LDBL. Channel 5 said that this response was included in the programme as broadcast.

Channel 5 said that Ms Smith's solicitors subsequently wrote to Mr Groves asking him to repay the £26,000 deposit. Channel 5 said that this letter inaccurately stated that £20,000 was paid to Jack Groves and £6,000 was paid to LDBL. LDBL's solicitors at the time responded suggesting that their clients start work on 23 March 2009 or that Mr Groves and LDBL would repay the monies via monthly installments. Channel 5 said that, although this letter does not explicitly recognize that the £26,000 was a deposit for the extension, this is the implication. Channel 5 said that by this time, Ms Smith had lost her confidence in Mr Groves. It said that he had taken a deposit for the extension but had not started work and she had also seen the Series 1 Programme. Channel 5 said that she therefore decided to commence proceedings against Jack Groves to recover the payments made to Jack Groves as trustee because she did not believe that LDBL would carry out the work or that Mr Groves and LDBL would repay the deposit.

Channel 5 said that it is clear from the evidence detailed above that the payment of £26,000 was a deposit for an extension to Ms Smith's property, which was never built by Mr Groves. In their final letter to Mr Groves' solicitors of 25 May 2010, Ricochet referred to Mr Groves' witness statement supporting Ms Smith's view that the payment was to be treated as a deposit for the extension. Channel 5 said that no response was ever received to this letter.

- b) In response to head b) of Mr Groves complaint that the programme wrongly and unfairly stated that the facts set out in bullet points below, Channel 5, in summary, said:

- Mr Groves and Mr Mitchell had a working relationship at the time of Ms Smith's build.

Channel 5 said that the programme does not state that Mr Groves and Mr Mitchell had a working relationship at the time of Ms Smith's build.

Instead, Channel 5 said that the programme refers to Mr Mitchell writing to Ms Smith offering to help with her dispute with Mr Groves and saying that he knows Mr Groves is a maverick who rips people off. Mr Mitchell of course subsequently commenced work on the extension and was responsible for the inadequate foundations uncovered on the programme.

Channel 5 said that the programme simply states that the two used to be business partners (in respect of Kingswood Group) and then makes it absolutely clear their relationship is historic. Channel 5 said that there is no suggestion that Mr Mitchell was involved in LDBL, which the programme makes clear was the company Mr Groves was trading as when he took the deposit for Ms Smith's extension.

- Ms Morgan could not get a mortgage because of the work Mr Groves had done, when in fact, it was because Ms Morgan could not get a mortgage (for reasons unrelated to the work by Mr Groves) that building work had to stop.

Channel 5 said that Ms Morgan had an agreement for a mortgage in place and although she was ultimately unable to obtain this mortgage (because works started at her property before her mortgage provider's surveyor had had an opportunity to value her home), works did not cease because the mortgage fell through and had her mortgage not fallen through because the surveyor refused to value her property, she would have been unable to obtain the mortgage on the basis of the work completed by Mr Groves because it was of a poor standard and unfinished. Channel 5 said that Ms Morgan was later able to obtain a mortgage to enable her to pay another contractor to finish the work, but had to spend much of these funds pursuing arbitration proceedings against Mr Groves.

Channel 5 said that, although a PRC certificate was issued confirming works were complete, Ms Morgan was unhappy from the outset with the standard of works completed by Mr Groves and, when Building Control carried out a routine inspection of the property following the PRC completion certificate having been issued, they discovered a number of more serious problems with the work, as explained in the programme.

Channel 5 said that this inspection should have taken place before the PRC completion certificate was issued, if this had happened, Building Control would not have signed off on the works and a certificate could not have been issued. Because the work was substandard and unfinished, Ms Morgan would not therefore have been able to obtain her mortgage at the time Mr Groves was demanding payment.

Channel 5 said that, in addition, the fact that a PRC completion certificate was issued (albeit wrongly) contradicts Mr Groves' assertion that work had to be stopped due to Ms Morgan's lack of funds. Channel 5 said that although he was incorrect in this regard, he clearly considered the work to be complete.

The programme aimed to simplify this element of Ms Morgan's story: her main complaint against Mr Groves was that his work was incomplete and of a poor standard and, as a result, her living conditions were poor. It said that, to this end, the programme stated that Ms Morgan had been unable to obtain a mortgage because the house was unfinished.

- c) In response to head c) of Mr Groves' complaint that the programme unfairly omitted the material fact that Mr Paul Roberts, another Director of Kingswood, was responsible for both Ms Morgan's and the Warwick's construction, Channel 5, in summary said that:

- Mr Groves had provided no documentation to evidence this claim;
- Mr Groves clearly was responsible for the works at Ms Morgan's and the Warwick's property;
- Mr Roberts was not a director of the company at the time during the works to Ms Morgan's home and never a director of the company contracted to carry out the Warwick's build;
- prior to his complaint to Ofcom, Mr Groves has not suggested to Ricochet or Channel 5 that Mr Roberts was responsible for the work at the Warwicks' property; and
- it was clear from Mr Groves' solicitors correspondence that Mr Groves was responsible for the building works of the respective companies.

Channel 5 said that Ms Morgan was clear that Mr Groves was responsible for the work at her property. Channel 5 said that Mr Groves was a director of Kingswood Group Ltd and, therefore, was responsible for the work carried out by that company. Ms Morgan also denies that Mr Roberts had an involvement in the works at her property.

Channel 5 said that the first time that it had been informed by Mr Groves that he believed he was not responsible for these works was in his complaint to Ofcom. Channel 5 said that this was not raised in correspondence prior to transmission, not even in response to the programme maker's letter of 11 March 2010 which set out a list of the allegations to be included in the programme together with the responses from Mr Groves from his solicitors' correspondence with Ricochet and Mr Groves' filmed interview with Mr Littlewood that Ricochet intended to include in the programme and offering Mr Groves a final opportunity to provide any additional responses (no response was received), nor was it raised during Mr Groves' filmed interview with Mr Littlewood during which this job was discussed.

Channel 5 said that, instead, prior to transmission, Mr Groves clearly accepted that he had carried out work at Ms Morgan's property (but denied that it was problematic):

- In his solicitors' letter of 16 April 2010, Mr Groves denied that his work was responsible for the regular infestations.
- In his solicitors' letters of 18 December 2009 and 16 April 2010, Mr Groves said there were no serious defects at Ms Morgan's house, had no knowledge of any issues other than those dealt with in the letter and these had never been raised with him, and he had never seen a list of faults.

Channel 5 said that these responses were all included in the programme as broadcast. It said that, therefore, the programme was fair to Mr Groves and fairly represented the responses he had provided prior to transmission.

Channel 5 said that, in addition to the above showing that Mr Groves clearly was responsible for the works at Ms Morgan's property, Mr Groves gave a witness statement as part of the arbitration proceedings commenced by Ms Morgan which were never concluded because Kingswood Group Ltd went into administration. In this statement Mr Groves stated that he was a director of the company and from the content of the statement, he clearly had an in depth knowledge of the works completed. Channel 5 said that Mr Roberts did not give evidence in these proceedings. It said that, furthermore, Mr Groves personally ordered materials for the build, which also confirms that Mr Groves was clearly heavily involved in works at Ms Morgan's property.

Channel 5 said that, finally, although Mr Roberts was a director of Kingswood, he was director for six months in 2007/2008. It said that work was undertaken at Ms Morgan's property in 2005, therefore, Mr Roberts was not a director of the company at the time in any event.

Channel 5 said that, prior to his complaint to Ofcom, Mr Groves has not suggested to Ricochet or Channel 5 that Mr Roberts was responsible for the work at the Warwicks' property. It said that Mr and Mrs Warwick were also clear that Mr Groves was responsible for the work at their property and deny that Mr Roberts had any involvement in works at their property: until now, they had never heard of Mr Roberts.

Channel 5 said that Companies House records show that Mr Roberts was never a director of Kingswood PRC Limited (the company that contracted to do the work at the Warwick's property).

Channel 5 said that in his solicitors' letter to Ricochet of 18 December 2009, Mr Groves did say that he was not a shareholder or director of Kingswood PRC Limited (the company contracted for the works) and that he did not carry out any works personally at the property (although he made no reference to Mr Roberts in this letter or elsewhere in correspondence). Channel 5 said that the letter then went on to state that the building method referred to in the programme was legitimate and that the Warwicks would therefore have no difficulty in selling their property as a result of this work.

Channel 5 said that Ricochet's response explained that Mr Groves was effectively controlling Kingswood PRC and, therefore, acting as a director (although he was not a named director and could not be as he was banned from being a director of a limited liability company having been made personally bankrupt on 15 May 2008). The information available at Companies House suggests that Kingswood PRC Limited was effectively a reincarnation of Kingswood Group Limited, of which Mr Groves was a director. In particular, a report to the creditors of Kingswood Group Limited on the progress of the administration of the company dated 20 June 2008 contains details of the sale of Kingswood Group Limited's work in progress/benefit of contracts, goodwill, and chattel assets to "*Kingswood PRC Limited a company run by Brendan Mitchell and Mark Groves*". Channel 5 said this shows that Mr Groves was so involved in the running of Kingswood PRC Limited that the creditors of his previous company, Kingswood Group Limited, believed him to be "running" Kingswood PRC Limited. It said that the details contained in Mr Groves' solicitors' letter of 18 December 2009 clearly showed that Mr Groves was aware of the intricacies of the project and, as is stated above, regardless of whether Mr Groves carried out work at the property, the Warwicks maintain that he was responsible for the works.

Channel 5 said that Mr Groves' solicitors denied that he controlled Kingswood PRC Limited, saying Mark Smith (not Paul Roberts) ran the company, but admitted that Mr Groves "*ran the building side of the company*". In addition the letter stated: "*we think it is right that he did have responsibility for the works*". Channel 5 said that this further confirms our view that Mr Groves was responsible for the works at the Warwicks' property.

Channel 5 said that in their letter of 16 April 2010, Mr Groves' solicitors seem to have dropped the suggestion that Mr Groves was not responsible for the works at the Warwicks and said there was a minor issue with some cement which Mr Groves attended to. Channel 5 said that this letter was sent in response to Ricochet's letter of 11 March 2010 giving Mr Groves a final right to respond to the allegations contained in the letter and also setting out the responses given so far by Mr Groves that would be included in the programme. Channel 5 said that it is surprising that Mr Groves did not take this opportunity to inform Ricochet that Mr Roberts was responsible for these works at this stage and has only raised it now in his complaint to Ofcom.

Channel 5 said in summary that prior to his complaint to Ofcom, Mr Groves did not claim that Mr Roberts was responsible for the works at Ms Morgan's and the Warwicks' properties and there is no evidence to suggest that Mr Groves himself was not responsible for these works.

## Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision, Ofcom considered all the relevant material provided by both parties. This included a recording of the programme as broadcast and transcript, both parties' written submissions and their supporting materials.

When considering complaints of unfair treatment, Ofcom has regard to whether the broadcaster's actions ensured that the programme as broadcast avoided unjust or unfair treatment of individuals and organisations, as set out in Rule 7.1 of the Code.

- a) Ofcom first considered the complaint that the programme wrongly and unfairly alleged that he had taken Ms Smith's money to carry put extension works which he never started.

In doing so, Ofcom had regard to Practice 7.9 before broadcasting a factual programme, including programmes examining past events, broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to an individual or organisation.

Ofcom first assessed what the specific allegation included in the programme related to this issue. It noted in particular the following excerpt:

Mr Littlewood: *"[...] she then gave him 26 grand as a deposit to start the extension. Groves removed the windows and doors off the back of the property in preparation but work never started. Months went by with Jacqui's house entirely open to the elements..."*

Ms Murphy: *"Did he ever give you any of the money back or did he ever come back and do any work?"*

Ms Smith: *"No, no, he never came back near the place, just never got a penny."*

Mr Littlewood: *"Mark Groves who took 26 grand of Jacqui's money and didn't build her an extension."*

Ofcom took the view that the allegation was that Mr Groves had taken £26,000 from his client, Ms Smith, for extension works to be carried out and that he failed to then carry out these works. Ofcom noted that neither party disputed that Mr Groves did not start work on Ms Smith's extension. Ofcom was therefore left to assess what evidence the broadcasters had before stating that Ms Smith had given Mr Groves £26,000 for the extension and not lent it to him.

Having considered what that specific allegation against Mr Groves, Ofcom then examined whether the broadcaster had taken reasonable care when presenting it.

Ofcom noted that the broadcasters had sight of a receipt from Lifestyle Design and Build Limited ("LDBL") for £26,000. It was dated 6 January 2009 and said: "Please find below the figure already paid in advanced [sic] for building works...A total of £26,000 already paid". It was signed by Mr Groves and he confirmed, on camera, that it was his signature and that he recognised this receipt. However, Ofcom noted that Mr Groves' subsequently said that the receipt was a fake that he had written at Ms Smith's request to show her father. Ofcom noted that this assertion was included in the programme.

The broadcaster also had Ms Smith's payment details, namely the amounts that she paid and the dates she paid them. Ofcom noted in particular the final payment which was made to LDBL in January 2009 - the same organisation that was detailed on Ms Smith's receipt. Ofcom noted that Mr Groves sub-contracted the job to Archway Design ("Archway") to draw up plans for the extension and act as an agent in respect of the planning application. In this process Archway in June 2008 (i.e. pre-dating all of Ms Smith's payments) visited Ms Smith's property, prepared an architectural survey and a preliminary drawing and had written to Woking Borough Council. Ofcom noted that Archway's invoice was sent to Kingswood Limited – Mr Groves' company and that Mr Groves' son had paid the Archway invoice one week after he had received Ms Smith's first payment. Ofcom also noted that Archway then applied for planning permission, which LDBL paid for.

Ofcom then noted that Ms Smith had taken legal action against Mr Groves' son (because he was the trustee of the money). Ofcom took into account Mr Groves' witness statement dated 23 March 2010 and the oral testimony he gave in Court on 14 May 2010. Ofcom noted that in his witness statement Mr Groves said that £20,000 would be deducted from the price of the extension.

Ofcom noted one further piece of evidence that became available after the broadcast of the programme. It was a letter dated 6 April 2011 from Ms Smith's loan provider confirming that on 13 August 2008 (two days before Ms Smith made her first payment) Ms Smith was given a loan of £25,000 and the purpose of the loan was for "home improvement".

Ofcom took the view that the cumulative effect of these pieces of evidence (namely:

- a receipt for building works in exchange for £26,000, signed by the complainant and addressed to Ms Smith;
- details of payments made by Ms Smith (when the payments were made and what amounts);
- evidence that Mr Groves' company had commissioned an architectural survey to be made;
- evidence that Mr Groves' company paid for a planning permission application;
- the evidence Mr Groves' himself gave to court stating that Ms Smith paid £20,000 for an extension; and
- confirmation from Ms Smith's loan provider that the purpose of the loan was stated as being for "home improvement")

formed a compelling case that Ms Smith had given money to Mr Groves for an extension to be built.

Taking into account all of the above detailed sources of information the broadcaster had in relation to the material fact that Ms Smith had given Mr Groves the money for extension works, Ofcom found that the broadcaster had taken reasonable steps in satisfying itself that the material fact was presented fairly.

Ofcom therefore found no unfairness in this regard.

- b) Ofcom then considered the complaint that the programme wrongly and unfairly stated the material facts detailed in the bullet points below. In doing so, Ofcom again had regard to Practice 7.9 which states that before broadcasting a factual programme, including programmes examining past events, broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to an individual or organisation.

- Mr Groves and Mr Mitchell had a working relationship at the time of Ms Smith's build.

Ofcom first assessed how the programme presented material facts pertaining to the relationship between Mr Groves and Mr Mitchell. Ofcom noted that Mr Littlewood said that he was "*convinced*" the two were "*linked*" because of how much Mr Mitchell knew about Mr Groves. Mr Littlewood then uncovered a photograph, dated 8 June 2007, which had both Mr Groves and Mr Mitchell on it who were both named as working at "Kingswood". Mr Littlewood then said, "*Turns out Groves and Mitchell used to be business partners.*" Ofcom then noted that the programme, when interviewing Mr Mitchell, asked him about his relationship with Mr Groves. The relevant excerpt of the interview was:

Mr Littlewood: "*Are you still friends with Mark Groves?*"

Mr Mitchell: "*No, I haven't spoken to Mark Groves for, in, a year and a half I suppose.*"

Mr Littlewood: "*Why's that.*"

Mr Mitchell: "*Um, we don't get on too well. Mark knows I was very disappointed having um, well, Kingswood, Kingswood Group and Kingswood Construction were placed in to administration, you're probably aware of that, um, it was really only at that point, um, that err, I became aware of the substandard nature of the works that were going on inside. I'm not very happy with regard to the work carried out.*"

Ofcom therefore took the view that it was clear from the programme that Mr Mitchell and Mr Groves did not have a working relationship since Kingswood had ceased trading. It further considered that the programme made clear that the company which Ms Smith dealt with for her extension was LDBL and this company was set up subsequent to when Kingswood ceased trading. In particular, it noted that the programme stated:

*"I know [...] that Groves used to run a company called "Kingswood Group Limited" but when he took Jackie Smith's money for the extension, he was trading as "Lifestyle design and build.""*

Having considered these excerpts of the programme, Ofcom took the view that because the programme made clear that Ms Smith's build was carried out but by LDBL and because Mr Groves and Mr Mitchell had stopped working together since Kingswood had gone into administration, the programme did not suggest that Mr Mitchell and Mr Groves had a working relationship at the time of Ms Smith's build. Consequently, Ofcom considered that the broadcaster had not presented the material facts regarding the relationship between Mr Groves and Mr Mitchell unfairly.

- Ms Morgan could not get a mortgage because of the work Mr Groves had done, when in fact, it was because Ms Morgan could not get a mortgage (for reasons unrelated to the work by Mr Groves) that building work had to stop.

In accordance with Practice 7.9, Ofcom first considered how this issue was presented in the programme. It noted that the programme said that Mr Groves had given Ms Morgan a certificate stating that the work was complete and that he gave her a bill of £42,000. The programme then said that the work carried out by Mr Groves was, in actual fact, unfinished and that because of this Ms Morgan was unable to obtain the mortgage she had intended to use to pay for the building works.

Having considered what material facts were presented by the programme in this regard, Ofcom went on to consider what steps the broadcaster took when presenting them.

Ofcom took into account the "Certificate of Completion" supplied by Channel 5 which stated that work carried out by "Kingswood Constructions Ltd" on Ms Morgan's house in 2005 was completed. Ofcom considered that this certificate, ostensibly provided by Mr Groves to Ms Morgan, contradicted his assertion that he 'had to stop' building work because Ms Morgan could not pay him.

Ofcom noted Channel 5's assertion that once Mr Groves had stopped working on Ms Morgan's flat and provided Ms Morgan with the "Certificate of Completion" Ms Morgan's mortgage provider's surveyor refused to value the property because of the incomplete works.

Ofcom also noted that the programme makers had visited Ms Morgan's home, filmed the parts of the house that Mr Groves had worked on and interviewed Ms Morgan about her experience of Mr Groves.

In addition, Ofcom noted that the programme included a summary of Mr Groves' position as regards Ms Morgan's home, namely, *"At Julie Morgan's house, he told me there were no serious defects. He says he never saw a list of problems, but would have fixed them only Julie couldn't afford to pay."*

Taking these factors into account, Ofcom considered that the programme makers had taken reasonable steps in presenting the material facts regarding Ms Morgan's build and that the programme was fair in its presentation of this issue.

- c) Ofcom then considered the complaint that the programme omitted that Mr Paul Roberts, another Director of Kingswood, was responsible for both Ms Morgan's



and Mr and Mrs Warwick's construction, not Mr Groves. In doing so, Ofcom again had regard to Practice 7.9 before broadcasting a factual programme, including programmes examining past events, broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to an individual or organisation.

Ofcom first noted that the programme did not refer to Mr Paul Roberts (either by name or by referring to him as another Director of Kingswood). In light of this, Ofcom was then considered whether the broadcaster had taken reasonable care in omitting Mr Roberts' name from the programme.

Ofcom considered that, given that this assertion (i.e. that Mr Roberts was responsible for the works being carried out) was made by Mr Groves in his complaint, Ofcom examined when Mr Groves first made this assertion and what information the broadcaster had about this assertion prior to broadcast.

Ofcom noted that the broadcaster had provided Mr Groves with a list of allegations that were due to be in the programme on 16 November 2009. Ofcom noted in particular that this letter included details of Ms Morgan's and the Warwick's grievances with the standard of Mr Groves' work. Ofcom noted that the programme makers, having received no response, chased up Mr Groves to try and get a response. On 18 December 2009, Mr Groves' solicitors responded to the programme makers. This response dealt with both Ms Morgan and Mr and Mrs Warwick.

As regards Ms Morgan, Ofcom noted in particular the following excerpts:

"In the last week of the build Ms Morgan informed Mr Groves that she had been unable to arrange finance."

"Mr Groves arranged for Thurrock Borough Council and an arbitrator to attend the property because he wanted Kingswood Group to get paid for the works they had carried out."

"I understand that Mr Groves actually offered to change the windows".

"Mr Groves has no knowledge of any other issues and these have never previously been raised with him. Effectively Ms Morgan has had a £45,000 worth of PRC works done to her house and has never paid for it. It is completely astonishing that this should be a cause for complaint."

Ofcom noted that nowhere in this response was Mr Roberts mentioned. It also noted that this response stated that Mr Groves had performed a number of tasks in relation to Ms Morgan's building works, such as offering to change the windows and organizing for the local council and an arbitrator to visit her property.

On the basis of such responses, Ofcom took the view that it was reasonable for the programme makers to infer that Mr Groves was responsible for Ms Morgan's building works and that because no mention was made of Mr Roberts, that the broadcaster would have, in any event, been unable to include Mr Groves' assertion that it was Mr Roberts that was responsible for Ms Morgan's build in the programme.

As regards the Warwick family, Mr Groves' solicitors said that "the work to Mr and Mrs Warwick's property was carried out by Kingswood PRC and I point out that

Mr Groves was not a shareholder or director of that company. Further he did not carry out any work personally to Mr and Mrs Warwick's property." The response then goes on to discuss the work carried out on the property and stated that the Warwicks would have no difficulty in selling their property. It did not mention Mr Roberts. Regarding Mr Groves' responsibility, further information was given on 16 April 2010 by his solicitors, who said, "There was a minor issue with some cement which was requested to be put in at the top of some block work. Mr Groves attended to this, even though Kingswood was insolvent and legally he did not have to."

Ofcom noted that there was subsequent correspondence between the programme makers and Mr Groves' solicitors. Ofcom noted that Mr Groves' assertion that Mr Roberts was responsible was not included on any of his responses to the programme makers.

Ofcom took into account the broadcaster's submission that the assertion concerning Mr Roberts had only been brought to its attention as a result of Mr Groves' complaint to Ofcom.

In conclusion, Ofcom found that because Mr Groves did not make the broadcaster aware of his contention that Mr Roberts was responsible for these builds, and that Mr Groves had sought to respond to the substantive allegations about their sub-standard nature, the broadcaster took reasonable care in satisfying itself that the omission of Mr Roberts from the programme did not result in unfairness to Mr Groves.

Ofcom therefore found no unfairness in this regard.

**Accordingly, Ofcom has not upheld Mr Groves' complaint of unjust or unfair treatment in the programme as broadcast.**

## Not Upheld

### Complaint by Mr Brendan Mitchell

*Cowboy Builders, Channel 5, 27 October 2010*

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**Summary:** Ofcom has not upheld this complaint of unjust or unfair treatment made by Mr Brendan Mitchell.

This edition of *Cowboy Builders* – a programme which seeks to expose builders who leave works incomplete or defective – focused on Mr Mark Groves, a builder. The programme interviewed Mr Brendan Mitchell because of his previous work relationship with Mr Groves and because of his involvement in construction work at Ms Jackie Smith's home.

The programme's presenters visited the home of Ms Smith who had wanted to extend her three bedroom house. The extension was planned to have two bedrooms, and Ms Smith planned to house her friend, Liz, who was dying of cancer and Liz's two children. The programme makers arranged a building team to complete unfinished building work at the site. One of the programme presenters said that while the builders working for the programme were digging a drainage ditch they discovered that the main house did not have foundations under one of its corners. The programme said that responsibility for this lay with Mr Brendan Mitchell.

Mr Mitchell complained to Ofcom that he was treated unfairly in both programme as broadcast.

In summary, Ofcom found that:

- Mr Mitchell's interview with the programme makers was not unfairly edited.
- The programme did not unfairly present, disregard or omit any other material facts.

### Introduction

On 27 October 2010, Channel 5 broadcast an edition of *Cowboy Builders*, a programme which seeks to expose builders who leave works incomplete or defective presented by Mr Dominic Littlewood and Ms Sheree Murphy. This edition focused on a builder called Mr Mark Groves.

At the beginning of the programme, Mr Littlewood said that he had tried to interview Mr Groves in a previous series but Mr Groves had refused to speak to him. Instead, Mr Groves sent him a letter stating that the only people that were unhappy with his work were those who featured on the programme. Mr Littlewood said that he had since found that this was not true and that he had met someone else "*whose life has been wrecked by this cowboy*". Mr Littlewood said that when he heard the name (i.e. Mr Groves) again his "*stomach turned*" because "*he destroys people's houses, he destroys people's lives*".

The programme's presenters then visited the home of Ms Jackie Smith. Ms Smith had wanted to extend her three bedroom house. The extension would have two bedrooms, and Ms Smith planned to house her friend, Liz, who was dying of cancer and Liz's two children in the extension.

The extension was to be built by Mr Groves. The programme said that he did not complete these works, and Mr Brendan Mitchell (a builder from a different company) offered to help Ms Smith and carry out works to the foundations of her home.

Having noted Ms Smith's account of what had happened to her house, the programme makers had arranged a building team to complete the unfinished extension work. Ms Murphy said that whilst the builders were digging a drainage ditch it was discovered that the main house did not have foundations under one of its corners. The programme said that responsibility for this lay with Mr Mitchell.

The programme included footage of Mr Littlewood "door-stepping" Mr Mitchell at his home where his office was. Mr Littlewood first asked whether Mr Mitchell was still in contact with Mr Groves, to which Mr Littlewood said that he had broken off contact with Mr Groves when Kingswood Group Limited ("Kingswood"), a company that both were Directors of, had ended after he became aware of the sub-standard work Mr Groves was responsible for. When asked if he would pay back Ms Smith for the foundation work he was responsible for, Mr Mitchell said that if it was apparent that she had paid too much for the work carried out he would reimburse what was due to her. Mr Mitchell also said that he had used a sub-contractor for the work on Ms Smith's house.

As Mr Littlewood was leaving the house, he said to camera:

*"He [Mr Mitchell]'s doing alright living in a house like this. Let's see if he's a man of his word. He certainly gave me a chat which is fair enough. So I'm going to give him three weeks, let's see if he pays that money. Not holding my breath though."*

As Mr Littlewood investigated further into Mr Groves, he visited Ms Julie Morgan who had hired Mr Groves in 2005 to modernise her prefabricated house and add an extension. After Mr Groves had stopped working on the house, the programme said that local building control found 10 faults with the property including a badly supported window and missing insulation. Ms Morgan said that she was also suffering from mice infestations. The programme said that Mr Groves denied that the work he did was responsible for this.

Before the end credits to the programme, the following text appeared on screen:

*"To date neither Brendan Mitchell nor Mark Groves have paid Jackie [Smith] any money back. The companies investigated in the programme are no longer trading."*

Mr Mitchell complained to Ofcom that he was treated unfairly in both programme as broadcast.

### **The Complaint**

In summary, Mr Mitchell complained that he was treated unfairly in the programme as broadcast in that:

- a) His contribution during the interview was unfairly edited in that a number of material facts which Mr Mitchell had given during the course of it were omitted, namely:

- That he believed that the programme was being supported by Mr Paul Roberts of Landmark PRD, a former Director of Kingswood with Mr Groves.
- That the circumstances relating to the initial loan by Ms Smith and Mr Groves may not be as clear as Mr Littlewood presented as it was within his knowledge that the two were in a relationship.
- That the actual works on Ms Smith's house were carried out by Mr Brad Travis, a sub-contractor.
- Mr Mitchell had no working relationship with Mr Groves either at the time or at any point since the administration of Mr Groves's company, Kingswood.
- That the sub-contractor he used was also a principal contractor for Landmark PRC and this was unknown to him at the time.

b) The programme unfairly presented, disregarded or omitted that:

- Mr Mitchell was only a Director of Kingswood for a relatively short period and was not a Director when the works to the Morgan property were being carried out.
- Mr Paul Roberts, who at all material times was a Director of Kingswood, was not mentioned at all.
- Mr Littlewood made specific reference to Mr Mitchell's house. Mr Mitchell told him that he was renting the property privately and did not own it.

### **Channel 5's case**

In response to Mr Mitchell's complaint that his contribution was unfairly edited in that material facts (set out in the bullet points below) were omitted, Channel 5, responded as follows:

- He believed that the programme was being "supported by" Mr Paul Roberts of Landmark PRC, a former director of Kingswood with Mr Groves.

Channel 5 said that the programme was not "supported by" Mr Roberts as Mr Mitchell claimed. It said that although the programme makers had contacted Mr Roberts as part of their investigations into Mr Groves and Mr Mitchell, Mr Roberts did not contact the programme makers following transmission of the Series 1 Programme. Instead, the Series 3 programme came about after other customers of Mr Groves who were unhappy with his work came forward.

Channel 5 said that during his interview with Mr Littlewood, Mr Mitchell made a number of vague allegations about Mr Roberts, Mr Roberts' involvement with the work at Ms Smith's property, and "other agencies" being involved. These allegations were as follows (taken from the original recorded interview):

"We're aware of the Jacqui Smith scenario, erm, what you're not aware of is all the things that have gone on in the background and the fact that we have, err, I've gotta be very careful how I deal with this Dom because there's other agencies involved given that Jacqui Smith scenario. Erm, that you're probably not aware of... well, the situation is that the Jacqui Smith scenario is being led by Paul Roberts at Landmark PRC. A, err, another PRC contractor. Erm, who you've been dealing with. Erm, what you don't know is that the situation with Jacqui Smith was set from the outset. This was always going to be the case because you've got a relationship between Paul Roberts of Landmark PRC and Mark Groves of Kingswood Construction. Erm, Jacqui Smith, I'm not saying that that in itself is wrong, but Jacqui Smith has been led down the road by Paul Roberts to

involve yourselves because of your issues with another property in Taunton that your television company covered last year...”

“I am aware that this scenario with Mrs Smith has been driven by Paul Roberts of ex Landmark PRC. Course Landmark PRC, and this is the bit that probably won’t reach your viewers which is a real shame, but Landmark PRC has recently gone into liquidation. Prior to it going into liquidation it changed its name to Ready Made Rags, because that way, nobody could see that Landmark PRC had gone into liquidation and this has been set from the outset...”

“No, the builder fell out with Jacqui and fell out with me because he was looking to be engaged by Paul Roberts, the person behind all of this...”

“What I’m asking you to consider Dom, and this is where again I will be very careful because there are other agencies involved, is that the builder that took over the job at Jacqui Smith’s, who no doubt you will speak to or have spoken to, was then reengaged by Paul Roberts of Landmark PRC to carry out works at the adjoining property... We are not happy with what happened at the Jacqui Smith project, there are other agencies involved and we’ll wait to see whether that results in a criminal prosecution, that is certainly what we’re pushing for...”

“It would have been so much more helpful and so much more constructive if we’d had the opportunity of seeing this on site for ourselves when you were initially involved by Paul Roberts...”

“You are not the only people involved in all of this and there are some extremely serious issues with regard to this project, the adjoining property and many others that you need to be aware of it you will have the full picture... We will see where the other agencies go with it and that includes, it includes a potential criminal investigation, it certainly involves the health and safety executive and many other agencies and it’s for them to investigate, it’s not for me to point out things to you to obviously go and discuss with them...”

“It needs to be fair Dom, particularly with the points regard to Landmark, Paul Roberts because they are very important to the Jacqui Smith scenario and it is fundamental Dom that your viewers understand that Mr Roberts is behind it day one before I arrived at Jacqui’s house, Paul Roberts was dealing with Jacqui Smith...”

“It would have been nice if we’d had the opportunity when you’d opened the site to look at it particularly given the issues we’ve mentioned to you with regards to Paul Roberts, Landmark PRC and his involvement in this long before we arrived on site...”

“I don’t need anything further from you at this moment, what I do need to know is where we are with the other agencies involved”.

Channel 5 said that because Mr Mitchell’s comments in this regard during the interview were vague, unclear, and unsubstantiated, Mr Littlewood asked Mr Mitchell to confirm the above in writing. Channel 5 said that Mr Mitchell did not respond.

Channel 5 said that given Mr Mitchell’s insistence that Mr Roberts was involved and in spite of the fact there was no evidence to prove this to ensure the programme was fair to Mr Mitchell, the following line was included:

*“Mitchell also claimed there was a mysterious third contractor somehow involved which Jacqui completely denies.”*

Channel 5 said that the allegations made by Mr Mitchell about Mr Roberts during this interview were not included in the programme for a number of reasons. First, Channel 5 said that it was not clear from Mr Mitchell's comments what exactly he was trying to say. Secondly, Ms Smith categorically denied that Mr Roberts was in any way involved in her building works. Channel 5 said that Ms Smith had not heard of Mr Roberts until he carried out works to her neighbour's property after her neighbour independently found out about Mr Robert's company via a Google search. Channel 5 said that Ms Smith only became aware that a contractor called Mr Roberts was working next door after Mr Mitchell had stopped working on her property. Channel 5 said that Ms Smith is adamant that her involvement in the Series 3 Programme was entirely unconnected with Mr Roberts. Thirdly, Channel 5 said that Mr Mitchell provided no evidence to support the allegations against Mr Roberts that he was making. It said that the programme makers did their best to investigate the vague claims made by Mr Mitchell, but could find no evidence to suggest that Mr Roberts was involved in Ms Smith's build or that there were "other agencies" involved. Channel 5 said that, as a result of the above, the comments made by Mr Mitchell were not relevant to the allegations about Mr Mitchell included in the programme, namely that he was a cowboy builder who was responsible for the inadequate foundations at Ms Smith's property.

Channel 5 said that the allegations being made by Mr Mitchell were not only unclear and vague, but were also defamatory of Mr Roberts and, without any proof of their truth, Channel 5 were not willing to broadcast defamatory allegations about a third party who from the programme maker's thorough investigations appeared to be entirely unconnected with the allegations being made about Mr Mitchell in the programme.

- The sub-contractor he used was also a principal contractor for Landmark PRC and this was unknown to him at the time.

Channel 5 said that Mr Mitchell did not refer to this when interviewed by Mr Littlewood. Channel 5 said that, in fact, his comments during this interview suggested that the subcontractor was not engaged by Landmark PRC at the time, but was subsequently: he said the "builder" (i.e. the subcontractor he used) "was looking to be engaged by Paul Roberts" and that he "was then reengaged by Paul Roberts...to carry out the works at the adjoining property". Mr Mitchell also did not say that the subcontractor was a principal contractor for Landmark PRC during his first telephone conversation with the programme makers and they do not recall him referring to this during the second call.

Channel 5 said that, in any event, this piece of information is wholly irrelevant to the allegations made about Mr Mitchell in the programme. It said that, ultimately, he was responsible for Ms Smith's foundations which were dangerous. Channel 5 said that the programme makers have not uncovered any evidence as part of their investigations to suggest that the subcontractors engaged by Mr Mitchell were working for anyone else at the time.

- The circumstances relating to the initial loan by Ms Smith and Mr Groves may not be as clear as Mr Littlewood presented as it was within his knowledge that the two were in a relationship.

Channel 5 said that Mr Mitchell made reference to Mr Groves and Ms Smith being "intimately involved" this during his interview. It said that it did not consider this relevant to the allegations contained in the programme about Mr Mitchell. Channel 5 said that Ms Smith denied that she and Mr Groves were in a relationship and in any

event, the programme stated that according to Mr Groves, he and Ms Smith were “close”.

- The actual works on Ms Smith’s house were carried out by Mr Brad Travis, a sub-contractor.

Channel 5 said that although Mr Travis was not named in the programme, the programme contained reference to Mr Mitchell subcontracting the work and, therefore, the programme fairly reflected the response given by Mr Mitchell in his broadcast interview with Mr Littlewood:

Mr Mitchell: *“It would have been so much more helpful and so much more constructive if we’d had the opportunity of seeing this on site for ourselves... I would be questioning the subcontractor on site, I would be questioning the local authority and, and I would be questioning my colleagues that inspect, inspected these works as they were going on.”*

Mr Littlewood: *“So you have somebody inspecting the work as it was going on.”*

Mr Mitchell: *“You took away.”*

Mr Littlewood: *“You should have been aware of that, you were the contractor.”*

Mr Mitchell: *“Dom I accept that.”*

Mr Littlewood: *“What happened at Jacqui’s house was complicated as there was another subcontractor involved as well. But the foundations were definitely Mitchell’s responsibility and Jacqui paid him 24 grand.”*

Channel 5 said that the programme also stated that Mr Mitchell, as the contractor, was ultimately responsible for the foundations. Channel 5 said that during his interview Mr Mitchell accepted that if the foundations were as described by Mr Littlewood, this was unacceptable and that if Ms Smith had paid too much for the work completed, Mr Mitchell would reimburse her. Channel 5 said that during his telephone conversation with the programme makers, Mr Mitchell also accepted responsibility for any defects in the foundations, saying “well if the contractor has done something wrong then it’s our responsibility”.

Channel 5 said that the programme made clear that the work was carried out by a sub-contractor but Mr Mitchell was ultimately responsible.

- Mr Mitchell had no working relationship with Mr Groves either at the time or at any point since Mr Groves’ company, Kingswood, went into administration.

Channel 5 said that there was no suggestion in the programme that Mr Groves and Mr Mitchell had a working relationship at the time of Ms Smith’s build in the programme as broadcast, and all relevant responses from Mr Mitchell were included in the programme.

Channel 5 said that the programme refers to Mr Mitchell writing to Ms Smith offering to help with her dispute with Mr Groves and saying that he knew Mr Groves was a maverick who ripped people off. It said that Mr Mitchell subsequently commenced work on the extension and was responsible for the inadequate foundations uncovered on the programme. The programme presenter then said:



*"What I can't understand though is how this Brendan Mitchell knew so much about Groves. I'm convinced the two builders must be linked, what I've got to do now is prove it. During my previous investigation, I found this photo of Groves in an old copy of the Swindon Advertiser taken when his company "Kingswood Group" were sponsoring the Swindon Town football strip. And as I look at my copy with fresh eyes, I can see that as well as Groves and the Swindon manager, there's someone else at the edge of the frame...Friday June 8<sup>th</sup> 2007, a photograph of, on the left, Mark Groves of "Kingswood" and then it goes on to say, "Kingswood" chairman, Brendan Mitchell. Turns out Groves and Mitchell used to be business partners."*

Mr Mitchell accepted himself when interviewed by Mr Littlewood that there was a connection between him and Mr Groves, and said Mr Littlewood would have to put this allegation to Ms Smith, although this detail was not included in the programme as broadcast. Instead, the programme contains the following extract from Mr Mitchell's interview with Mr Littlewood, which makes clear that Mr Groves and Mr Mitchell are no longer friends:

Mr Littlewood: *"Are you still friends with Mark Groves?"*

Mr Mitchell: *"No, I haven't spoken to Mark Groves for, in, a year and a half I suppose".*

Mr Littlewood: *"Why's that?"*

Mr Mitchell: *"Um, we don't get on too well. Mark knows I was very disappointed having um, well Kingswood, Kingswood Group and Kingswood Construction were placed in to administration, you're probably aware of that, um, it was really only at that point, um, that err, I became aware of the substandard nature of some of the works that were going on inside. I'm not very happy with regard to the work carried out."*

Channel 5 said that viewers were made aware that Ms Smith's extension was intended to be built by Mr Groves by his company Life Style Design and Build Limited ("LDBL"), not any of the Kingswood companies and there is no suggestion in the programme that Mr Mitchell is any way involved in LDBL, only that he was involved in Kingswood Group Limited. Channel 5 said that, therefore, the programme did not suggest that Mr Mitchell had a working relationship with Mr Groves at the time of Ms Smith's extension. Channel 5 said that in actual fact it was clear that Mr Mitchell was unhappy with Mr Groves following his realisation that works carried out by Kingswood Group and Construction were substandard.

Channel 5 said that although the programme maker's letter of 11 March 2010 stated the programme would allege that Mr Mitchell was acting in conjunction with Mr Groves with the intention of ripping her off twice, the allegation was not ultimately included in the programme as broadcast.

In response to Mr Mitchell's complaint that the programme unfairly presented, disregarded or omitted material facts (set out in the bullet points below), Channel 5, responded as follows:

- Mr Mitchell was only a director of Kingswood for a relatively short period and was not a director when the works to the Morgan property were being carried out.

Channel 5 said that Mr Mitchell was a director of Kingswood for approximately 18 months from 21 December 2006 until March 2008, when the company went into administration. Channel 5 said that the programme informs viewers that Mr Mitchell was a director of Kingswood but does not go in to further detail.

Channel 5 said that Mr Mitchell's response in respect of the works carried out by this company was included in the programme as broadcast as follows:

*"I was very disappointed having um, well Kingswood, Kingswood Group and Kingswood Construction were placed in to administration, you're probably aware of that, um, it was really only at that point, um, that err, I became aware of the substandard nature of some of the works that were going on inside. I'm not very happy with regard to the work carried out."*

Channel 5 also said the fact that Mr Mitchell was director of the company for 18 months was not relevant to the allegations being made about Mr Mitchell in the programme, which related to the work he carried out at Ms Smith's property as Equity Estates (SW) Limited.

In conclusion, Channel 5 said that the programme does not identify Kingswood Group Limited as being the company responsible for the works to Ms Morgan's property and explicitly refers to Mr Groves in connection with the works at Ms Morgan's property.

- Mr Paul Roberts, who at all material times was a director of Kingswood, was not mentioned at all.

Channel 5 said that, although not named, Mr Roberts was referred to in the programme. It said that, in any event, this head of Mr Mitchell's complaint is not relevant to the allegations about Mr Mitchell contained in the programme, which all related to his work at Ms Smith's property. Channel 5 repeated that none of the Kingswood companies were involved in the building of Ms Smith's extension. It said that Mr Groves intended to build the extension as LDBL and Mr Mitchell completed the work as Equity Estates (SW) Limited.

- Mr Littlewood made specific reference to Mr Mitchell's house, however Mr Mitchell had told him that he was renting the property privately and did not own it.

Channel 5 said that Mr Littlewood simply commented that:

*"he's doing alright for himself living in a house like this."*

Channel 5 said that the programme did not state that Mr Mitchell owned the property, it merely pointed out that if he lived in a large house in a beautiful setting he was doing well financially. Channel 5 said that this was a fair comment to make regardless of whether the house is owned or rented.

## **Decision**

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the

principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision, Ofcom considered all the relevant material provided by both parties. This included a recording of the programme as broadcast and transcript, both parties' written submissions and their supporting materials.

When considering complaints of unfair treatment, Ofcom has regard to whether the broadcaster's actions ensured that the programme as broadcast avoided unjust or unfair treatment of individuals and organisations, as set out in Rule 7.1 of the Code.

- a) Ofcom first considered Mr Mitchell's complaint that his contribution during the interview was unfairly edited in that a number of material facts he had given were omitted.

In doing so, Ofcom had regard to Practice 7.9 of the Code which states that before broadcasting a factual programme, including programmes examining past events, broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to an individual or organisation. Ofcom also had regard to Practice 7.6 of the Code which states that when a programme is edited, contributions should be represented fairly.

Ofcom considered individually the following sub-heads to this complaint in order to reach an overall as to whether Mr Mitchell's contribution was unfairly edited and material facts omitted in a way that portrayed him unfairly.

- He believed that the programme was being "supported by" Mr Roberts of Landmark PRC, a former director of Kingswood with Mr Groves.

Ofcom noted that Mr Mitchell had said that people other than himself and Mr Groves were involved in Jacqui Smith's build, namely Mr Roberts and what Mr Mitchell describes as "*other agencies*". Ofcom also noted that Mr Mitchell described this issue as "fundamental". Ofcom then took into account Channel 5's submission that it found no basis for Mr Mitchell's assertion. It noted in particular Channel 5's submission that Mr Mitchell had not provided any evidence to support his assertion and that this was in spite of him being specifically invited to do so, in writing, by the programme's presenter, Mr Littlewood. It further noted that Ms Smith, the person who had actually commissioned the building works and dealt with the builders involved "categorically denied" that Mr Roberts had anything to do with her building works and was "adamant" that he was not involved in her decision to become involved in the programme. Ofcom noted that given Mr Mitchell did not provide any evidence to back up his assertion about Mr Roberts, despite being invited to do so, and that this assertion could not be substantiated by any other source.

In such circumstances, Ofcom considered that the broadcaster had taken reasonable care when deciding to omit this assertion made by Mr Mitchell and that in so doing, no material facts were omitted and his contribution to the programme was edited fairly.

- The sub-contractor Mr Mitchell used was also a principal contractor for Landmark PRC and this was unknown to him at the time.

Ofcom first noted that this assertion was not put forward by Mr Mitchell in his on-camera interview. Ofcom then took into account Channel 5's submission that Mr Mitchell did not make any similar assertion in either of the two telephone conversations he had with the programme makers.

Ofcom also took into account the substantive allegation against Mr Mitchell, namely carrying out substandard work on Ms Smith's foundations, and that Mr Mitchell had accepted that he was ultimately responsible for this project.

Ofcom took the view that the assertion that sub-contractors were responsible was not relevant to the substantive allegation against Mr Mitchell, given that he had accepted responsibility for the project. Further, Ofcom considered that Mr Mitchell's contribution to the programme was not unfairly edited in this regard because Mr Mitchell did not mention this assertion in the interview, nor did he mention it in any other correspondence with the broadcaster prior to transmission.

- The circumstances relating to the initial loan by Ms Smith and Mr Groves may not be as clear as Mr Littlewood presented, as it was within his knowledge that the two were in a relationship.

Ofcom considered that this assertion related to Ms Smith and Mr Groves, and concerned their relationship while Mr Groves was being retained by Ms Smith to carry out extension works. Ofcom further noted that Mr Mitchell had asserted that he had no links at all with Mr Groves by this point, and that he only became involved with Ms Smith's build after Mr Groves had stopped working there.

Ofcom therefore took the view that this assertion did not relate to Mr Mitchell or how he carried out the works he was responsible for.

In such circumstances, Ofcom considered that the broadcaster had taken reasonable care when deciding to omit this assertion related to Ms Smith and Mr Groves and that in so doing, Mr Mitchell's contribution to the programme was edited fairly.

- The actual works on Ms Smith's house were carried out by Mr Brad Travis, a sub-contractor.

Ofcom noted that the fact that Mr Mitchell had used a sub-contractor to carry out the works was not in dispute between the parties. It also noted that Mr Mitchell had accepted that he had ultimate responsibility for the build. Ofcom then noted what the programme contained regarding a sub-contractor. Ofcom noted in particular:

Mr Mitchell: *"I would be questioning the subcontractor on site"*

and

Mr Littlewood: *"What happened at Jacqui's house was complicated as there was another subcontractor involved as well."*

and

Mr Mitchell: *“...well if the contractor has done something wrong then it’s our responsibility.”*

Ofcom considered that the issue of a sub-contractor being used by Mr Mitchell was therefore clear from the programme. Ofcom took into account that the programme did not name the sub-contractor as Mr Brad Travis.

Ofcom therefore had to decide whether omitting Mr Travis’ name was fair. Ofcom first took the view that the key material fact in this instance was the substantive point that a sub-contractor was used by Mr Mitchell. This is because this fact demonstrated to viewers that the actual works were carried out by someone other than Mr Mitchell. Ofcom considered that it was not necessary to identify who the sub-contractor was

Ofcom took the view that the broadcaster did take reasonable steps in presenting the material facts regarding the issue of Mr Mitchell retaining a sub-contractor and that the omission of Mr Travis’ name did not lead to unfairness.

- Mr Mitchell had no working relationship with Mr Groves either at the time or at any point since Mr Groves’ company, Kingswood, went into administration.

In accordance with Practice 7.9, Ofcom first considered how the relationship between Mr Groves and Mr Mitchell was presented in the programme.

The programme said that the two worked together at Kingswood.. The programme then said, *“Turns out Groves and Mitchell used to be the business partners”*.

In the interview, Mr Littlewood asked Mr Mitchell whether he was still friends with Mr Groves, and Mr Mitchell replied, *“No, I haven’t spoken to Mark Groves for, in, a year and a half I suppose”*. When asked why, he then said, *“Mark knows I was very disappointed having um, well, Kingswood, Kingswood Group and Kingswood construction were placed into administration, you’re aware of that, um, it was really only at that point, um, that err, I became aware of the substandard nature of some of the works that were going on inside”*.

Ofcom took the view that the programme’s presentation of Mr Mitchell’s relationship with Mr Groves, together with Mr Mitchell’s response included in the programme, made clear to viewers that Mr Groves and Mr Mitchell had worked together at Kingswood, that Kingswood had ceased trading at least a year and half prior to Mr Mitchell’s interview taking place, and that Mr Mitchell and Mr Groves had stopped speaking from that point on.

Ofcom therefore considered that the broadcaster had taken reasonable steps when presenting the material facts surrounding the relationship between Mr Groves and Mr Mitchell since Kingswood had gone into administration.

Having considered each of the specific complaints made by Mr Mitchell, Ofcom then reached an overall finding that the broadcaster had taken reasonable care in satisfying itself that all material facts discussed in Mr Mitchell’s interview were presented fairly and that therefore, his interview was edited fairly.

- b) Ofcom then considered the complaint that the programme unfairly presented, disregarded or omitted the following material facts:

As it did in head a), Ofcom had regard to Practice 7.9 of the Code and considered the sub-heads to this complaint (set out below) in order to reach an overall decision as to whether the relevant material facts were presented fairly.

- Mr Mitchell was only a director of Kingswood for a relatively short period and was not a director when the works to the Morgan property were carried out.

Ofcom first considered how Mr Mitchell's tenure at Kingswood was presented in the programme. Ofcom noted that Mr Mitchell was described as Kingswood chairman, and that the photograph was dated 8 June 2007. The programme did not go into further detail about Mr Mitchell's time at Kingswood. Ofcom noted that Mr Mitchell had been a Director at Kingswood from 21 December 2006 to March 2008.

Ofcom then examined who the programme presented as being responsible for the works carried out on the Morgan property. Ofcom noted that this story was introduced by Mr Littlewood who said:

*"To try and build a bigger picture of Mark Grove's activities, I start investigating other stories and it doesn't take much digging around to find other people who have had issues with Groves".*

*"Julie Morgan hired Groves in 2005 to modernize her prefab house and add an extension".*

*"But rather than improve Julie's life, Groves ended up destroying it".*

*"The house is full of cracks and crevices but Groves denies any of the work he did is responsible for the regular infestations".*

*"With Julie's house left in a state, Groves gave her a certificate saying the work was complete and a bill for £42,000".*

*"With the house unfinished Julie was unable to get a mortgage so she couldn't have paid Groves even if she wanted to. She ended up in a legal battle with him but Groves' company went bust and the case was never concluded".*

Ofcom took the view that the programme clearly placed responsibility for the Morgan property on Mr Groves. Ofcom further noted that whilst the programme discussing Ms Morgan's house, it did not mention Kingswood or Mr Mitchell at all. Ofcom therefore considered that viewers would not have attributed any responsibility to Mr Mitchell for the Morgan property.

Ofcom considered therefore that the broadcaster had taken reasonable care when presenting who was responsible for Ms Morgan's build.

- Mr Paul Roberts, who at all material times was a director of Kingswood, was not mentioned at all.

Ofcom first considered how this was presented in the programme and noted that Mr Roberts was not named in the programme at all. Ofcom then considered whether this omission was unfair to Mr Mitchell.

Ofcom noted that the substantive allegations against Mr Mitchell in the programme concerned the works he carried out on Ms Smith's property. Ofcom noted that the companies concerned with this building work were LDBL (Mr Groves' company) and that the subsequent work carried out was contracted to Mr Mitchell (his company was called Equity Estates (SW) Limited, although this was not named in the programme). Ofcom therefore noted that Kingswood, as a company, was not responsible for Ms Smith's build.

In such circumstances it appeared to Ofcom that material facts regarding who was responsible for Kingswood's operations were not relevant to what Mr Mitchell was being accused of in the programme, namely, being responsible for the poor foundation works carried out on Ms Smith's property.

Having taken that view, Ofcom found that the identity of other Kingswood builders was not a relevant material fact in relation to the presentation of Mr Mitchell in the programme and that therefore, its omission did not lead to unfairness.

- Mr Littlewood made specific reference to Mr Mitchell's house, however Mr Mitchell had told him that he rented the property privately and did not own it.

Ofcom first considered how the programme presented where Mr Mitchell lived.

Ofcom noted that the only reference to it was made by Mr Littlewood, when leaving the interview with Mr Mitchell (which was carried out at his home), said:

*"he's doing alright for himself living in a house like this."*

Ofcom noted the fact that Mr Mitchell was living at the property seen in the programme was not in dispute. Ofcom then considered whether the broadcaster took reasonable care in omitting the material fact that Mr Littlewood rented the property and did not own it.

Ofcom noted that the only assertion made beyond the fact that Mr Mitchell lived in the property was that he was *"doing alright for himself"*. Ofcom understood this to mean that Mr Mitchell was earning a good enough income for him to afford living in a desirable property. Ofcom took the view that this suggestion could not be unfair.

Ofcom considered that in the absence of any pejorative suggestion linked to Mr Mitchell's house, that no unfairness could arise and that the broadcaster had taken reasonable care when omitting the material fact that Mr Mitchell rented the property he lived in, and did not own it.

Having considered each of the specific complaints made by Mr Mitchell under this head of complaint, Ofcom reached the overall finding that no material facts were presented, disregarded or omitted in a way that was unfair to Mr Mitchell.

**Accordingly, Ofcom has not upheld Mr Mitchell's complaint of unjust or unfair treatment in the programme as broadcast.**

## Not Upheld

### Complaint by Mr D

*Five Daughters, BBC4, 20 January 2011*

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**Summary:** Ofcom has not upheld this complaint of unfair treatment made by Mr D.

The third and final part of a three part factually based drama about the murders in 2006 of five young women working as prostitutes in the Ipswich area showed the progress of the investigation. It included scenes showing the activities of Mr D (played by an actor), his arrest on suspicion of the murders and his subsequent release.

Mr D complained to Ofcom that he was treated unfairly in the programme as broadcast.

In summary, Ofcom found the following:

- The programme makers were not unfair in their dealings with Mr D.
- The scenes Mr D complained of did not contain any material inaccuracies and he was not portrayed unfairly in the programme.
- Mr D's character was not merely "loosely" based on him, but was a dramatisation of the role he played in the investigation. It was therefore not unfair that the programme makers did not include a caption to that effect or did not give Mr D anonymity.

### Introduction

On 20 January 2011, BBC4 broadcast the final episode of a factually based drama in three parts about the murders in 2006 of five young women who were working as prostitutes in the Ipswich area. The series was first broadcast in May 2010 and was repeated in January 2011. The third episode showed the progress of the investigation, the discovery of more bodies, the impact on the families of the victims and the efforts of various agencies to help the women get off the streets. The opening caption stated that the drama was *"based on the personal testimonies of many of those most closely involved in the events..."*.

The programme included the portrayal of an investigation into the activities of a local man who lived near Ipswich Mr D (who was played by an actor), his arrest on suspicion of the murders and his subsequent release. He was first shown talking to a journalist at the site where one of the bodies was discovered. Police officers at the scene said that Mr D seemed to be enjoying the attention of the press and agreed that he should be observed. The programme included a scene in which Mr D was shown sitting in a car talking to a journalist. While under observation by police officers, Mr D was shown picking up a young woman in the street and driving with her. He was followed and stopped by the police officers who later agreed that they would arrest him in order to *"eliminate or implicate him"*. Mr D was later shown being arrested on suspicion of the murders.



The programme also included the arrest of another suspect, Mr Stephen Wright, who was found guilty of the five murders and sentenced to life imprisonment. A caption at the end of the programme said: “[Mr D] was released without charge”.

## The Complaint

### Mr D’s case

In summary, Mr D complained that he was treated unjustly or unfairly in the programme as broadcast in that:

- a) The programme makers were not fair in their dealings with him, in that unlike other main characters portrayed in the programme, he was not contacted in advance and given an opportunity to have some input at the programme making stage. The programme makers were aware before the repeat that Mr D had concerns but still did not contact him for his complaints to be considered.

By way of background, Mr D said that he contacted the BBC after the programme was first broadcast in April 2010 to offer his input so that matters could be put right in any repeat, but was told that such programmes did not really get repeated. He therefore did not pursue any complaint at that stage. When he saw the second episode being repeated on 13 January 2011, he contacted the BBC and the producer called him back the day before the broadcast of the programme complained of. Mr D had a further discussion with a member of BBC staff on the day of the broadcast, but it was clear that no changes would be made and the programme would be repeated, regardless of any potential consequences.

- b) He was unfairly portrayed as a result of inaccuracies in the programme. In particular:
  - i) A scene showing him giving a woman a lift was inaccurate and suggested that the incident would have given the police grounds for suspecting him in relation to the murders. He was shown picking the woman up from the side of a street, giving her a lift and then being stopped by the police. In fact, the woman had telephoned him and asked him to give her a lift to see a client and he had picked her up from a house. He said that when he was stopped by the police, he had been driving for about five minutes and was still in a built-up residential area of Ipswich. However, the programme suggested that they were travelling past the Old Felixstowe Road. This was the in opposite direction and much further away than they had actually travelled. As several of the deceased women were found on the Old Felixstowe Road, this was not a neutral location to choose. The use of the incorrect location might also have led viewers to believe he was taking the girl back to his house.
  - ii) He was inaccurately shown “*hanging around*” at the police cordon where one of the bodies had been found and talking to a journalist. One of the police officers was shown referring to his presence at the cordon. This incident had not happened and its inclusion in the programme suggested that he had voluntarily put himself in the public eye.
  - iii) His conversation with the journalist in a car was portrayed as a friendly chat, when in fact someone had sold Mr D’s details to the journalist, who then hounded him until he had eventually and reluctantly decide to speak to him.

By way of background, Mr D said that the use of an actor best known for his comedy role in *The IT Crowd* to play the role of the journalist was insensitive, as it appeared that Mr D was having a friendly chat with a funny man, when he had in fact been hounded by the journalist.

- c) Given the deviation from the truth about him, his name should have been changed and a caption included to explain that the character was loosely based on a real person. However unlike other main characters, his name was not changed and his character was not merged with others to give him anonymity.

### **The BBC's case**

The BBC said that the aim of the programmes was to provide an accurate account of events from the day the first victim, Ms Tania Nichol, went missing to the arrest of Mr Wright for the murders of all five women. The programmes told the story of the murdered women's lives and showed how they took to working on the streets to fund drug addiction. They were shown as women who had lives and relationships, not merely as the "prostitutes" they had been portrayed as in much of the press coverage at the time. The programmes also told the story of the police investigation, of which Mr D was part because he became a suspect, his arrest and his ultimate release without charge, as was made clear at the end of the programme.

The BBC said that the programme makers felt it was important to show how the police came to regard Mr D as a suspect, how they came to arrest him and then how they then came to arrest Mr Wright. The BBC said that the programme's information about Mr D was based on extensive interviews with Detective Chief Superintendent Stewart Gull and Detective Chief Inspector Andy Henwood of Suffolk Constabulary, with several other officers who worked on the investigation and with prosecution lawyers. The programme makers also spoke to Mr Brian Tobin and Mr Patrick Palmer at the Iceni Project, a charity that offers support for those with addiction and their families and which helped some of the prostitutes who were portrayed in the programme. The programme makers also talked to ten other women who had been working as prostitutes in Ipswich at the time of the murders and considered many newspaper articles from the time, including an interview which Mr D had given to a journalist from the Sunday Mirror, from which the programme took a verbatim excerpt.

The BBC said that, before filming, every effort was made to check that events would be portrayed as accurately as possible. The programme makers went back to DCI Henwood and DCS Gull and to Mr Tobin and Mr Palmer and went through all the scripts for each episode with them checking for accuracy. During this process, the police confirmed that the scenes in which Mr D appears were accurate. The BBC said that since Mr D had made his complaint the programme makers had again consulted DCS Gull and DCI Henwood, who stood by the information they gave about Mr D.

The BBC then responded to Mr D's specific complaints.

- a) As regards the complaint that the programme makers were not fair in their dealings with Mr D, the BBC said that the programme makers made a number of attempts to contact Mr D, through the Suffolk police and through the solicitor who had represented him after his arrest, to alert him to the forthcoming broadcast. Neither attempt had been successful initially, as Mr D had moved from the address where he had been living during the investigation, but Suffolk Constabulary had eventually managed to locate him and deliver a letter from the

programme makers. Mr D had telephoned the week prior to the original broadcast, which began on 27 April 2010, and left his number. The director had returned Mr D's call and described to him in detail the content of the three programmes. The BBC said that at the end of the conversation Mr D seemed happy that his story was minimal in terms of screen time and did not raise concerns about the accuracy of the scenes. Mr D spoke to the producer again the following day and raised no concerns about accuracy. The producer had agreed to stay in touch with Mr D as the episodes were transmitted to ensure that he was content with his portrayal. This led to four further calls, each of which lasted for more than thirty minutes and also covered Mr D's concerns about how he had been treated during the investigation by the local police and press. Again Mr D had raised no concerns about the accuracy of the scenes.

The BBC accepted that, during one of these conversations, the producer had told Mr D that it was unlikely that the programme would be repeated. This was an honest assessment at the time, because it was very unusual for this type of drama to be repeated. The BBC said that, while it was regrettable that the producer inadvertently misled Mr D in this respect, this did not result in unfairness, given that Mr D had raised no objections to the way that he had been presented in the programme.

As regards the complaint that the programme makers were aware before the repeat that Mr D had concerns about the way he was represented and should have contacted him, the BBC said that when Mr D contacted the BBC after the first transmission of the programme the only issue he raised was that the helpline announcement which followed the programme did not include a reference to people who might have suffered from media harassment.

The BBC said that when the series repeat began, but before the episode complained of had been repeated, Mr D contacted the BBC and raised the matter of how he had been represented in the scene where he was depicted picking up a young prostitute in his car. The BBC said that the sequence in question had been filmed in Bristol as the programme makers did not want to cause unnecessary distress to the families of those murdered. Although actual locations were referred to in the script, the journey would have looked visually dissimilar to that which actually took place. The programme makers considered Mr D's position and concluded that no changes needed to be made. They also took into account the fact that, although Mr D had complained to the BBC about the helpline after the original broadcast, he had not raised this matter.

- b) The BBC next responded to the complaint that Mr D was unfairly portrayed as a result of inaccuracies in the programme.
  - i) As regards the complaint that the scene showing Mr D giving a woman a lift suggested that the incident would have given the police grounds for suspecting him in relation to the murders, the BBC said that Mr D had already admitted, in the interview he gave to the Sunday Mirror journalist, that his profile and behaviour made him a suspect. He had conceded that it was possible he would be arrested and he was under surveillance at the time of the car journey precisely because his behaviour had already led police to conclude that he had to be regarded as a suspect. The BBC said that it was his behaviour on the car journey that led to the police moving beyond regarding him as a suspect and arresting him because they believed that the young woman in his company might be at risk. The BBC said that DCS Gull and DCI John Quinton had told the programme makers that they believed it

was immaterial whether or not Mr D had pre-arranged the pick up, as he had picked the woman up in the red light district and was driving in the direction of the murder sites when he was stopped. The BBC said that it was precisely because of Mr D's actions on that night that DCS Gull decided to arrest him and that the way that the journey was represented in the programme, including the direction in which Mr D was shown to be travelling, could not have given an unfair impression as to how or why the police came to regard him as a suspect.

- ii) In response to the complaint that Mr D was inaccurately shown "*hanging around*" at the police cordon where one of the bodies had been found and talking to a journalist, the BBC said that the investigating police officers told the programme makers that Mr D did "hang around" at the cordons of murder sites. The BBC said that this was one example of the kind of behaviour through which Mr D had drawn attention to himself and which led to him being regarded as a suspect. The BBC said that Mr D had also rung the police incident room on several occasions, spoken to police officers at cordons, spoken to the Sunday Mirror journalist and spoken to a BBC Radio Suffolk journalist, in an interview which was not broadcast at that time but which had been made available to the police. Mr Tobin, of the Iceni Project, told the programme makers that Mr D rang the Project several times, to the extent that Mr Tobin got fed up with him ringing. The BBC said that, overall, it considered that the scene depicting Mr D at the police cordon was accurate and merely helped paint a picture of Mr D drawing attention to himself as a possible suspect.
- iii) As regards the complaint that Mr D's conversation with the journalist in a car was inaccurately portrayed as a friendly chat, when in fact he had been hounded into giving the interview, the BBC said that the programme had given no indication as to how the meeting had come to take place and could not have been misleading in that respect. The BBC did not accept that the interview was portrayed as a "friendly chat" and said that its portrayal was based scrupulously on the transcript of the interview.

With reference to the actor who played the Sunday Mirror journalist, the BBC said that, although he may have a background as a comedy actor, this was a serious role and was played as such.

- c) The BBC then responded to the complaint that Mr D's name should have been changed and a caption included explaining that the character was loosely based on a real person. The BBC said that it did not accept that the programme deviated from the truth or that the way that Mr D was portrayed was only "loosely" based on him. The BBC said that Mr D's name was already in the public domain and that the events in which he was depicted were commonly known. Given Mr D's behaviour in courting the police and the media and drawing attention to himself in and around Ipswich, it would have been "absurd" to depict him anonymously.

The BBC said that the programme did not "merge" any other characters. The names of two other people, who were vulnerable, recovering drug addicts and ex-street workers whose names were not in the public domain, were changed. Unlike Mr D, their relationship to the events in question was peripheral. Everyone else who appeared in the programme was identified by their real name.

## Mr D's comments

- a) As regards the BBC's response to the complaint that the programme makers were not fair in their dealings with him, Mr D queried why the programme makers did not contact him. He said that the BBC's claim that the programme makers had tried to contact him was not reasonable, as his contact details were readily available and many people from other branches of the media had managed to contact him, including a researcher from another BBC programme.
- b) Mr D commented as follows on the BBC's statement that he was unfairly portrayed as a result of inaccuracies in the programme:

- i) With reference to the scene showing him giving a woman a lift, Mr D said that the BBC appeared to be saying that the police provided details of this incident to the programme makers. Mr D said that the BBC should provide evidence as to how they obtained details of the incident and that where the programme deviated from the truth, the BBC should clarify whether that was the responsibility of the police or the programme makers. Mr D said that, even if DCS Gull and DCI Quinton considered it was immaterial whether he picked the woman up by prior arrangement, the distinction would have been important to viewers' understanding of his actions, as the programme showed him picking up a prostitute who was working on the street, when in reality he was giving a friend a lift.

Mr D said that the journey he took was about one mile and remained within the built up area of Ipswich, but that the programme showed a journey of about five miles, which went well outside the built up area of Ipswich. Mr D said that this would have given viewers a completely different opinion of the events.

- ii) With reference to the scene showing him "*hanging around*" at the police cordon where one of the bodies had been found and talking to a journalist, Mr D again challenged the BBC to provide evidence that this was accurate, as he denied that this happened.
  - iii) As regards his conversation with the journalist in a car, Mr D said that the BBC seemed to be brushing aside his concern that the actor who played the journalist had the image of a comic actor.
- c) In relation to his complaint that his name should have been changed and a caption included to explain that the character was loosely based on a real person, Mr D said that the BBC's assertion that the events portrayed relating to him were in the public domain was directly contradicted by its claims that the programme makers received information from the police about surveillance they carried out. Mr D said that police surveillance was a very strong tool that should only be used when appropriate and that information gained from such surveillance should not be used for entertainment programmes.

As regards the names that were changed, Mr D said that he understood why some names had been changed, but said that, given the impact of what happened on his life and given that he had one conviction for a minor motoring offence, he should have been protected in a similar way.

### The BBC's comments

- a) As regards the complaint that the programme makers were not fair in their dealings with Mr D, the BBC confirmed that strenuous efforts were made to contact him prior to transmission.
- b) As regards the complaint of unfair portrayal, the BBC commented as follows:
  - i) With reference to the scene showing Mr D giving a woman a lift, the BBC said that the police had considered this behaviour to be of serious concern, particularly as Mr D was a suspect in the murder case at the time, and had felt compelled to stop his car and arrest him. The BBC said that the actual motive for the drive was immaterial, as Mr D was a suspect at the time and his actions had to be considered in that light. The BBC said that the precise circumstances of the journey were also irrelevant as they did not give rise to any unfair suggestions about Mr D. The BBC noted that Mr D considered that the way the journey was portrayed gave rise to a suggestion that he may have been a suspect, or actually involved in the murders, but said that it was a matter of fact that he was already considered a suspect and that the programme made it quite clear that he was released without charge and that Mr Wright was convicted of the murders.

In response to Mr D's suggestion that the way this journey was portrayed may have given an unfair impression that the young woman in the car was at risk, the BBC said that the police's assessment was that she was at risk, because for reasons not connected with the journey itself Mr D was already a suspect for the other murders, and that they would have stopped the journey regardless of the precise route being taken.

- ii) With reference to the scene showing Mr D "*hanging around*" at the police cordon and talking to a journalist, the BBC said that police witnesses told the programme makers that they had evidence that Mr D was standing near at least one of the cordons, that he engaged officers in conversation at a police mobile crime unit and that they felt that he had drawn attention to himself, as was corroborated by many articles in the media.
  - iii) The BBC did not add to its first statement in relation to the complaint about the actor used to play the role of the journalist.
- c) As regards anonymity, the BBC said that any consequences suffered by Mr D arose not from the way he was portrayed in the programme but from the events in which he became caught up as a result of his own behaviour.

### Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording of the programme as broadcast and transcript and both parties' written submissions.

When considering complaints of unfair treatment, Ofcom has regard to whether the broadcaster's actions ensured that the programme as broadcast avoided unjust or unfair treatment of individuals and organisations, as set out in Rule 7.1 of Ofcom's Broadcasting Code ("the Code"). Ofcom had regard to this Rule when reaching its decisions on the individual heads of complaint detailed below.

- a) Ofcom first considered the complaint that the programme makers were not fair in their dealings with Mr D, in that, unlike other main characters portrayed in the programme, he was not contacted in advance and given an opportunity to have some input at the programme making stage. The programme makers were aware before the repeat that Mr D had concerns but still did not contact him for his complaints to be considered.

In considering this part of the complaint, Ofcom had regard to Practice 7.2 of the Code, which states that broadcasters and programme makers should normally be fair in their dealings with potential contributors to programmes unless, exceptionally, it is justified to do otherwise.

As Ofcom has no remit to consider complaints of unfair treatment in the making of a programme, it would only be able to make a finding of unfairness in relation to the programme makers' dealings with Mr D if the programme as broadcast resulted in unfairness to him.

Ofcom noted that the BBC said that the programme makers had found it difficult to make contact with Mr D initially, despite Mr D's position being that he was not difficult to locate and that other media organisations had been able to get in touch with him. Notwithstanding this disagreement, Ofcom noted that the programme makers were able to deliver a letter to Mr D, via the Suffolk Constabulary, and that Mr D responded to this before the original broadcast of the series by telephoning the programme makers. Mr D had not disputed that he had a conversation with the director before the original broadcast, during which the scenes involving him were described to him in detail. Nor did he dispute that he had not made any objections to these scenes. At the time the series was broadcast originally, Mr D spoke to the director again, in particular about the helpline, but did not raise any concerns about accuracy.

Ofcom took the view that it was regrettable that Mr D was told during the course of these conversations that it was unlikely that the series would be repeated, but did not consider that this, in itself, resulted in unfairness to him. It noted Mr D's position that, had he known the series would be repeated, he would have raised concerns with the programme makers. However, Ofcom also noted that, during a number of conversations with the director, Mr D did not raise any concerns about accuracy and that the only issue he raised related to the helpline announcement made after the programme.

In these circumstances, Ofcom took the view that Mr D had a number of opportunities to have some input and to raise any concerns with the programme makers before and during the original broadcast of the series and that the inaccurate information regarding possible repeats did not prevent him raising such concerns.

Ofcom noted that when the series repeat began, Mr D contacted the programme makers and set out some concerns about the scene which showed him picking a prostitute up and that the programme makers did not consider that changes were required to the programme. Ofcom was satisfied that the programme makers took into account the issues raised by Mr D, but took the view that the question of any changes was an editorial matter, provided no unfairness resulted from the scene. As set out under decision head b) i) below, Ofcom did not consider that any unfairness arose from that scene.

Taking all the above factors into account, Ofcom did not consider that the programme makers were unfair in their dealings with Mr D.

Ofcom therefore found no unfairness in this respect.

- b) Ofcom then considered the complaint that Mr D was unfairly portrayed as a result of inaccuracies in the programme.

In considering this complaint Ofcom had regard to Practice 7.10 of the Code which states that programmes – such as dramas and factually-based dramas – should not portray facts, events, individuals or organisations in a way which is unfair to an individual or organisation.

Ofcom noted that the programme was a factual drama, which looked at the murders of the five prostitutes in Ipswich and the police investigation into their deaths. This included looking at Mr D's involvement in the investigation, during which he was a suspect for a period of time. Ofcom noted that the programme made clear that Mr Wright was convicted for the offences and that Mr D was released without any charges being made against him.

Ofcom noted that the programme makers had significant input from police officers involved in the case and took the view that they were entitled to rely on the information provided by those officers. It also noted that much of the material used in relation to the portrayal of Mr D was in the public domain.

Ofcom then considered the various separate matters raised under this head of complaint:

- i) Ofcom first considered the scene which showed Mr D giving a woman a lift, which he complained was inaccurate and suggested that the incident would have given the police grounds for suspecting him in relation to the murders.

Ofcom noted that the programme include a scene in which police officers, having become suspicious of Mr D's behaviour, decided to observe his activities. He was shown driving in the red light district of Ipswich, picking a woman up from the street and driving out of town. Officers followed him as he drove past the area where one of the prostitutes' bodies had been found. As the journey continued, the officers were shown becoming increasingly concerned and deciding to stop Mr D and *"get the girl out safely"*. A little later some of the officers were shown discussing whether Mr D really wanted to protect the women, as he had claimed in his conversation with the journalist, and concluding that they could not afford to *"give him the benefit of the doubt"*.



Ofcom noted that Mr D said that the woman was a friend of his, who he picked up from her home by prior arrangement, and that the route of the journey was inaccurately portrayed.

Ofcom noted that Mr D did not raise any concerns about this scene when he spoke to the director before the original broadcast of the series, but that he did refer to this scene when he spoke to the director when the series was being repeated. The programme makers considered his concerns, but decided that no changes to the scene were necessary.

It is not Ofcom's role to establish whether or not Mr D had acted as the programme suggested he had but rather to determine whether, in broadcasting the scene, the programme makers portrayed Mr D and the incident in a way which was unfair to him. In Ofcom's view, notwithstanding the alleged inaccuracies in this scene, the version of events as set out in the programme did not differ materially from Mr D's version, since it was the case that the police, who were already suspicious because of Mr D's conduct, decided to follow him on the journey and stop him, because they were concerned for the safety of the woman to whom he was giving a lift. Ofcom considered that viewers would have understood this scene to convey the fact that the police had become suspicious and decided to stop Mr D. It also considered that viewers would have understood that the scene was a dramatisation designed to convey the circumstances surrounding the police decision to stop Mr D, rather than an absolutely accurate portrayal of the events.

- ii) Ofcom considered next the complaint that Mr D was inaccurately shown "*hanging around*" at the police cordon where one of the bodies had been found and talking to a journalist.

Ofcom noted that the programme showed a scene in which DCS Gull announced at a press conference that two more bodies had been found. Mr D was then shown at the murder scene, carrying some flowers and talking to a journalist by the cordon. DCI Henwood commented that Mr D seemed to be "*enjoying the attention*". DCS Gull said that that did not make Mr D guilty. The officers then agreed to observe Mr D, "*if only to eliminate him*".

Mr D's position was that this had not happened and that the inclusion of the scene suggested that he had put himself in the public eye. The BBC said that police sources had told the programme makers that Mr D did "hang around" at cordons at murder sites. The BBC also said that Mr D had drawn attention to himself in other ways during the course of the police investigations by contacting the police, the press and the Iceni Project.

Taking into account the information provided by the police and the ways in which Mr D drew attention to himself during the course of the investigation into the murders, Ofcom took the view that the inclusion of this scene was justified as a dramatic device. Again Ofcom considered that viewers would have understood that the scene was a dramatisation designed to convey that Mr D had drawn attention to himself in a number of ways during the course of the investigation and had aroused the suspicions of the police.

- iii) Ofcom then considered the complaint that Mr D's conversation with the journalist in a car was portrayed as a friendly chat, when in fact someone had

sold details of Mr D to the journalist, who then hounded him until he had eventually and reluctantly decide to speak to him.

In the relevant scene, following a news update on the murders, Mr D was shown getting into a car with a journalist and engaging in conversation with him, observed by police officers. Mr D was shown telling the journalist that he was "*watching over the girls*", who trusted him, and that, although he knew he was innocent, he did not have tight alibis for some or perhaps all the relevant times.

The scene gave no indication as to how the conversation came to take place. Having viewed the scene, Ofcom considered that it was portrayed not as a "friendly chat" but as a conversation between an individual caught up in a story, who was very emotional, and a journalist. Ofcom noted also the BBC's statement that conversation was taken verbatim from a transcript made by the journalist, which was not challenged by Mr D. Taking these factors into account, Ofcom did not consider that the conversation was unfairly portrayed.

As regards the actor playing the role of the journalist, Ofcom considered that some viewers may have associated him with comedy material. However, the role he played in this programme was clearly not comic and viewers would have appreciated the distinction between this role and others he may have played.

Ofcom therefore found no unfairness to Mr D in this respect.

- c) Ofcom then considered the complaint that, given the deviation from the truth about Mr D, his name should have been changed and a caption included to explain that the character played by the actor was loosely based on a real person, but, unlike other main characters, his name was not changed and his character was not merged with others to give him anonymity.

In considering this part of the complaint Ofcom took account of Practice 7.10 of the Code, as set out under decision head b) above.

Ofcom noted Mr D's point that the BBC said that the material used in the programme was in the public domain but also referred to police surveillance. In Ofcom's view, the scenes complained of did not rely on material gained from police surveillance, but on information that was in the public domain.

Ofcom took the view that Mr D's character was not merely "loosely" based him, but was a dramatisation of the role he played in the investigation and that the programme's portrayal of him and his role in the investigation was not materially inaccurate. For the reasons set out under decision head b) above, Ofcom did not consider that the programme deviated in any material way from the truth about Mr D.

In these circumstances, Ofcom did not consider that there was any reason why the programme makers should have included a caption of the sort suggested by Mr D or given him anonymity and no unfairness resulted from their decision not to do so.

Ofcom therefore found no unfairness in this respect.

**Accordingly, Ofcom has not upheld Mr D's complaint of unfair treatment.**

## Not Upheld

### Complaint by Mr James Rafferty

*Big Fat Gypsy Weddings, Channel 4, 25 January 2011*

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**Summary:** Ofcom has not upheld this complaint of unjust or unfair treatment and unwarranted infringement of privacy made by Mr James Rafferty.

Channel 4 broadcast an edition of *Big Fat Gypsy Weddings*, a series of programmes looking at the life of people from the Gypsy/Traveller community in the UK, particularly at points of celebration in their lives. In this edition of the programme, Mr James Rafferty was shown attending a wedding where the groom was from the Gypsy/Traveller community and the bride was not.

Mr Rafferty complained that he was treated unfairly in the programme as broadcast and that his privacy was unwarrantably infringed in the programme as broadcast.

In summary, Ofcom found the following:

- Mr Rafferty's image was shown on screen for a very brief period and the programme did not disclose any information about him of a sensitive or private nature.
- The programme did not state or imply that Mr Rafferty was a member of the Gypsy/Traveller community and therefore Mr Rafferty was not portrayed unfairly in the programme as broadcast.

### Introduction

On 25 January 2011, Channel 4 broadcast an edition of *Big Fat Gypsy Weddings*, a documentary series that followed Gypsy/Traveller families as they prepared for, celebrated and considered key events in their lives (most notably weddings).

This edition included footage of the celebration of a wedding, which the programme indicated was unusual in that the groom was from the Gypsy/Traveller community and the bride was not.

Mr James Rafferty, who was a guest at the wedding, was shown in the programme standing with a small group of other male guests at the wedding reception.

Following the broadcast of the programme, Mr Rafferty complained to Ofcom that he was treated unjustly or unfairly in the programme as broadcast and that his privacy was unwarrantably infringed in the programme as broadcast.

### The Complaint

#### Mr Rafferty's case

##### Unjust or Unfair treatment

In summary, Mr Rafferty complained that he was treated unjustly or unfairly in the programme as broadcast in that:

- a) Footage of him was included in the programme without his permission. Mr Rafferty explained that on the day of the recording people from Channel 4 had asked guests at the wedding if they wanted to be on television and if they did asked them to sign consent forms. He added that he had refused to sign the form and told the programme makers that he did not wish to appear in the programme “for work reasons”.
- b) He was “portrayed as a Gypsy”. By way background, Mr Rafferty said that since the programme was broadcast he had been a victim of jokes at work which he feared would have an effect on his employment opportunities and he had received threats in the area where he lives.

#### Unwarranted infringement of privacy

In summary, Mr Rafferty complained that his privacy was unwarrantably infringed in the programme as broadcast in that:

- c) Despite his clearly stated wishes and refusal to sign the consent form, his face was clearly shown in the programme.

#### **Channel 4's case**

Before responding to the specific heads of Mr Rafferty's complaint, Channel 4 set out the context in which Mr Rafferty appeared in the programme featuring the wedding of a member of the Gypsy/Traveller community to a non-Gypsy/Traveller. During a discussion with the wedding dress maker about how well members from the Gypsy/travelling community were mixing with members of the non-Gypsy/travelling community during the wedding reception, the programme cut to a brief shot of wedding guests, one of whom was Mr Rafferty. The guests: were seen on screen (not always in full view) for approximately two seconds; were not heard speaking; and were not referred to by anyone or named.

Channel 4 said that the comments regarding the integration of Gypsy/Traveller and non-Gypsy/Traveller guests were made in the context of considering the prejudice that the Gypsy/Traveller community sometimes faced from people outside that community; and, that this was a theme touched upon throughout the series. It added that the example shown at the point Mr Rafferty appeared clearly illustrated a positive integration of the two communities, and the comment made at this point expressed the hope that this integration would continue.

#### Unjust or Unfair treatment

In summary, Channel 4 responded to Mr Rafferty's complaints that he was treated unfairly in the programme as broadcast as follows.

- a) With regard to Mr Rafferty's complaint that footage of him was included without his consent Channel 4 said that it took all reasonable and necessary steps to ensure that all contributors were treated fairly and justly and that for this series a filming protocol, that paid particular regard to obtaining consents, had been drafted for the production team.

It said that as a minimum, informed consent to be filmed for broadcast was obtained from all major contributors to the programme either by signing a written release form or, where appropriate, by filming an 'on camera' consent. These included the bride and groom, the bride's mother and sister, the wedding dress

maker, her employees, the bridesmaids and the DJ. Written consents were also obtained from wedding guests who were also interviewed or otherwise featured significantly.

With regard to those people who did not feature significantly, such as incidental wedding guests, specific consent forms or on camera consent were not always obtained for every single guest. Channel 4 said that, as is quite standard at large gatherings at which filming is taking place, the production team took appropriate steps to inform wedding guests that the wedding was being filmed for broadcast on Channel 4, and that if they did not want to appear, they could make themselves known to the production team. In addition, having encouraged all major contributors to make other guests aware of the filming, members of the production team made themselves available to talk to guests about filming throughout the evening and the filming was carried out openly.

Channel 4 said that for guests who did not want to appear in the programme, the filming protocol set out the following steps:

- programme makers to make a note of anyone who refused to be filmed on filming notes (including a description and contact details for each person in case of any uncertainty during editing);
- filming notes to be handed to the series producer for filing/checking over by the production co-ordinator;
- all release forms to be handed to the production co-ordinator for filing;
- during the edit, the producer/director and production co-ordinator to identify which people did not want to appear on camera from the filming notes; and
- the producer/director to make best endeavours not to include shots of those people. If any shots did make it into the final cut, they would be blurred.

Channel 4 said that at the wedding in question five guests advised the production team that they did not wish to appear in the programme. In accordance with the filming protocol, details of those people were taken (including their name, gender, hair and clothing) and either footage in which they appeared was not used in the final programme or their identity was obscured by blurring.

The broadcaster said that, despite Mr Rafferty's claim that he had refused to sign a release form and told the programme makers that he did not wish to appear in the programme "for work reasons", the production company does not have any record of him indicating his wishes. In addition members of the production team who filmed at this wedding confirmed that they do not recall a conversation with Mr Rafferty. Channel 4 also said that if the production company had a record of Mr Rafferty's request there was no reason why that request would not have been satisfied as it was for other guests.

- b) Channel 4 responded to Mr Rafferty's complaint that he was portrayed as a "Gypsy".

It accepted that there were members of the Gypsy/Traveller community at the wedding, but argued that it was made clear to viewers that: not all guests at the wedding were from the Gypsy/Traveller community; and, that the bride was marrying a man who was a member of the Gypsy/Traveller community although she herself was not from this community.

In support of its position Channel 4 quoted a number of comments included in the programme in which the narrator, the bride, the groom, and the bride's family and friends discussed the bride and groom's respective backgrounds.

Channel 4 said that during the short sequence at the wedding reception in which Mr Rafferty appeared, the groom discussed how well the wedding guests, who were from both Gypsy/Traveller and non-Gypsy/Traveller communities, were getting on. The broadcaster also indicated that this comment preceded the following exchange between the director of the programme and the dress maker:

Director: *"[Are] the two communities getting on better? Is that a picture of the future?"*

Dress maker: *"Wouldn't that be lovely if they did? You know. It would be nice if that happened, like what's happening in there, where the communities are joining together because of a couple. Whether it will or not I don't know, because you do get the staunch Travellers who just don't want any intrusion at all."*

The broadcaster said that, in contrast to Mr Rafferty's claim in the complaint, during the period when he was visible he was not identified by any contributor or in the commentary as a "Gypsy". It added that because of the above context, the viewers would have inferred that guests seen during this sequence were not all from the Gypsy/Traveller community.

It also said that: the image of Mr Rafferty was very fleeting; that his face was in full view for less than a second; and, that, as it had already noted, neither Mr Rafferty nor any of the people he was seen standing with were heard speaking or identified by name.

Channel 4 said that the editing of such sequences took account of continued sensitivities among the non-Gypsy/Traveller community about being associated with the Gypsy/Traveller community by ensuring that there were no problematic juxtapositions of images with potentially inflammatory audio or commentary.

It said that in this case it did not believe the audio was in any way inflammatory or suggested that every wedding guest present must be a "Gypsy". In addition, the programme makers believed that all guests at the wedding attended voluntarily and that they would be aware that there were members of the Gypsy/Traveller community present. Channel 4 argued that it was a reasonable assumption that the guests who had not informed the production team that they did not wish to be featured in the programme had no issue with being seen at a "Gypsy" wedding. It noted that Mr Rafferty attended the wedding as he knew the groom who is a member of the Gypsy community.

Channel 4 acknowledged Mr Rafferty's claim that being seen in the programme had a negative impact on him due to other people's prejudice against the Gypsy/Traveller community but said that the programme had not "portrayed him as a Gypsy", and as such, he was not treated unfairly or unjustly in this regard.

#### Unwarranted infringement of privacy

In summary, Channel 4 responded to Mr Rafferty's complaint that his privacy was unwarrantably infringed in the programme as broadcast (in that despite his clearly

stated wishes and refusal to sign a consent form his face was shown in the programme) as follows.

- c) Channel 4 said that it repeated its submissions in response to the complaints of unfairness above.

It questioned if Mr Rafferty had an expectation of privacy. It said that he was aware that the wedding was being filmed for television and contended that he did not, as he claimed, indicate to the production team that he did not wish to appear in the programme. Channel 4 said that on this basis, it was assumed that he was happy to appear in the programme.

The broadcaster also said that like many weddings within the Gypsy/Traveller community, the wedding guests were not restricted to those who had an invitation, but rather attendance was by word of mouth and there were no restrictions on who could come to the wedding and no guest was turned away. Channel 4 said that given this there were many non-Gypsy/Traveller guests at the wedding, to whom Mr Rafferty would have been clearly identifiable, and argued that accordingly the extent of privacy that Mr Rafferty could have legitimately expected was reduced.

Channel 4 said that if it was thought that the extent of privacy that Mr Rafferty could have legitimately expected was significant, it would argue that in the absence of Mr Rafferty having advised the production team that he did not wish to appear in the programme, and having confirmed (as he did within his complaint) that he was aware that filming was taking place, and what it was for, there was no unwarranted infringement of privacy.

It also reiterated that Mr Rafferty's appearance was brief and that he was not named nor was any information of a private nature disclosed about him.

### **Mr Rafferty's comments on Channel 4's statement**

In response to Channel 4's statement on his complaint, Mr Rafferty made the following comments.

- a) With regard to his complaint that footage of him was included without his consent, Mr Rafferty said that he accepted that the consent forms were intended mainly for major contributors and that if someone did not wish to appear in the programme at all he/she should have made that clear to a member of the production staff. However, he said that he had had a conversation with a member of the production staff during which he made it clear that he did not wish to appear on the programme because of the impact that his association with the Gypsy/Traveller community might have on his career progression and that he refused to sign the consent form.

Mr Rafferty added that where someone expresses a wish not appear this should be taken with all seriousness, especially with a programme of this type and where concerns about the impact of inclusion have been made clear, but that, despite taking appropriate action to ensure that a member of staff was made aware that he did not wish to appear in the programme (and why this was so), this did not happen in his case.

- b) With regard to his complaint that he was portrayed as a Gypsy, Mr Rafferty accepted that: the programme intended to highlight the integration and tolerance

between the Gypsy/Traveller and non-Gypsy/Traveller community; the transcript of the programme did not suggest that he was a member of the Gypsy/Traveller community or label him a Gypsy/Traveller; and, the programme made it clear that there were members of the non-Gypsy/Traveller community present. However, he said that because many outside the Gypsy/Traveller community still had a negative attitude towards those within it his association with that community had negative consequences. He argued that Channel 4 should have been aware that this could potentially be the case, and that in light of this and given that he was included in the programme despite his refusal to sign the consent form, and his statement that he did not wish to appear in the programme, he was treated unfairly in this respect.

- c) With regard to his complaint that his privacy was unwarrantably infringed in the programme as broadcast, Mr Rafferty disputed Channel 4's position that he did not have a reasonable expectation of privacy because he had attended the wedding, knowing that it was being filmed and did not make it clear to the production team that he did not wish to appear.

He said that, on the contrary, he did make it clear that he did not wish to appear, and therefore he had had a reasonable expectation of privacy.

Mr Rafferty said that he attended a friend's wedding, and, knowing that it was being filmed, made it clear to the production staff that he wished not to be featured. He added that the only other action to avoid appearing on the show that he could have taken would have been to not attend the wedding, and that it would be unreasonable of Channel 4 to expect those who did not wish to appear in the programme simply to not attend the wedding.

Mr Rafferty said that: the protocol that Channel 4 had regarding those who did not wish to appear on certain shows was satisfactory; he took the steps that the protocol required but that in his case that protocol was not followed and his privacy was unwarrantably infringed in this respect.

### **Channel 4's response to Mr Rafferty's comments**

In response to Mr Rafferty's comments the broadcaster made the following points:

- a) Channel 4 indicated that the production company did take requests not to appear in the programme seriously. It also set out in greater detail how the filming procedure was implemented by the production team. For example, it said that:
- six crew members were available to discuss aspects of the programme with guests at the wedding;
  - in some cases, photographs were taken of people who did not want to appear in the programme and if people did not want their photograph taken details of their age, clothing, hair, gender were noted; and
  - the final version of the programme was viewed frame by frame by the production management team to ensure that all those people who did not wish to appear were obscured and to ensure that releases were obtained for all featured contributors.

Channel 4 said that the filming procedure used was extremely labour intensive with a strict system of checks and balances which every member of the production team took very seriously. It argued that the process worked



successfully. In all cases where people had indicated they did not want to appear in the series, those wishes were adhered to. Accordingly, many people were blurred throughout all five episodes of the series. It added that the fact that there had only been one complaint of this nature demonstrated that the process worked well given the many hundreds of people who attended events at which filming took place and that had Mr Rafferty made it known to the production team that he did not wish to appear he would have been blurred or edited out.

- b) Channel 4 noted that Mr Rafferty accepted that the transcript of the programme did not suggest that he was a member of the Gypsy/Traveller community and that the programme did not label him as a Gypsy/Traveller. The broadcaster said that it would go further to say that not only did the programme not portray Mr Rafferty as a Gypsy/Traveller, but that he was also not treated unfairly or unjustly in the programme as broadcast.

It said that although it was unfortunate that Mr Rafferty's association with the Gypsy/Traveller community had negative consequences. Having accepted that the programme did not portray him as a Gypsy/Traveller, however, it was important to note that Mr Rafferty attended the wedding because he knew the groom, who was a Gypsy and therefore he already had an association with the Gypsy/Traveller community.

### **Response to comment: Unwarranted infringement of privacy**

- c) Channel 4 made no further comment in regard to this head of complaint.

### **Decision**

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording of the programme as broadcast and transcript and both parties' written submissions.

### **Unjust or unfair treatment**

In considering the two heads of Mr Rafferty's complaint of unfair treatment Ofcom assessed whether the broadcaster's actions were consistent with its obligation to avoid unjust or unfair treatment of individuals in programmes as set out in Rule 7.1 of the Ofcom Broadcasting Code ("the Code"). In doing so it paid particular regard to Practice 7.9 of the Code, which states that before broadcasting a factual programme broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to an individual or organisation.

- a) Ofcom first considered Mr Rafferty's complaint that he was treated unfairly in that footage of him was included in the programme without his permission.

Ofcom observed that from the submissions made by both parties it was clear that: Mr Rafferty was not invited to contribute to the programme (for example, by giving his view of the wedding or any matter related to it); and, given this, the programme makers did not specifically seek consent from Mr Rafferty for his inclusion in the programme.

It was also clear to Ofcom that there was a conflict between the parties regarding whether or not Mr Rafferty had told the programme makers at the wedding that he did not wish to appear in the programme.

In the absence of any definitive evidence, Ofcom was not able to draw a conclusion regarding whether Mr Rafferty made a request not to appear in the programme or not, and/or what actions were or were not taken with regard to any such request by the programme makers.

However, notwithstanding the dispute between the parties, Ofcom recognised that the programme makers had a protocol in place to deal with requests not to appear in the programme from people, like Mr Rafferty, who attended the wedding but were not invited to make a specific contribution to the programme.

In addition, Ofcom observed that the footage, which included Mr Rafferty, was filmed openly. As both parties indicated, it was apparent to the guests at the wedding, including Mr Rafferty, that filming was taking place and that anyone who did not wish to appear in the programme should contact one of the programme makers present during filming in order to ensure that they were aware of this wish.

While Mr Rafferty would have preferred not to have been included in the programme, Ofcom recognised also noted that his image was shown on screen for a very brief period; he was not named or referred to; and, nothing of a personal nature to him was revealed in this footage.

Ofcom concluded that Mr Rafferty was not portrayed as a Gypsy (see Decision head b) below for the reasons why). Therefore, he was not treated unfairly or unjustly in this regard.

In light of the factors noted above, Ofcom found that Mr Rafferty was not treated unfairly in respect of the fact that footage of him was included in the programme as broadcast without his permission.

- b) Ofcom then looked at Mr Rafferty's complaint that he was portrayed as a Gypsy and therefore was treated unfairly in the programme as broadcast.

Ofcom noted that the wedding shown in the programme was between a groom who was from the Gypsy/Traveller community and a bride who was not. It also noted the exchanged during the relevant section of the footage of this wedding between one of the programme makers and the dress maker (set out above on page 4).

As the dress maker was speaking the programme cut away from the image of her, to show various wedding guests, before coming back to her. Mr Rafferty, who was one of the wedding guests included in this section of the programme,

was shown on the edge of a group of male guests. His face was clearly visible to the side of the picture for between one and two seconds but he was not named or referred to in the programme.

Ofcom recognised that, given that he was shown at a wedding where the groom was from the Gypsy/Traveller community, some viewers might have concluded that Mr Rafferty was a member of the Gypsy/Traveller community. However, given that the programme made it clear that the wedding guests came from both the Gypsy/Traveller community and the non Gypsy/Traveller community. Ofcom also considered that it was equally likely that viewers might have concluded that Mr Rafferty was not from the Gypsy/Traveller community.

In this context, Ofcom observed that Mr Rafferty was not referred to or identified as a member of the Gypsy/Traveller community and no contentious comments about gypsies/Travellers or the Gypsy/Traveller community were juxtaposed with his brief appearance in the programme.

Taking into account the factors noted above Ofcom concluded that the programme did not state or imply that Mr Rafferty was a member of the Gypsy/Traveller community. It therefore found that he was not portrayed unfairly in the programme as broadcast in this respect.

#### Unwarranted infringement of privacy

- c) Ofcom then turned to Mr Rafferty's complaint that his privacy was unwarrantably infringed in the programme as broadcast in that despite his clearly stated wishes and refusal to sign the consent form, his face was clearly shown in the programme.

In Ofcom's view, the individual's right to privacy has to be balanced against the competing rights of the broadcaster to freedom of expression. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to focus intensely on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate.

This is reflected in how Ofcom applies Rule 8.1 of the Code - which states that any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

In considering this head of Mr Rafferty's complaint Ofcom paid particular regard to Practice 8.6 of the Code, which states that if the broadcast of a programme would infringe the privacy of a person, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted.

In order to establish whether or not Mr Rafferty's privacy was unwarrantably infringed in the programme as broadcast Ofcom first assessed the extent to which he could have legitimately expected that the footage of him attending the wedding reception would not be broadcast without his consent.

Mr Rafferty was filmed standing with a group of other guests at the reception of the wedding which was featured in this edition of the programme. Having examined the footage and the submissions of both parties, it was clear to Ofcom that the programme makers had filmed openly, in full view of those attending the wedding reception. Also, as both parties accepted, it was made clear to guests

that if they did not wish to appear in the programme they should contact one of the programme makers to make them aware of this wish.

Ofcom recognised the dispute between the parties regarding whether or not Mr Rafferty had contacted one of the programme makers to indicate that he did not wish to appear in the programme but in the absence of definitive evidence was unable to draw a conclusion on this matter.

However, Ofcom noted that the invitation to the wedding was by word of mouth. Given this Mr Rafferty would have been identifiable to a large number of fellow guests who were not of the immediate circle of either the bride or the groom. Ofcom also noted that the footage included in the programme in no way focused on Mr Rafferty and was brief, approximately two seconds in total. Mr Rafferty was neither named nor referred to in the programme and the only information disclosed about him was that he had attended the reception of this wedding, which the programme made clear was between a groom who was from the Gypsy/Traveller community and a bride who was not.

In light of these factors, it is Ofcom's view that the broadcast footage of Mr Rafferty did not amount to information that could be regarded as either private or sensitive in nature.

Ofcom recognised that Mr Rafferty considered that his attendance at this wedding was a sensitive matter given that some people held prejudiced views of people from the Gypsy/Traveller community. However, Ofcom considered that the circumstances in which he was filmed were not so sensitive as to attract a degree of privacy which meant that Mr Rafferty could have legitimately expected the resultant footage not to have been broadcast to a wider audience without his consent.

Ofcom noted that Mr Rafferty said that he had not given his consent for footage of him to be included in the broadcast programme. However, given the lack of any special circumstances in relation to filming of Mr Rafferty which gave rise to an expectation of privacy in the subsequent broadcast of the footage, Ofcom considered that his prior consent was not required.

Therefore, taking all the factors above into account, Ofcom did not consider that Mr Rafferty had a legitimate expectation of privacy in relation to broadcast of the footage of him at the wedding reception. It was also satisfied that the circumstances in which Mr Rafferty was filmed were such that his consent for the footage to be subsequently broadcast was not required. Given this conclusion, it was not necessary for Ofcom to consider whether any intrusion into Mr Rafferty's privacy was warranted.

Ofcom therefore found that there was no unwarranted infringement of Mr Rafferty's privacy in the programme as broadcast and has not upheld the complaint in this respect.

**Accordingly, Ofcom has not upheld Mr Rafferty's complaint of unjust or unfair treatment and unwarranted infringement of privacy in the broadcast of the programme.**

## Not Upheld

### Complaint by Mr Thomas Sheridan

*The Rise and Lies of Tommy Sheridan, BBC1 Scotland, 23 December 2010*

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**Summary:** Ofcom has not upheld this complaint of unjust or unfair treatment and unwarranted infringement of privacy in the programme as broadcast made on behalf of Mr Thomas Sheridan.

This programme examined the events leading up to the conviction for perjury of Mr Thomas Sheridan, the former Scottish Socialist Party Member of the Scottish Parliament, in 2010. The programme included footage taken from police CCTV recordings of Mr Sheridan being interviewed by police officers.

Mr Sheridan's legal representatives complained to Ofcom on his behalf that the inclusion in the programme of the police CCTV footage of his interview was unfair and that it unwarrantably infringed his privacy in the programme as broadcast.

Ofcom found the following:

- Ofcom considered that the inclusion of police interview footage relating to an incident that was not connected with his perjury trial was unlikely to materially affect viewers' understanding of Mr Sheridan, his defence at trial and his denial of the allegations levelled against him, in a way that was unfair. It was satisfied that the broadcaster had taken reasonable care to ensure that material facts were not presented, omitted or disregarded in a way that portrayed Mr Sheridan unfairly.
- Mr Sheridan had a legitimate expectation of privacy that the footage of him in a vulnerable position and sensitive situation (i.e. being interviewed by the police) would not be broadcast without his consent. However, on balance, the broadcaster's right to freedom of expression and the genuine public interest in examining the details of Mr Sheridan's trial and conviction for perjury outweighed the intrusion into his privacy. Therefore, there was no unwarranted infringement of Mr Sheridan's privacy in the programme as broadcast.

### Introduction

On 23 December 2010, BBC1 Scotland broadcast *The Rise and Lies of Tommy Sheridan*, which examined the events leading up to the conviction for perjury of Mr Thomas Sheridan, the former Scottish Socialist Party ("SSP") MSP<sup>1</sup>. The programme included an interview with Mr Sheridan filmed just before his conviction and interviews with a number of other contributors linked to Mr Sheridan and the trial. Archive footage of Mr Sheridan was also used in the programme, including footage taken from police CCTV recordings of Mr Sheridan being interviewed under caution.

The programme set out the background to Mr Sheridan's conviction for perjury and explained that in August 2006 Mr Sheridan was awarded £200,000 damages after being successful in his defamation action against News Group Newspapers after allegations about his personal life (namely, allegations relating to adultery and visiting 'Cupids', a "swingers" sex club) were published in 'The News of the World' newspaper. However, the newspaper later obtained secretly recorded footage of a

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<sup>1</sup> Member of the Scottish Parliament.

man whom it believed to be Mr Sheridan admitting that he had visited a sex club. Although Mr Sheridan denied that the secret recording was authentic, it provided a platform for a police investigation which culminated in Mr Sheridan being charged with perjury on 16 December 2007. The trial began in October 2010 and on 23 December 2010 (which was also the date of the broadcast of the programme) Mr Sheridan was convicted of perjury (i.e. he was found guilty of five out of fourteen subsections in the charge against him) and was sentenced to three years imprisonment on 26 January 2011.

During the course of the police investigation into allegations of perjury, Mr Sheridan was interviewed by the police and the interviews were recorded by CCTV cameras. Although the police CCTV footage of Mr Sheridan's interview was not used by the prosecution in the course of the trial, excerpts were included in the programme and were introduced by the programme as being *"leaked police interview footage seen for the first time"*. The programme later stated that the programme would reveal new allegations about Mr Sheridan's sexual history and showed further police interview footage of Mr Sheridan admitting to the police interview that *"there's been times when I've been involved with other, more than one participating partners in sex"*.

The programme stated that the allegations *"speak directly to Sheridan's sexual character dating back to as early as 1996"* and that two different women had made police statements in which they admitted to having had group sex with Mr Sheridan and a *"prominent Scottish football personality"*. One of the women, Ms Anvar Khan, had told the police that the incident had taken place in 1999, a year before Mr Sheridan's marriage. The programme included an excerpt from the police interview footage in which Mr Sheridan was asked about Ms Khan's claims and was shown dismissing them as *"nonsense"*.

The programme stated that, although these allegations did not surface at the time, Ms Khan, who was also a "sex columnist" for the News of the World newspaper, claimed in an article that she had had an adulterous affair with an unnamed MSP and that they had gone to a sex club together. Further allegations were published in the newspaper by another woman who claimed that she had had a "drink and drugs fuelled" affair with Mr Sheridan. Mr Sheridan successfully sued the owners of the newspaper in relation to these allegations in 2006.

Further footage of Mr Sheridan being interviewed by the police was shown in which he admitted telephoning a number of people (though not Ms Khan) with whom he was alleged to have attended Cupids. Police interview footage was also shown of Mr Sheridan accusing the police investigation of being part of a political conspiracy and denying the authenticity of the secretly recorded footage allegedly showing him admitting to attending a sex club.

The programme concluded by stating that: *"The jury [in the 2010 perjury trial] reject one sub-charge relating to an affair with Anvar Khan, but find him [Mr Sheridan] guilty of the rest."*

Following the broadcast of the programme, Aamer Anwar & Co Solicitors ("Aamer Anwar") complained to Ofcom on behalf of Mr Sheridan that he was treated unfairly in the programme and that his privacy was unwarrantably infringed in the programme as broadcast.

## **The Complaint**

### **Mr Sheridan's case**

#### *Unfair treatment*

In summary, Mr Sheridan's solicitors complained that Mr Sheridan was treated unfairly in the programme in that:

- a) The footage of the police interview included material about questions relating to group sex which related to matters that had nothing to do with the evidence in the trial for perjury. His solicitors said that this footage was used specifically for sensational purposes and to suggest that Mr Sheridan was guilty [of perjury], although the matters discussed related to a different period of his life.

The programme raised issues about charges of which Mr Sheridan was acquitted in the 2010 perjury trial. In particular, Mr Sheridan was accused of having sexual relationship with Ms Khan but had been acquitted of the sub-charge related to this issue during the trial.

#### *Privacy*

In summary, Mr Sheridan's solicitors complained that Mr Sheridan's privacy was unwarrantably infringed in the programme as broadcast in that:

- b) The programme included police CCTV footage of Mr Sheridan being questioned under police caution. No consent was sought from or given by Mr Sheridan for the footage to be used, nor could it be inferred that his consent would have been given.

His solicitors complained that the footage was not in the public domain and had not been used by the prosecution during the trial. The use of the word "*leaked*" in the programme suggested that the programme makers were aware that the provision of the material to them was not authorised and contained a cloak of confidentiality. His solicitors also said that Mr Sheridan had an expectation that a recording of his interview under police caution would not be broadcast to a wide audience and that no public interest existed in relation to the broadcast of personal information and such sensitive footage.

### **The BBC's case**

#### *Unfair treatment*

In summary, the BBC responded to the complaint that Mr Sheridan was treated unfairly as follows:

- a) The BBC said that the programme investigated the political career and personal life of Mr Sheridan, a high-profile public figure in Scotland and a former MSP. The programme was broadcast at the culmination of a trial in which he was convicted of lying on oath during a defamation action he had brought against a national newspaper. The programme examined Mr Sheridan's rise to political prominence and the series of controversial allegations about his private life which had emerged during his career. It also examined the numerous allegations about his sex life which prompted him to bring a defamation action against the News of the World newspaper in 2006, but ended with his conviction for perjury in 2010.

The BBC said that, while Mr Sheridan's conviction for perjury was the event which prompted the programme, its content extended beyond the consideration of the evidence presented in the perjury trial. It said that the scope and subject matter of the programme were clearly established and viewers would have been aware that it set out to examine Mr Sheridan's political rise and the allegations and events which eventually led to his imprisonment. The BBC said that in the opening sequence of the programme, the reporter said "*We reveal the inside story of the investigation which brought him [Mr Sheridan] down*" and went on to say that "*Sheridan's fall from grace has been spectacular, but how did it come to this?*"

The BBC said that the programme also contained further contextual analysis of Mr Sheridan's crime, including an interview with Mr Jonathan Aitken, another former senior politician who was found guilty of perjury, and an examination of the methods used by tabloid newspapers to uncover details of the private lives of politicians and celebrities.

The BBC said that it was legitimate for the programme to address issues which were relevant to Mr Sheridan's political and personal life, regardless of whether or not those issues directly formed part of the evidence in the 2010 perjury trial. The police CCTV footage of his interviews was used to illustrate issues pertinent to the trial, issues that surrounded the trial and issues that informed the viewer of the background to the trial, all of which were relevant to Mr Sheridan's defence and his subsequent conviction.

In particular, the BBC said that the programme included a sequence from Mr Sheridan's police interview in which he admitted that he had previously engaged in group sex. The issue of his sexual character was brought up consistently during his trial and Mr Sheridan consistently denied allegations that he had engaged in sex with multiple partners. The BBC said that at no stage during his trial did Mr Sheridan admit to engaging in such sexual activity. It was therefore reasonable to include footage from his police interview in which he admitted to such behaviour, as the admission spoke directly to his previous sexual history and character and was therefore relevant to a full and accurate assessment of his evidence. The BBC said that, in light of Mr Sheridan's proven dishonesty about his adultery, visiting sex clubs and other sexual practices, it was not unfair to him to include his confirmation that he had engaged in group sex.

The BBC said that, in order to explain the nature of the perjury trial, it was necessary to refer to the events which led up to it. Ms Khan's claims, as reported in the News of the World newspaper, that she had an affair with Mr Sheridan and visited a sex club with him, were fundamental to those events and Mr Sheridan's relationship with, and attitude towards, Ms Khan was pivotal to understanding the events that the programme covered. The BBC also said that Mr Sheridan was accused of visiting a sex club with a group of people which included Ms Khan, who gave evidence to this effect, following which the jury in the perjury trial found Mr Sheridan guilty of lying under oath.

The BBC said that the footage used from Mr Sheridan's police interview ensured that the programme accurately reflected his categorical denial that he had had a sexual relationship with Ms Khan.

In addition, the BBC said that the programme also included further footage from the police interview in which Mr Sheridan gave his version of disputed events. For



instance, it included his claim that the police investigation was biased against him from the outset and his confirmation that he denied telling his SSP colleagues that he had visited a sex club. The programme also included footage from the police interview in which Mr Sheridan categorically denied that he was the individual apparently confessing to visiting a sex club in a secretly filmed recording.

### *Privacy*

In summary, the BBC responded to the complaint that Mr Sheridan's privacy was unwarrantably infringed in the programme as broadcast as follows:

- b) The BBC said that the programme included CCTV footage recorded during a police interview with Mr Sheridan under caution. It maintained that the footage was obtained legally by the BBC. The BBC said that the prosecution gave an undertaking not to use the police interview recordings, following a challenge by the defence in light of a recent Supreme Court decision<sup>2</sup>.

The BBC said that Mr Sheridan was interviewed under caution by the police in the full knowledge that the interview was being recorded in sound and vision. It said that he would have understood at the time that the recording could be used in any future legal proceedings and the content of the interview could be made public in court. There was no sense in which he could, at the time, have understood the police interview to be a private or "off-the-record" conversation. The BBC said that his conduct during the interview was that of someone who expected the material to be disclosed. It said that it did not believe that Mr Sheridan's consent was required for the broadcast of this material. There was a legitimate public interest in including police interview footage with a convicted criminal. Therefore, the BBC said that the footage fairly represented Mr Sheridan's position, including his denial of the serious allegations put to him.

The BBC said that the sections of the police interview footage used in the programme covered a number of aspects of Mr Sheridan's personal and professional life as follows: allegations Mr Sheridan had engaged in group sex and his denial; Mr Sheridan's allegation that the police investigation was a politically motivated vendetta against him; Mr Sheridan's alleged visit to a sex club; questioning about an SSP meeting in November 2004; and claims that Mr Sheridan was the man featured in the secretly recorded footage. The BBC said that all these subjects were matters of widespread public knowledge and had been reported at length by the media before and during Mr Sheridan's original defamation case, and throughout his trial for perjury. Although the interview footage was not used in court, all the sections used in the programme related to information which was in the public domain. In addition, there was a legitimate public interest in including the interview footage in the programme.

The BBC said that Mr Sheridan was found guilty of perjury by lying under oath about the facts that he had:

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<sup>2</sup> *Cadder v H.M. Advocate* [2010] UKSC 43. The Court decided that a suspect who is detained has a right of access to legal advice from a lawyer in terms of Article 6 of the European Convention on Human Rights before he or she is interviewed by the police. The prosecution cannot rely on evidence of any incriminating answers obtained by the police from a detainee who is questioned in a police station without access to legal advice.

- told a meeting of the SSP in November 2004 that he had visited a sex club in 1996 and 2002 with Ms Khan;
- admitted to two party members that it was true that he had attended a sex club;
- visited the sex club on 27 September 2002; and
- had a sexual relationship with Ms Katrine Trolle between 1 January 2005 and 31 December 2005.

The BBC said there was a legitimate public interest in exposing the misleading claims that Mr Sheridan had made to the police during questioning. The police interview footage included evidence that Mr Sheridan had lied to the police about what he told colleagues at the SSP meeting about visiting a sex club and evidence that he lied about visiting Cupids with four other people including Ms Khan.

The BBC said that there was also a public interest in showing Mr Sheridan's dismissal of serious allegations which were made against him, including his participation in group sex and the claim he was the person in the secretly recorded footage. The police interview footage also showed Mr Sheridan's claim that the police investigation into his affairs were politically motivated and part of a personal vendetta against him. The BBC said that although the police interview footage itself was not used in court that did not affect its evidential value as a record of what Mr Sheridan had, in fact, said to the police about the matters concerned. It said that all the allegations formed part of the evidence presented in the perjury trial and the police interview footage accurately portrayed Mr Sheridan's defence which he presented to the court.

## **Decision**

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision, Ofcom considered all the relevant material provided by both parties. This included a recording and transcript of the programme as broadcast and written submissions and supporting material from both parties.

### *Unfair treatment*

- a) Ofcom considered the complaint that Mr Sheridan was treated unfairly in the programme as broadcast in that the footage of the police interview included material about questions relating to group sex which related to matters that had nothing to do with the evidence in the trial for perjury.

Ofcom considered whether the broadcaster's actions were consistent with its obligation to avoid unjust or unfair treatment of individuals or organisations in programmes as set out in Rule 7.1 of the Ofcom Broadcasting Code ("the Code").

In particular, Ofcom had regard to Practice 7.9 of the Code which states that broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that it unfair to an individual or organisation.

Ofcom noted the specific references in the programme that related directly to the complaint that it included material about allegations that had nothing to do with the evidence in Mr Sheridan's perjury trial. After the main introduction to the programme, the reporter stated:

*"New allegations about Tommy Sheridan's so-called vice can be revealed tonight. The BBC has obtained these police interview tapes which can be broadcast for the first time. More than 10 hours long, they contain fresh claims about Tommy Sheridan's sexual history. These include allegations of three-in-a-bed sex with a well-known Scottish football personality".*

The following excerpt of Mr Sheridan's police interview was then shown in the programme:

Police Officer: *"Have you ever been involved in group sex?"*

Mr Sheridan: *"I reckon to...up to...and when I got out of prison<sup>3</sup> there's been times when I've been involved with other, more than one participating partner in sex".*

Police Officer: *"And who would that be? Who would the other partners be?"*

Mr Sheridan: *"No, I can't remember".*

Police officer: *"Would [beep] be one of the partners?"*

Mr Sheridan: *"I don't think so, no".*

Immediately following this extract, the programme's reporter stated:

*"Two different women claim in police statements that they had three-in-a-bed sex with Sheridan and a prominent Scottish football personality. We have decided not to reveal his name. These allegations speak directly to Sheridan's sexual character, dating back to as early as 1996. One of the women was Anvar Khan, who would prove pivotal in the Sheridan story. She told the police that the threesome took place in 1999, just a year before Sheridan got married, and that he had told her that the other man had been in football".*

Footage of Mr Sheridan denying allegations made by Ms Khan about this particular incident to the police interviewer was then shown in the programme:

*"She's [Ms Khan] got a vivid imagination. She writes for a living and writes sex stories for a living and that sounds like one of them with partners put in appropriately. Nonsense, complete nonsense".*

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<sup>3</sup> In 1992, Mr Sheridan was sentenced to a six month prison sentence for contempt of court for denying a court order relating to his attendance to a proposed 'warrant sale'.

Ofcom went on to examine the steps taken by the programme makers to ensure that the programme was not unfair to Mr Sheridan in including this material. Ofcom's role is to determine whether or not, in broadcasting the police interview footage relating to allegations which were not part of the perjury trial, the broadcaster took reasonable care not to present, disregard or omit material facts in a way that was unfair to Mr Sheridan.

The Code recognises the importance of freedom of expression and the need to allow broadcasters the freedom to broadcast matters of genuine public interest without undue interference. However, in presenting material facts and allegations, reasonable care must be taken not to do so in a way that results in unfairness. Ofcom also recognised that the decision about what material was to be used in a programme was an editorial one for the broadcaster to make. In this particular case, Ofcom recognised that it was in the public interest for the broadcaster to report on the allegations such as those covered in the programme, but that this needed to be consistent with the requirements of the Code.

Ofcom noted that the programme was broadcast on the same date as Mr Sheridan's conviction for perjury and that it was the conclusion of this trial that had prompted the broadcast of the programme. It noted the programme's title *The Rise and Lies of Tommy Sheridan* along with the opening remarks in the programme that "...we reveal the inside story of the investigation which brought him down" and "*Sheridan's fall from grace has been spectacular, but how did it come to this?*". Ofcom took note of the BBC's submission that the scope of the programme was clearly to examine Mr Sheridan's political rise, the allegations about his private life and the events which led to his conviction and subsequent imprisonment. Ofcom also noted the BBC's submission that, although the police footage of Mr Sheridan admitting to participating in group sex at a previous point of time may not have formed part of the evidence in the perjury trial, it was relevant to the nature of his sexual character.

Ofcom noted that, despite including Mr Sheridan's admission to the police that he had engaged in group sex (albeit relating to a different occasion), the programme also included his denial that he had had a sexual relationship with Ms Khan and his assertion that her allegations were "*Nonsense, complete nonsense*". The programme also included Mr Sheridan's denial that he had admitted at the SSP meeting in November 2004 that he had visited a sex club and that he was the person filmed in the secretly recorded footage of a man admitting visiting a sex club.

Ofcom noted that while the programme reported that Mr Sheridan had been accused of having an affair with Ms Khan, it did not make that allegation itself. Notwithstanding Mr Sheridan's denial that he had had a sexual relationship with Ms Khan, the programme made it clear in commentary that:

*"It was Anvar Khan's sex story which set off the Sheridan scandal but in the witness box she is forced to admit a series of details in that original story were made up".*

Towards the conclusion of the programme, the commentary stated:

*"The jury [in the perjury trial] reject one sub-charge relating to an affair with Anvar Khan, but they convict him of the rest".*

Ofcom considered that viewer would have been left in little doubt that Mr Sheridan denied that he had a sexual affair with Ms Khan, that parts of Ms Khan's story were fictitious and that the jury acquitted him of the charge relating to Ms Khan in the perjury trial.

Ofcom took the view that it was not only legitimate for the programme to examine the events leading up to Mr Sheridan's conviction for perjury, but also to explore the background to these events and to Mr Sheridan's sexual character. While it noted that Mr Sheridan's admission to participating in group sex related to an occasion unconnected with that under scrutiny in the perjury trial, it was relevant to the wider circumstances of the case, including Mr Sheridan's sexual character and the fact that he was found by a jury to have lied to a court about aspects of his sex life.

In Ofcom's view, it was clear that the aim of programme, while prompted by the conclusion of the perjury trial, was to chronicle the events that led to Mr Sheridan's conviction and to explore the allegations that went to the heart of the trial and the 2006 defamation case. Ofcom considered that, given this context, viewers would have understood that the police interview footage in relation to his admission to engaging in group sex formed relevant background to Mr Sheridan's defamation and perjury cases and would have been able to reach their own conclusions as to the significance, if any, of his admission to this aspect of his sexual character in the events leading up to his conviction for perjury.

Taking all these factors into account, Ofcom considered that the inclusion of the police interview footage in the programme in which Mr Sheridan admitted to taking part in an incident of group sex, even though it was not part of the evidence at his perjury trial was unlikely to materially affect viewers' understanding of Mr Sheridan, his defence at the trial and his denial of the allegations against him, in a way that was unfair. Ofcom was satisfied that the broadcaster had taken reasonable care to ensure that material facts were not presented, omitted or disregarded in a way that portrayed Mr Sheridan unfairly.

Ofcom therefore found no unfairness to Mr Sheridan in this regard.

### *Privacy*

- b) Ofcom considered the complaint that Mr Sheridan's privacy was unwarrantably infringed in the broadcast of the programme in that the programme included police CCTV footage of Mr Sheridan being questioned under police caution. No consent was sought from or given by Mr Sheridan for the footage to be used, nor could it be inferred that his consent would have been given.

In Ofcom's view, the individual's right to privacy has to be balanced against the competing rights of the broadcaster to freedom of expression. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to focus on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate.

This is reflected in how Ofcom applies Rule 8.1 of the Ofcom's Broadcasting Code ("the Code"), which states that any infringement of privacy in programmes or in connection with obtaining material included in programmes must be warranted. Ofcom also had regard to Practice 8.6 of the Code which states that if the broadcast of a programme would infringe the privacy of a person or

organisation, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted.

In considering whether or not Mr Sheridan's privacy was unwarrantably infringed in the programme as broadcast, Ofcom first considered the extent to which he could have legitimately expected that the footage of his police interview, in which personal information about him was disclosed, would not be broadcast without his consent.

Having watched the footage of Mr Sheridan in the programme, Ofcom noted that the footage had been filmed by a CCTV camera in a police interview room. The footage showed Mr Sheridan being questioned by and responding to a police officer about: his involvement in group sex; Ms Khan's allegations; phone calls made by him before the alleged visit to the sex club; the SSP meeting and the members who had said that he admitted to visiting the sex club; and the authenticity of the secretly recorded footage.

Ofcom noted that the BBC submitted that it had obtained access to the police interview footage legally, and that the complainant questions whether the material was in fact obtained legally. It noted too that the information contained in the footage shown in the programme was already in the public domain (i.e. questioning and responses in relation to: group sex; Ms Khan; the sex club; the SSP meeting; and the secretly recorded footage). It also noted that aspects of Mr Sheridan's professional and personal life were widely-known publicly and had been reported at length throughout the 2006 defamation case and his perjury trial.

Ofcom considered that the broadcast of the footage of Mr Sheridan's police interviews did not disclose any information about his personal life that had not already been placed in the public domain either by Mr Sheridan himself, or as a result of the media reporting of the facts and allegations surrounding the defamation and perjury proceedings. In Ofcom's view, this considerably diminished any expectation of privacy Mr Sheridan may have had in relation to those details of his personal life or that the content of his police interview would not broadcast in a programme focusing on him and his conviction for perjury.

However, despite concluding that the footage itself did not disclose any information about Mr Sheridan that was private, Ofcom considered that the CCTV footage itself of Mr Sheridan in a police interview room being questioned by a police officer under caution showed him in a vulnerable position and in a sensitive situation. While Mr Sheridan may have expected that the footage of him being interviewed may have been subsequently made public by its use in evidence in the perjury trial (which it was not), he was unlikely to have expected that the footage would be disclosed in the broadcast to a wider audience in a television programme.

Therefore, taking all the factors above into account, Ofcom took the view that Mr Sheridan had a legitimate expectation of privacy that the footage of him in such a vulnerable position and sensitive situation would not be broadcast without his consent.

Ofcom then went on to consider the broadcaster's competing right to freedom of expression and the need for broadcasters to have the freedom to broadcast matters of a genuine public interest without undue interference. In this respect, Ofcom considered whether there was sufficient public interest to justify the

intrusion into Mr Sheridan's privacy by including the police interview footage of him in the programme without his consent.

Ofcom took the view that the programme was a serious piece of broadcast journalism and that there was a significant public interest in the programme's examination of Mr Sheridan's political career and personal life on the day that he was found guilty of perjury. Ofcom recognised that Mr Sheridan had been a prominent political figure in Scotland and that both his trial for perjury in 2010 and his 2006 defamation action were a high profile and generated significant media interest not only in Scotland where the programme was broadcast, but also throughout the rest of the United Kingdom. Given these factors, Ofcom considered that there was a genuine and significant public interest in the programme's examination of Mr Sheridan and aspects of his private life that were central to his successful defamation action in 2006 and his subsequent conviction of perjury in 2010. Ofcom considered it was legitimate for the programme to explore these issues and to use footage of Mr Sheridan's police interview to illustrate his responses to the allegations made against him. Ofcom considered that Mr Sheridan's consent was not required in these circumstances.

On balance and given all the factors set out above, Ofcom concluded that the broadcaster's right to freedom of expression and to impart information and ideas and the audiences' right to receive the same, without interference, in the circumstances of this particular case, outweighed the intrusion into the privacy that Mr Sheridan would have expected. Ofcom found therefore that there was no unwarranted infringement of Mr Sheridan's privacy in the programme as broadcast.

**Accordingly, Ofcom has not upheld Mr Sheridan's complaint of unjust or unfair treatment and unwarranted infringement of privacy in the programme as broadcast.**

## Not Upheld

### Complaint by Mrs Gail Sheridan

*The Rise and Lies of Tommy Sheridan, BBC1 Scotland, 23 December 2010*

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**Summary:** Ofcom has not upheld Mrs Gail Sheridan's complaint of unwarranted infringement of privacy in the programme as broadcast.

This programme examined the events leading up to the conviction for perjury of Mr Thomas Sheridan, the former Scottish Socialist Party Member of the Scottish Parliament, in 2010. The programme included archive footage taken from police CCTV recordings of Mr Sheridan and his wife, Mrs Gail Sheridan, being interviewed by police officers.

Mrs Sheridan's legal representatives complained to Ofcom on her behalf that the inclusion of the police CCTV footage of her interview unwarrantably infringed her privacy in the programme as broadcast.

Ofcom found that Mrs Sheridan had a legitimate expectation of privacy that the footage of her in a vulnerable and sensitive situation would not be broadcast without her consent. However, on balance, Ofcom concluded that the broadcaster's right to freedom of expression and the genuine public interest in examining the details of Mr Sheridan's trial and conviction for perjury and Mrs Sheridan's role in the story outweighed the intrusion into her privacy. Therefore, there was no unwarranted infringement of Mrs Sheridan's privacy in the programme as broadcast.

### Introduction

On 23 December 2010, BBC1 Scotland broadcast *The Rise and Lies of Tommy Sheridan*, which examined the events leading up to the conviction for perjury of Mr Thomas Sheridan, the former Scottish Socialist Party MSP<sup>1</sup>. The programme included an interview with Mr Sheridan filmed just before his conviction (on 23 December 2010) and interviews with a number of other contributors linked to Mr Sheridan and the trial. Archive footage of Mr Sheridan and Mrs Sheridan, was also used in the programme, including footage taken from police CCTV recordings of Mr and Mrs Sheridan being interviewed.

The programme set out the background to Mr Sheridan's conviction for perjury and explained that in August 2006, Mr Sheridan was awarded £200,000 in damages after being successful in his defamation action against News Group Newspapers after allegations about his private life (namely, allegations relating to adultery and a "swingers" sex club) were published in 'The News of the World' newspaper. However, the newspaper later obtained secretly recorded footage of a man who it believed to be Mr Sheridan admitting that he had visited a sex club. Although Mr Sheridan denied that the secret recording was authentic, it provided a platform for a police investigation which culminated in Mr Sheridan being charged with perjury in December 2007. In February 2008, Mrs Sheridan was also charged with perjury (in relation to alibi evidence given by her during the 2006 defamation trial) and their trial began in October 2010. On 17 December 2010, Mrs Sheridan was acquitted after the prosecution dropped the charges against her. However, on 23 December 2010, Mr

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<sup>1</sup> Member of the Scottish Parliament.



Sheridan was convicted of perjury and was subsequently sentenced to three years imprisonment.

During the course of the police investigation into allegations of perjury, Mr and Mrs Sheridan were interviewed separately by the police and their interviews were recorded by CCTV cameras. Although the police CCTV footage of Mrs Sheridan's interview was not used by the prosecution in the course of the trial, excerpts were included in the programme and were introduced by the programme's presenter as being *"leaked police interview footage seen for the first time"*. The presenter later stated that *"the BBC has obtained these police interview tapes which can be broadcast for the first time."*

Extracts of Mrs Sheridan's police interview were then shown in the programme:

Mrs Sheridan: *"Based on legal advice from my senior counsel, Mr Paul McBride, I intend to make no further comment."*

Presenter: *"Gail, on the other hand exercised her right to silence."*  
(voiceover)

Police officer: *"Are you married Mrs Sheridan?"*

*[silence]*

*"Clearly we are aware that you are married, Mrs Sheridan, these are basic, basic questions, okay?"*

Presenter: *"Gail, who is a Catholic, has her rosary beads removed from her during a break from questioning, and what comes next is totally unexpected."*  
(voiceover)

Police officer: *"Gail, I must ask you at this time, who has schooled you to make no...or to sit and focus on one point on the wall? 'Cause I can tell you now, I have interviewed people who have been held under the Terrorism Act at a police station just along the road from yourself over a period of seven days and that is the kind of activity I would expect from them. It's a recognised, PIRA<sup>2</sup>, IRA, whatever, form of terrorism, technique. Focus on a spot on the wall, focus on the table, focus on the roof, focus on the bin, say nothing."*

*[silence]*

*"Who trained you in this technique?"*

Later in the programme, further police interview footage of Mrs Sheridan was shown in which she was questioned about alibi evidence given by her in the 2006 defamation trial. In particular, a police officer was shown putting to Mrs Sheridan that the police had evidence that suggested that Mr Sheridan had not been with her on a particular evening as she had claimed, but that he had been at a sex party and she had been telephoning people to ascertain his whereabouts. Mrs Sheridan made no comment.

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<sup>2</sup> The Provisional Irish Republican Army.

Following the broadcast of the programme, Bannatyne, Kirkwood, France & Co Solicitors (“BKF”) complained to Ofcom on behalf of Mrs Sheridan that her privacy was unwarrantably infringed in the programme as broadcast.

## **The Complaint**

### **Mrs Sheridan’s case**

In summary, BKF complained that Mrs Sheridan’s privacy was unwarrantably infringed in the programme as broadcast in that the programme included police CCTV footage of Mrs Sheridan being interviewed under police caution and which disclosed private information of a sensitive nature about her religious beliefs (i.e. she was shown playing with her rosary beads). No consent was sought, or given by Mrs Sheridan for the footage of her to be broadcast, nor could it be inferred that her consent would have been given.

BKF complained that the footage was not in the public domain and had not been used by the prosecution during the trial. The use of the word “*leaked*” in the programme suggested that the programme makers were aware that the provision of the material to them was not authorised and contained a cloak of confidentiality. BKF also said that Mrs Sheridan had an expectation that a recording of her interview under police caution would not be broadcast to a wide audience. BKF also stated that no public interest existed in relation to the broadcast of such private information, the more so in circumstances where Mrs Sheridan was acquitted of all charges against her.

### **The BBC’s case**

In summary, and in response to the complaint of unwarranted infringement of privacy in the programme as broadcast, the BBC said the programme examined Mr Sheridan’s rise to political prominence and the series of controversial allegations about his private life which emerged during his career. It also examined the numerous allegations about his personal life which prompted him to bring a successful defamation action against the ‘News of the World’ in 2006, but ended with his conviction for perjury in 2010.

The BBC said that Mrs Sheridan had been a constant figure throughout Mr Sheridan’s career, supporting him during the public allegations of infidelity and during his defamation action. It was therefore legitimate, the BBC said, for the programme to examine the role that Mrs Sheridan had played in her husband’s rise to political power, particularly bearing in mind that she provided the crucial alibi evidence which helped him to win his defamation case in 2006.

The BBC said that the programme included footage recorded in February 2008 during a police interview with Mrs Sheridan under caution. It maintained that the footage was obtained legally by the BBC. The BBC also clarified that the police interview recordings were not ruled inadmissible by the court: instead the prosecution gave an undertaking not to use them following a challenge by the defence in light of a recent Supreme Court decision<sup>3</sup>.

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<sup>3</sup> *Cadder v H.M. Advocate* [2010] UKSC 43. The Court decided that a suspect who is detained has a right of access to legal advice from a lawyer in terms of Article 6 of the European Convention on Human Rights before he or she is interviewed by the police. The prosecution cannot rely on evidence of any incriminating answers obtained by the police from a detainee who is questioned in a police station without access to legal advice.

In relation to the specific issues raised in the complaint, the BBC said that the content of Mrs Sheridan's police interview had been widely reported by the media in Scotland after it was introduced in court by her husband during the couple's trial for perjury. The BBC said that Mr Sheridan had accused the police of mounting a personal vendetta against him during the trial and that he had spoken at length during the trial about the way the police had mistreated his wife and daughter, including the manner in which his wife was interviewed. He also told the court that the only reason a case had been brought against his wife was because she had supported her husband throughout.

In particular, the BBC said that Mr Sheridan had drawn attention to the manner in which his wife had been interviewed by police officers in February 2008. He accused the police of conducting an intimidating interview and harassing his wife because she was a Catholic. The BBC also said that Mr Sheridan told the court on 2 December 2010 that one police officer had accused Mrs Sheridan of "acting like a terrorist". He also told the court that his wife had exercised her right to remain silent during the interview on the advice of her lawyer. The BBC said that Mr Sheridan also asked one of the police officers who led the investigation into allegations of perjury to read from a transcript of Mrs Sheridan's police interview in court:

Police Officer: "Gail, I must ask you at this time who has schooled you to sit  
(from transcript) and focus at one point on the wall because I've interviewed people arrested under the Terrorist Act and that's exactly the kind of activity I've experience from them."

Mr Sheridan: "You've just in the course of that interview accused her of  
(to police officer) being a trained terrorist."

Police Officer: "I've just asked her where she learned that technique because  
it's so hard to do."

Mr Sheridan: "That was just pure and utter intimidation by you."

The BBC went on to state that Mr Sheridan asked the police officer:

"Is it because my wife is a practising Catholic, whose QC had advised her to stay silent that you discussed her acting as a PIRA/IRA terrorist?"

The BBC said that these exchanges were made in open court and were widely reported in the media at the time. The BBC said it was clear that Mr Sheridan chose to make public the content of the police interview with his wife in order to further his defence. It also said that Mr Sheridan had accused the police of waging a personal vendetta against himself and his family and had cited the treatment of his wife during her interview as evidence of police bullying and intimidation. The BBC, therefore, said that it was apparent that both the fact that the interview had taken place and material parts of the content of Mrs Sheridan's police interview were in the public domain.

The BBC said that Mrs Sheridan was interviewed by the police under caution in the full knowledge that the interview was being recorded in sound and vision. It said that she would have understood at the time that the recording could be used in any future legal proceedings and that the content of the interview could be made public in court. The BBC said that there was no sense in which Mrs Sheridan could, at the time, have understood the police interview to be a private or off-the-record conversation and her conduct during the interview was that of someone who expected the material

to be disclosed. It also said that account must be taken of the extent to which the substance of the interview had already been disclosed by Mr Sheridan during the course of the trial. Furthermore, the BBC said that it did not believe that the interview conveyed any information about Mrs Sheridan which was intrinsically private such that her consent was required for its use in the programme.

The BBC said that Mrs Sheridan was a well-known figure in Scotland and that her religious beliefs were a matter of public knowledge. She is a practising Catholic, went to a Catholic school and was married in a Catholic church, an event which was widely covered by the media in Scotland. The BBC said that Mrs Sheridan had also spoken publicly about her religious beliefs. Therefore, the BBC said that it did not believe that the broadcast of the police interview revealed any information about Mrs Sheridan's religious beliefs which could reasonably be considered sensitive or private in nature.

The BBC reiterated that Mr Sheridan based a significant element of his defence on the grounds that the prosecution was motivated by a desire to ruin him personally and professionally, and this extended to mistreatment of his wife and daughter. Therefore, the footage in which Mrs Sheridan refused to respond to police questions in interview and in which she was accused of acting like terrorist was cited by Mr Sheridan as evidence that his wife was subjected to unacceptable treatment by the police. The BBC said that there was a clear public interest in showing parts of the police interview which were directly relevant to this aspect of Mr Sheridan's defence.

## **Decision**

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision, Ofcom considered all the relevant material provided by both parties. This included a recording and transcript of the programme as broadcast and written submissions and supporting material from both parties.

Ofcom considered the complaint that Mrs Sheridan's privacy was unwarrantably infringed in the broadcast of the programme in that the programme included police CCTV footage of Mrs Sheridan being interviewed under police caution and which disclosed private information of a sensitive nature about her religious beliefs without consent.

In Ofcom's view, the individual's right to privacy has to be balanced against the competing rights of the broadcaster to freedom of expression. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to focus on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate.

This is reflected in how Ofcom applies Rule 8.1 of the Ofcom's Broadcasting Code ("the Code"), which states that any infringement of privacy in programmes or in connection with obtaining material included in programmes must be warranted. Ofcom also had regard to Practice 8.6 of the Code which states that if the broadcast of a programme would infringe the privacy of a person or organisation, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted.

In considering whether or not Mr Sheridan's privacy was unwarrantably infringed in the programme as broadcast, Ofcom first considered the extent to which she could have legitimately expected that the footage of her police interview in which personal information about her was disclosed would not be broadcast without her consent.

Having watched the footage of Mrs Sheridan in the programme and subject to her complaint (as detailed in the Introduction above), Ofcom noted that the footage had been filmed by a CCTV camera in a police interview room. The footage showed Mrs Sheridan being questioned by a police officer about: her marital status; whether she had been trained in a technique the police officer likened to that used by Irish republican terrorists under interrogation; and, about alibi evidence she had given in the 2006 defamation trial. It noted that Mrs Sheridan remained silent throughout the footage shown apart from at the beginning in which she told the police interviewer that she intended to make no further comment on the advice of her lawyer (who was not present at the time). Ofcom also noted that the BBC submitted that it had obtained access to the police interview footage legally, and that the complainant questions whether the material was in fact obtained legally. Ofcom further noted that both the fact that the interview had taken place and material parts of the subject matter of the interview footage shown (i.e. questioning about "terrorist technique") were already in the public domain. It also noted from the BBC's submission that Mrs Sheridan's religious beliefs were well-known and that she had spoken publicly about being a Catholic. Ofcom considered that the broadcast of the footage of Mrs Sheridan's police interviews did not disclose any information about Mrs Sheridan's religious beliefs, or her treatment by the police interviewer in relation to her remaining silent during the interview, that had not already been placed in the public domain either by Mrs Sheridan herself, or by her husband during the course of the perjury trial. In Ofcom's view, this considerably diminished any expectation of privacy Mrs Sheridan may have had in that detail of her religious beliefs and the content of her police interview (in relation to her "terrorist interrogation technique") would not broadcast in a programme focusing on her husband and the perjury case in which she was involved.

Ofcom concluded that the footage itself did not disclose any information about Mrs Sheridan that was private. However, Ofcom considered that the CCTV footage of Mrs Sheridan in a police interview room being questioned by a police officer under caution showed her in a vulnerable position and in a sensitive situation. While Mrs Sheridan may have expected that the footage of her being interviewed may have been subsequently made public by its use in evidence in the perjury trial (which it was not), she was unlikely to have expected that the footage would be disclosed in the broadcast to a wider audience in a television programme. Therefore, taking all the factors above into account, Ofcom took the view that Mrs Sheridan had a legitimate expectation of privacy in that the footage of her in such a vulnerable and sensitive situation would not be broadcast without her consent.

Ofcom then went on to consider the broadcaster's competing right to freedom of expression and the need for broadcasters to have the freedom to broadcast matters of a genuine public interest without undue interference. In this respect, Ofcom

considered whether there was sufficient public interest to justify the intrusion into Mrs Sheridan's privacy by including the police interview footage of her in the programme.

Ofcom took the view that the programme was a serious piece of broadcast journalism and that there was a significant public interest in the programme's examination of Mr Sheridan's political career and personal life on the day that he was found guilty of perjury. Ofcom recognised that Mr Sheridan had been a prominent political figure in Scotland and that both his trial for perjury in 2010 and his 2006 defamation action were a high profile and generated significant media interest not only in Scotland where the programme was broadcast, but also throughout the rest of the United Kingdom. It noted that Mrs Sheridan had played a public role in supporting her husband throughout his successful defamation action in 2006, in which she gave alibi evidence, and against allegations of his infidelity. Ofcom also noted that Mrs Sheridan had been charged with perjury alongside her husband although she was acquitted after the prosecution dropped the charges against her during the trial, and that her part in both the perjury trial and the defamation action had been central. Given these factors, Ofcom considered that there was a genuine and significant public interest in the programme's examination of the circumstances surrounding Mr. Sheridan's trial and conviction for perjury, and, the central roles played in this by those directly involved, which included Mrs Sheridan and therefore it was legitimate for the programme to explore these issues.

On balance and given all the factors set out above, Ofcom concluded that the broadcaster's right to freedom of expression and to impart information and ideas and the audience's right to receive the same, without interference, in the circumstances of this particular case, outweighed the intrusion into the privacy that Mrs Sheridan's would have expected. Ofcom found, therefore, that there was no unwarranted infringement of Mrs Sheridan's privacy in the programme as broadcast.

**Accordingly, Ofcom has not upheld Mrs Sheridan's complaint of unwarranted infringement of privacy in the broadcast of the programme.**

## Other Programmes Not in Breach

Up to 3 October 2011

| Programme                           | Broadcaster       | Transmission Date | Categories                       | Number of complaints |
|-------------------------------------|-------------------|-------------------|----------------------------------|----------------------|
| Penn and Teller: Fool Us            | ITV2              | 05/08/2011        | Violence and dangerous behaviour | 1                    |
| Roger Day                           | BBC Radio Kent    | 22/06/2011        | Race discrimination/offence      | 1                    |
| Sky Anytime+ promotion              | Sky Movies Comedy | 06/08/2011        | Materially misleading            | 1                    |
| Torchwood: Miracle Day              | BBC 1             | 25/08/2011        | Sexual material                  | 78                   |
| Traffic Cops                        | BBC 1             | 11/08/2011        | Offensive language               | 1                    |
| XFM Drivetime with Eoghan McDermott | XFM               | 02/09/2011        | Due impartiality/bias            | 1                    |

## Complaints Assessed, not Investigated

Between 20 September and 3 October 2011

This is a list of complaints that, after careful assessment, Ofcom has decided not to pursue because they did not raise issues warranting investigation.

| Programme                            | Broadcaster | Transmission Date | Categories                               | Number of complaints |
|--------------------------------------|-------------|-------------------|--|----------------------|
| 118 118's sponsorship of ITV movies  | ITV2        | 17/09/2011        | Violence and dangerous behaviour         | 2                    |
| 118 118's sponsorship of ITV movies  | ITV2        | 24/09/2011        | Violence and dangerous behaviour         | 4                    |
| 4thought.tv                          | Channel 4   | 30/09/2011        | Religious/Beliefs discrimination/offence | 2                    |
| Advertising                          | Channel 5   | 21/09/2011        | Advertising minutage                     | 1                    |
| All Star Family Fortunes             | ITV1        | 17/09/2011        | Race discrimination/offence              | 1                    |
| All Star Family Fortunes             | ITV1        | 17/09/2011        | Religious/Beliefs discrimination/offence | 1                    |
| ARY News                             | ARY News    | 02/08/2011        | Race discrimination/offence              | 1                    |
| Aviva's sponsorship of Downton Abbey | ITV1        | 18/09/2011        | Generally accepted standards             | 15                   |
| Aviva's sponsorship of Downton Abbey | ITV1        | 25/09/2011        | Generally accepted standards             | 1                    |
| Balls of Steel Australia             | 4 Music     | 26/09/2011        | Animal welfare                           | 1                    |
| Bang Goes the Theory                 | BBC 1       | 26/09/2011        | Outside of remit / other                 | 1                    |
| Bargain Hunt                         | BBC 1       | 26/09/2011        | Harm                                     | 1                    |
| BBC News                             | BBC         | n/a               | Outside of remit / other                 | 1                    |
| BBC News at Six                      | BBC 1       | 28/09/2011        | Offensive language                       | 1                    |
| BBC News at Ten                      | BBC 1       | 15/09/2011        | Outside of remit / other                 | 1                    |
| BBC News                             | BBC 1       | 21/09/2011        | Outside of remit / other                 | 1                    |
| Big Brother                          | Channel 5   | 09/09/2011        | Race discrimination/offence              | 1                    |
| Big Brother                          | Channel 5   | 15/09/2011        | Nudity                                   | 1                    |
| Big Brother                          | Channel 5   | 15/09/2011        | Religious/Beliefs discrimination/offence | 1                    |
| Big Brother                          | Channel 5   | 18/09/2011        | Generally accepted standards             | 1                    |
| Big Brother                          | Channel 5   | 23/09/2011        | Materially misleading                    | 1                    |
| Big Brother                          | Channel 5   | 25/09/2011        | Sexual material                          | 6                    |
| Big Brother                          | Channel 5   | 27/09/2011        | Violence and dangerous behaviour         | 1                    |
| Big Brother                          | Channel 5   | 28/09/2011        | Animal welfare                           | 1                    |
| Big Brother                          | Channel 5   | 02/10/2011        | Generally accepted standards             | 1                    |
| Big Brother (trailer)                | Channel 5   | 21/09/2011        | Violence and dangerous behaviour         | 1                    |
| Big Brother (trailer)                | Channel 5   | n/a               | Outside of remit / other                 | 1                    |



|  |                |            |                                    |   |
|--|----------------|------------|------------------------------------|---|
| Big Brother's Bit on the Side          | 5*             | 14/09/2011 | Nudity                             | 1 |
| Big Brother's Bit on the Side          | Channel 5      | 23/09/2011 | Generally accepted standards       | 2 |
| Big Brother's Bit on the Side          | Channel 5      | 29/09/2011 | Race discrimination/offence        | 1 |
| Blue Peter                             | BBC 1          | 26/09/2011 | Sexual material                    | 1 |
| Brainiac                               | Pick tv        | 01/10/2011 | Scheduling                         | 1 |
| BT Vision's sponsorship of Drama on 4  | Channel 4      | 28/09/2011 | Generally accepted standards       | 1 |
| BT Vision's sponsorship of Drama on 4  | E4             | n/a        | Generally accepted standards       | 1 |
| Capital FM daytime                     | Capital FM     | n/a        | Competitions                       | 1 |
| Catherine Cookson's The Dwelling Place | Yesterday      | 04/09/2011 | Sexual material                    | 1 |
| Celebrity Big Brother                  | Channel 5      | 08/09/2011 | Voting                             | 1 |
| Celebrity Juice                        | ITV2           | 17/09/2011 | Race discrimination/offence        | 1 |
| Celebrity Juice                        | ITV2           | 22/09/2011 | Gender discrimination/offence      | 1 |
| Channel 4 News                         | Channel 4      | 15/09/2011 | Fairness & Privacy                 | 1 |
| Channel 4 News                         | Channel 4      | 17/09/2011 | Offensive language                 | 1 |
| Channel 4 News                         | Channel 4      | 21/09/2011 | Gender discrimination/offence      | 1 |
| Channel 4 News                         | Channel 4      | 28/09/2011 | Due impartiality/bias              | 1 |
| Channel 4 promo                        | Channel 4      | 06/09/2011 | Animal welfare                     | 1 |
| Channel Report                         | Channel TV     | 19/09/2011 | Generally accepted standards       | 1 |
| Chatbox                                | Chatbox        | 11/09/2011 | Offensive language                 | 1 |
| Chowder                                | CNToo          | 24/09/2011 | Scheduling                         | 1 |
| Coach Trip                             | Channel 4      | 26/09/2011 | Offensive language                 | 1 |
| Colin Murray                           | BBC Radio 5    | n/a        | Commercial communications on radio | 1 |
| Come Dine with Me                      | Channel 4      | 23/09/2011 | Sexual material                    | 1 |
| Coronation Street                      | ITV1           | 21/09/2011 | Scheduling                         | 2 |
| Coronation Street                      | ITV1           | 29/09/2011 | Scheduling                         | 1 |
| Countryfile                            | BBC 1          | 11/09/2011 | Materially misleading              | 1 |
| Coverage of 9/11                       | BBC 1, 2 and 3 | n/a        | Outside of remit / other           | 1 |
| Cowboy Builders                        | Channel 5      | 08/09/2011 | Offensive language                 | 1 |
| Daybreak                               | ITV            | 15/07/2011 | Materially misleading              | 1 |
| Daybreak                               | ITV1           | 17/08/2011 | Due accuracy                       | 1 |
| Daybreak                               | ITV1           | 19/09/2011 | Generally accepted standards       | 1 |
| DCI Banks (trailer)                    | ITV1           | 24/09/2011 | Scheduling                         | 1 |
| Doc Martin                             | ITV1           | 19/09/2011 | Advertising minutage               | 1 |
| Doc Martin                             | ITV1           | 19/09/2011 | Materially misleading              | 1 |
| Doctor Who                             | BBC 1          | 10/09/2011 | Scheduling                         | 1 |
| Doctor Who                             | BBC 1          | 24/09/2011 | Generally accepted standards       | 1 |
| Doctors                                | BBC 1          | 21/09/2011 | Generally accepted                 | 1 |

|  |                          |            | standards                           |   |
|--|--------------------------|------------|-------------------------------------|---|
| Doctors                                  | BBC 1                    | 21/09/2011 | Scheduling                          | 1 |
| Doctors                                  | BBC 1                    | 21/09/2011 | Violence and dangerous behaviour    | 1 |
| Don't Tell the Bride                     | BBC 3                    | 19/09/2011 | Offensive language                  | 1 |
| Downton Abbey                            | ITV1                     | 18/09/2011 | Advertising scheduling              | 6 |
| Downton Abbey                            | ITV1                     | 25/09/2011 | Advertising minutage                | 1 |
| Downton Abbey                            | ITV1                     | 02/10/2011 | Advertising minutage                | 2 |
| Eastenders                               | BBC 1                    | 31/12/2010 | Generally accepted standards        | 1 |
| EastEnders                               | BBC 1                    | 22/09/2011 | Drugs, smoking, solvents or alcohol | 1 |
| EastEnders                               | BBC 1                    | 23/09/2011 | Generally accepted standards        | 1 |
| Eastenders, Emmerdale, Coronation Street | Various                  | n/a        | Outside of remit / other            | 1 |
| Eid Announcement                         | Crescent Radio, Rochdale | 29/08/2011 | Materially misleading               | 1 |
| Embarrassing Bodies                      | Channel 4                | 19/09/2011 | Nudity                              | 1 |
| Emmerdale                                | ITV1                     | 15/09/2011 | Suicide and self harm               | 1 |
| Emmerdale                                | ITV1                     | 29/09/2011 | Suicide and self harm               | 5 |
| Entertainment Programming                | NTV                      | n/a        | Outside of remit / other            | 1 |
| Fags, Mags and Bags                      | BBC Radio 4              | 20/09/2011 | Outside of remit / other            | 1 |
| Fighting on the Frontline                | Channel 4                | 25/09/2011 | Generally accepted standards        | 4 |
| Fighting Talk                            | BBC Radio 5 Live         | n/a        | Outside of remit / other            | 1 |
| Five Cafe                                | Five FM                  | 29/07/2011 | Materially misleading               | 1 |
| Foyle's War                              | ITV3                     | 19/09/2011 | Advertising minutage                | 1 |
| Fresh Meat (trailers)                    | Channel 4                | 08/09/2011 | Nudity                              | 1 |
| Future Weapons                           | Quest                    | 03/09/2011 | Violence and dangerous behaviour    | 1 |
| Ghosthunting with the Only Way is Essex  | ITV2                     | 18/09/2011 | Materially misleading               | 1 |
| Gillette Soccer Saturday                 | Sky Sports News          | 03/09/2011 | Race discrimination/offence         | 1 |
| Glee (trailer)                           | Sky 2                    | 23/09/2011 | Race discrimination/offence         | 1 |
| GMTV                                     | ITV1                     | 21/09/2011 | Gender discrimination/offence       | 1 |
| Gypsy Eviction: The Fight for Dale Farm  | Channel 4                | 19/09/2011 | Generally accepted standards        | 7 |
| Have I Got Old News For You              | BBC 2                    | 07/08/2011 | Race discrimination/offence         | 1 |
| Hollyoaks                                | Channel 4                | n/a        | Outside of remit / other            | 1 |
| Ibuleve sponsorship credits              | ITV3                     | n/a        | Sponsorship credits                 | 1 |
| In the Night Garden                      | CBeebies                 | 24/09/2011 | Offensive language                  | 1 |
| International Boxing (trailer)           | Channel 5                | 14/09/2011 | Scheduling                          | 1 |

|  |                              |            |  |   |
|--|------------------------------|------------|--|---|
| ITV Competition                            | ITV1                         | 25/09/2011 | Competitions                             | 1 |
| ITV News and Weather                       | ITV1                         | 27/09/2011 | Drugs, smoking, solvents or alcohol      | 1 |
| ITV News and Weather                       | ITV1                         | 27/09/2011 | Due impartiality/bias                    | 1 |
| ITV1 +1 promo                              | ITV1                         | 19/09/2011 | Materially misleading                    | 1 |
| Jack the Ripper (trailer)                  | Channel 5                    | 16/09/2011 | Generally accepted standards             | 1 |
| Jeff Randall Live                          | Sky News                     | 27/09/2011 | Generally accepted standards             | 1 |
| Jeremy Kyle                                | ITV2                         | 21/09/2011 | Sponsorship credits                      | 1 |
| Jeremy Vine Show                           | BBC Radio 2                  | 15/09/2011 | Crime                                    | 1 |
| Jeremy Vine Show                           | BBC Radio 2                  | 20/09/2011 | Fairness                                 | 1 |
| John Bishop's Britain                      | BBC 1                        | 02/09/2011 | Race discrimination/offence              | 1 |
| Jonathon Ross                              | ITV                          | 24/09/2011 | Generally accepted standards             | 1 |
| Julia Hartley Brewer                       | LBC 97.3FM                   | 30/08/2011 | Race discrimination/offence              | 1 |
| Kundali Aur Kismet                         | Sunrise TV                   | 26/01/2011 | Participation TV - Harm                  | 1 |
| LBC  | LBC 97.3FM                   | n/a        | Generally accepted standards             | 1 |
| Little Britain                             | BBC 3                        | 19/09/2011 | Generally accepted standards             | 1 |
| Live Ford Super Sunday                     | Sky Sports 1/Sky Sports 1 HD | 18/09/2011 | Materially misleading                    | 1 |
| Location, Location, Location               | Channel 4                    | 21/09/2011 | Animal welfare                           | 1 |
| Loose Women                                | ITV1                         | 29/09/2011 | Religious/Beliefs discrimination/offence | 1 |
| Lorraine                                   | ITV1                         | 29/09/2011 | Race discrimination/offence              | 1 |
| Midsomer Murders                           | ITV                          | 22/09/2011 | Generally accepted standards             | 1 |
| Mike Graham                                | Talksport                    | 01/09/2011 | Race discrimination/offence              | 1 |
| Mock the Week                              | BBC 2                        | 22/09/2011 | Race discrimination/offence              | 1 |
| Moorlands Music on Moorlands Radio 103.7FM | Moorlands Community Radio    | 05/09/2011 | Religious/Beliefs discrimination/offence | 1 |
| My Teenage Diary                           | BBC Radio 4                  | 22/09/2011 | Generally accepted standards             | 1 |
| News                                       | Geo News / Ary World         | 02/08/2011 | Crime                                    | 1 |
| News Programming                           | BBC and Sky                  | 27/09/2011 | Outside of remit / other                 | 1 |
| News Programming                           | Various                      | n/a        | Outside of remit / other                 | 1 |
| Newsnight                                  | BBC 2                        | 28/09/2011 | Generally accepted standards             | 5 |
| Newsround                                  | BBC 1                        | 01/09/2011 | Outside of remit / other                 | 1 |
| Nolan Show                                 | Radio Ulster                 | 22/09/2011 | Due accuracy                             | 1 |
| Outnumbered                                | BBC 1                        | 16/09/2011 | Disability discrimination/offence        | 2 |

|                                 |                |            |   |   |
|---------------------------------|----------------|------------|---|---|
| Outnumbered                     | BBC 1          | 23/09/2011 | Sexual orientation discrimination/offence | 2 |
| Peppa Pig                       | Channel 5      | 26/09/2011 | Generally accepted standards              | 1 |
| Planet's Funniest Animals       | ITV2           | 25/09/2011 | Animal welfare                            | 1 |
| Pointless                       | BBC 1          | 16/09/2011 | Generally accepted standards              | 2 |
| QI                              | BBC 2          | 23/09/2011 | Gender discrimination/offence             | 1 |
| Question Time                   | BBC 1          | 15/09/2011 | Race discrimination/offence               | 1 |
| Question Time                   | BBC 1          | 29/09/2011 | Due impartiality/bias                     | 1 |
| Ramsey's Kitchen Nightmares USA | Channel 4      | 22/09/2011 | Race discrimination/offence               | 1 |
| Red Light Central               | Red Light 1    | 30/08/2011 | Participation TV - Offence                | 1 |
| Reporting Scotland              | BBC 1 Scotland | 08/09/2011 | Generally accepted standards              | 1 |
| Rock FM Bride Wars              | 97.4 Rock FM   | n/a        | Competitions                              | 1 |
| Rude Tube                       | Channel 4      | 26/09/2011 | Disability discrimination/offence         | 1 |
| Rugby World Cup 2011            | ITV1           | 24/09/2011 | Race discrimination/offence               | 1 |
| Rugby World Cup 2011            | ITV1           | 01/10/2011 | Race discrimination/offence               | 1 |
| Shameless                       | Channel 4      | 20/09/2011 | Generally accepted standards              | 1 |
| Shameless                       | Channel 4      | 21/09/2011 | Offensive language                        | 1 |
| Silent Library (trailer)        | Channel 5      | 24/09/2011 | Generally accepted standards              | 1 |
| Sky Anytime Promotion           | Sky1           | 01/09/2011 | Materially misleading                     | 1 |
| Sky News                        | Sky News       | 16/09/2011 | Generally accepted standards              | 1 |
| Sky News                        | Sky News       | 22/09/2011 | Due accuracy                              | 1 |
| Snog, Marry, Avoid?             | BBC 3          | 19/09/2011 | Transgender discrimination/offence        | 1 |
| Soccer A.M.                     | Sky1           | 24/09/2011 | Sexual orientation discrimination/offence | 1 |
| Songs of Praise                 | BBC 1          | n/a        | Outside of remit / other                  | 1 |
| Spooks                          | BBC 1          | 18/09/2011 | Outside of remit / other                  | 1 |
| Spooks                          | BBC 1          | 26/09/2011 | Outside of remit / other                  | 1 |
| Sport                           | All            | n/a        | Outside of remit / other                  | 1 |
| Sports News                     | STV            | n/a        | Sponsorship                               | 1 |
| Star Plus                       | Star Plus      | 28/09/2011 | Scheduling                                | 1 |
| Star Trek                       | Channel 4      | 02/10/2011 | Offensive language                        | 1 |
| Starz TV                        | Starz TV       | 17/08/2011 | Sexual material                           | 1 |
| Steve Allen                     | LBC 97.3FM     | 31/08/2011 | Due impartiality/bias                     | 1 |
| Strictly Come Dancing           | BBC 1          | 10/09/2011 | Sexual material                           | 1 |
| Sunrise                         | Sky News       | 29/09/2011 | Disability discrimination/offence         | 1 |

|  |              |            |  |    |
|--|--------------|------------|--|----|
| T4 (trailer)   | Channel 4    | 28/09/2011 | Offensive language                     | 1  |
| Television Licence Fee promotion                     | BBC          | n/a        | Outside of remit / other               | 2  |
| Tetley Bitter's sponsorship of Real Men's TV on ITV4 | ITV4         | n/a        | Gender discrimination/offence          | 1  |
| That Sunday Night Show                               | ITV1         | 25/09/2011 | Crime                                  | 1  |
| That Sunday Night Show                               | ITV1         | 02/10/2011 | Generally accepted standards           | 1  |
| The Hour   | STV          | 20/09/2011 | Generally accepted standards           | 1  |
| The Jeremy Kyle Show                                 | ITV1         | 29/09/2011 | Scheduling                             | 1  |
| The Jonathan Ross Show                               | ITV1         | 24/09/2011 | Generally accepted standards           | 1  |
| The Mid Morning Show                                 | Vectis Radio | 14/09/2011 | Race discrimination/offence            | 1  |
| The Million Pound Drop Live                          | Channel 4    | 17/09/2011 | Generally accepted standards           | 1  |
| The Million Pound Drop Live                          | Channel 4    | 30/09/2011 | Outside of remit / other               | 1  |
| The One Show   | BBC 1        | 16/09/2011 | Animal welfare / Materially misleading | 93 |
| The One Show   | BBC 1        | 22/09/2011 | Due impartiality/bias                  | 4  |
| The Sex Education Show                               | Channel 4    | 26/07/2011 | Sexual material                        | 1  |
| The Sex Education Show                               | Channel 4    | 28/09/2011 | Generally accepted standards           | 1  |
| The Simpsons   | Channel 4    | 20/09/2011 | Generally accepted standards           | 1  |
| The Wright Stuff                                     | Channel 5    | 21/09/2011 | Generally accepted standards           | 1  |
| The X Factor   | ITV          | 20/08/2011 | Generally accepted standards           | 1  |
| The X Factor   | ITV1         | 20/08/2011 | Voting                                 | 1  |
| The X Factor   | ITV1         | 17/09/2011 | Generally accepted standards           | 1  |
| The X Factor   | ITV1         | 18/09/2011 | Generally accepted standards           | 53 |
| The X Factor   | ITV1         | 24/09/2011 | Drugs, smoking, solvents or alcohol    | 2  |
| The X Factor   | ITV1         | 24/09/2011 | Generally accepted standards           | 1  |
| The X Factor   | ITV1         | 24/09/2011 | Scheduling                             | 1  |
| The X Factor   | ITV1         | 25/09/2011 | Race discrimination/offence            | 1  |
| The X Factor   | ITV1         | 25/09/2011 | Scheduling                             | 7  |
| The X Factor   | ITV1         | 25/09/2011 | Sexual material                        | 1  |
| The X Factor   | ITV1         | 01/10/2011 | Outside of remit / other               | 1  |
| The X Factor   | ITV1         | 02/10/2011 | Advertising scheduling                 | 1  |
| The X Factor   | ITV1         | 02/10/2011 | Generally accepted standards           | 1  |
| The X Factor   | ITV1         | 02/10/2011 | Outside of remit / other               | 3  |

|  |                |            |                              |    |
|--|----------------|------------|------------------------------|----|
| The X Factor                             | STV            | 24/09/2011 | Outside of remit / other     | 10 |
| This Morning                             | ITV1           | 19/09/2011 | Generally accepted standards | 1  |
| This Morning                             | ITV1           | 19/09/2011 | Race discrimination/offence  | 6  |
| This Morning                             | ITV1           | 20/09/2011 | Nudity                       | 3  |
| This Morning                             | ITV1           | 29/09/2011 | Generally accepted standards | 1  |
| This Morning                             | ITV1           | 30/09/2011 | Scheduling                   | 1  |
| Tombola.co.uk's sponsorship of Emmerdale | ITV1           | n/a        | Sponsorship credits          | 2  |
| Top Gear                                 | Dave ja vu     | 02/10/2011 | Offensive language           | 1  |
| True Talent                              | TV3 (Sweden)   | 24/08/2011 | Offensive language           | 1  |
| Two and a Half Men                       | Comedy Central | 16/09/2011 | Generally accepted standards | 1  |
| Trailer                                  | Viva           | 13/09/2011 | Offensive language           | 1  |
| Various                                  | Various        | n/a        | Nudity                       | 1  |
| Various                                  | Various        | n/a        | Outside of remit / other     | 2  |
| Watchdog                                 | BBC 1          | 15/09/2011 | Sexual material              | 1  |

## Investigations List

If Ofcom considers that a broadcast may have breached its codes, it will start an investigation.

Here is an alphabetical list of new investigations launched between 6 and 19 October 2011

| Programme                                     | Broadcaster                   | Transmission Date |
|---|-------------------------------|-------------------|
| Advertising minutage                          | Hollywood Classics Movies Ltd | Various           |
| Advertising minutage                          | Sony TV                       | 22 August 2011    |
| Advertising scheduling                        | ITV1                          | Various           |
| Anglia News                                   | ITV1                          | 07 September 2011 |
| Charity appeal                                | Channel S                     | 18 August 2011    |
| Charity appeals                               | Channel i                     | 26 August 2011    |
| Charity appeals                               | NTV                           | 19 August 2011    |
| Digital Music Awards                          | ITV2                          | 07 October 2011   |
| Keeping up with the Kardashians               | E!                            | 24 September 2011 |
| Roberto                                       | Capital FM                    | 04 October 2011   |
| Russia Today                                  | Russia Today                  | 21 August 2011    |
| Soapbox with Chris Hossacks                   | Phoenix FM                    | 01 July 2011      |
| Straight Talk                                 | Voice of Africa Radio         | 21 August 2011    |
| Sunrise Radio South East Asia Disaster Appeal | Sunrise Radio                 | Various           |
| The Big Appeal Live                           | ARY QTV                       | 17 August 2011    |
| The Exorcist                                  | GEM TV                        | 20 September 2011 |
| The Keiser Report                             | Russia Today                  | 14 September 2011 |
| This Morning                                  | ITV1 London                   | 07 October 2011   |

**It is important to note that an investigation by Ofcom does not necessarily mean the broadcaster has done anything wrong. Not all investigations result in breaches of the Codes being recorded.**

For more information about how Ofcom assesses complaints and conducts investigations go to:

<http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/standards/>.

For fairness and privacy complaints go to:

<http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/fairness/>.

