

# **Ofcom Broadcast Bulletin**

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## Introduction

Under the Communications Act 2003 (“the Act”), 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. Ofcom also has a duty to secure that every provider of a notifiable On Demand Programme Services (“ODPS”) complies with certain standards requirements as set out in the Act<sup>2</sup>.

The Broadcast Bulletin reports on the outcome of investigations into alleged breaches of those Ofcom codes below, as well as licence conditions with which broadcasters regulated by Ofcom are required to comply. We also report on the outcome of ODPS sanctions referrals made by ATVOD and the ASA on the basis of their rules and guidance for ODPS. These Codes, rules and guidance documents include:

- a) [Ofcom’s Broadcasting Code](#) (“the 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.
- 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>3</sup>.
- 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 can be found on Ofcom’s website for [television](#) and [radio](#) licences.
- e) rules and guidance for both [editorial content and advertising content on ODPS](#). Ofcom considers sanctions in relation to ODPS on referral by the Authority for Television On-Demand (“ATVOD”) or the Advertising Standards Authority (“ASA”), co-regulators of ODPS for editorial content and advertising respectively, or may do so as a concurrent regulator.

[Other codes and requirements](#) may also apply to broadcasters and ODPS, depending on their circumstances. These include the Code on Television Access Services (which sets out how much subtitling, signing and audio description relevant

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

<sup>2</sup> The relevant legislation can be found at Part 4A of the Act.

<sup>3</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.

licensees must provide), the Code on Electronic Programme Guides, the Code on Listed Events, and the Cross Promotion Code.

**It is Ofcom's policy to describe fully the content in television, radio and on demand content. Some of the language and descriptions used in Ofcom's Broadcast Bulletin may therefore cause offence.**

## Note to Broadcasters

### Election programming

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On 2 May 2013, local elections will be held in a number of English local authority areas and in the Welsh unitary authority of Ynys Mon/Anglesey.

Ofcom reminds all broadcasters that great care needs to be taken when broadcasting election-related programming. In particular, broadcasters should ensure that they comply with Section Five (Due Impartiality) and Section Six (Elections and Referendums) of the Code, as well as the prohibition of political advertising contained in section 321 of the Communications Act 2003.

Ofcom will consider any breach arising from election-related programming to be potentially serious, and will consider taking regulatory action, as appropriate, in such cases, including considering the imposition of a statutory sanction.

Following a public Consultation<sup>1</sup>, Ofcom will be publishing revised Guidance to Section Five<sup>2</sup> and Section Six<sup>3</sup> of the Code. This Guidance will be published before the commencement of the election period for the May 2013 elections, and aims to help broadcasters comply with the Code when broadcasters produce their own coverage of elections and referendums. Broadcasters should ensure that they consult this revised Guidance, as appropriate, if they intend to provide coverage of the May 2013 elections.

For further information about the various elections being contested on 2 May 2013 (including information about “election periods” as defined by the Code), broadcasters should visit the Electoral Commission website at [www.electoralcommission.org.uk](http://www.electoralcommission.org.uk).

Broadcasters are also reminded that if they would find it helpful to have informal guidance on Sections Five and Six of the Code, they can contact Ofcom directly ([adam.baxter@ofcom.org.uk](mailto:adam.baxter@ofcom.org.uk)).

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<sup>1</sup> In November 2012, Ofcom published a Consultation as part of its review of the Ofcom Rules on Party Political and Referendum Broadcasts (“the PPRB Rules”) and Proposed Ofcom Guidance for broadcast coverage of elections. See: <http://stakeholders.ofcom.org.uk/binaries/consultations/ppbs/summary/condoc.pdf>. Ofcom will be imminently publishing its Statement laying out revised PPRB Rules and revised Code Guidance in relation to broadcast coverage of elections and referendums.

<sup>2</sup> See: <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section5.pdf>.

<sup>3</sup> See: <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section6.pdf>.

## Standards cases

### In Breach

#### Provision of recordings

*Chaal Sitaroon Ki, DM Digital, 9 December 2012, 12:30*

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##### Introduction

DM Digital is a television channel primarily aimed at an Asian audience in the UK, which features broadcasts in a number of languages including English, Punjabi, Urdu, Sindhi, Kashmiri and Hindi. The service is also received in the Middle East and parts of Asia.

The programme *Chal Sitaroon Ki*, translated as “Actions of Stars”, is a daily phone-in programme. During the programme the presenter carries out horoscope readings for members of the public based on their name and date of birth. Viewers are invited to contact the presenter via a premium rate telephony service, which is displayed on screen throughout the programme. The holder of the DM Digital licence is DM Digital Television Limited (“DM Digital” or “the Licensee”).

A complainant was concerned that the presenter gave life-changing advice to callers.

As part of its assessment of the complaint, Ofcom asked the Licensee to provide a recording of the programme.

The recording was not provided by the specified deadline. Ofcom therefore wrote to the Licensee to advise the recording was still outstanding, that the request should be acknowledged, and a recording be provided by a new deadline.

The Licensee did not acknowledge the request, nor did it provide the requested recording by the new deadline.

Ofcom received a recording of the programme from DM Digital three working days after the deadline. The covering letter made no reference to the late provision of the recording.

Ofcom considered the matter warranted investigation under the following Licence Condition:

“11(2) In particular the Licensee shall:

...

(b) at the request of Ofcom forthwith produce to Ofcom any...recording for examination or reproduction[.]”

Ofcom therefore asked DM Digital for its comments under this Licence Condition.

##### Response

The Licensee did not provide any formal comments.

## Decision

Under the Communications Act 2003, Ofcom has a duty to ensure that in each broadcaster's licence there are conditions requiring that the licensee: retains recordings of each programme broadcast in a specified form and for a specified period after broadcast; and complies with any request by Ofcom to produce such recordings.

Under Licence Condition 11(2)(b) licensees are required to adopt procedures for the retention and production of recordings and provide these recordings to Ofcom "forthwith" if requested. Failure by a licensee to provide the recording when requested by Ofcom is a significant breach of Licence Condition 11(2)(b).

Breaches of Licence Condition 11(2)(b) are potentially serious because they impede Ofcom's ability to assess whether a particular broadcast raises potential issues under the relevant codes. This can therefore affect Ofcom's ability to carry out its statutory duties in regulating broadcast content.

In this case, while DM Digital did provide the recording to Ofcom, it failed to do so "forthwith" within the deadlines which Ofcom set, in breach of Condition 11(2)(b) of its TLCS licence.

Ofcom has recorded three previous breaches of Licence Condition 11(2)(b) against DM Digital for its failure to provide recordings to Ofcom and two further breaches of the same Licence Condition for its delay in providing recordings to Ofcom<sup>1</sup>.

In the case of the breach recorded against DM Digital on 10 May 2010, Ofcom stated in its Finding that it had carefully considered whether to recommend that particular case for consideration of the imposition of a statutory sanction. On balance, however, it decided not to do so in that instance. However, Ofcom put DM Digital on notice that it must take all necessary and appropriate measures to ensure it complies fully with Condition 11 of its licence in the future and that further breaches of this nature may be considered for further regulatory action by Ofcom.

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- *Baba Ji Online*, DM Digital, 13 May 2009, 11:00. Issue 147 of Ofcom's Broadcast Bulletin, 7 December 2009, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb147/Issue147.pdf>.
- *Chal Sitaroon Ki*, DM Digital, 18 February 2010, 13:00. Issue 157 of Ofcom's Broadcast Bulletin, 10 May 2010, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb157/Issue157.pdf>.
- Islamabad Grill sponsorship of *Zaika he Zaika*, DM Digital, 10 July 2010, 13:00. Issue 169 of Ofcom's Broadcast Bulletin, 8 November 2010, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb169/issue169.pdf>.
- *Charity Appeals*, DM Digital, October 2012. Issue 223 of Ofcom's Broadcast Bulletin 223, 4 February 2013, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb223/obb223.pdf>.



Ofcom has already recently made clear to the Licensee that it is particularly concerned about its compliance procedures. Ofcom is currently considering the imposition of statutory sanctions on DM Digital for previous breaches of rules in Sections Three and Five of the Code. In this instance Ofcom notes that DM Digital did provide the recording but failed to do so “forthwith” within the deadlines set by Ofcom. Ofcom therefore puts DM Digital on notice that the breach of Licence Condition 11(2)(b) recorded in this Finding raises further significant concerns about the effectiveness of its compliance procedures.

**Breach of TLCS Licence Condition 11(2)(b)**

## In Breach

### Most Haunted

*Pick TV, 17 October 2012, 18:00*

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#### Introduction

*Most Haunted* is a well-established series which takes viewers to locations where in the past, according to the programme, there has been reported supernatural activity. The series is presented by Yvette Fielding and 'celebrity' psychic Derek Acorah. The programme involves trying to film paranormal activity, as well as attempting to demonstrate possible paranormal activity through séances and possession by spirits at the location. *Most Haunted* was last made in 2010 but repeats of episodes continued to be broadcast regularly on the Living TV channels and, since July 2012, on Pick TV, a channel which offers repeats of popular programming. Pick TV is broadcast free-to-air on all platforms: Freeview, Sky and Virgin Media. British Sky Broadcasting Limited ("Sky" or the "Licensee") holds the licence for Pick TV.

A complainant alerted Ofcom to this episode because of concerns regarding the suitability of the content before the watershed when children might be watching.

In this episode, *Most Haunted* investigated Chatham Dockyard in Kent where, over a number of years, there had been several accounts of malevolent spirits and "dark evil shadows...wandering around" as well as more benign ghostly sightings. Ofcom noted that the programme included the following:

#### *Introduction*

- reports on supposed paranormal activity at Chatham Dockyard which included sightings of various spirits such as: a headless drummer boy; duelling cavaliers; a dark shadow that walked towards people; a grey lady with no feet who hovered; a woman smelling of lavender; the ghost of a woman called Mary whom it was said had taken her own life on the site and whose presence had been felt on "numerous occasions"; the ghost of a woman looking out of a window; and the ghost of one of the port's commissioners, Peter Pett, who had later been killed in the Tower of London; and
- the reported experiences of staff working at the dockyard, at the time of the filming, including: unexplained dark shapes; very cold spots; the unexplained sounds of shouts and screams and children running about; sounds of dragging across the floorboards; someone touching their shoulders; someone pushing them and even knocking them over; and objects being moved around the building without cause.

#### *Investigation*

- psychic Derek Acorah walked around the building reporting on the presence of: a female spirit; an evil man called Leonard; an evil woman whom he believed hurt and murdered children in one of the buildings; and the spirits of six or seven children who could be heard running around;

- “psychic artist” Brian Shepherd sketched the images of the female presence he reportedly saw in the attic at the window holding a rope near her neck and of a high ranking naval man with the name Peter;
- Derek Acorah suddenly became “possessed” by the spirit of a soldier and spoke in the soldier’s gruff deep voice and identified himself at Richard Neville and then collapsed;
- members of the production team, who were conducting night-time vigils in various locations in the dockyard, reported on their experiences of dragging sounds, doors slamming, changes in atmosphere and calling on the spirits to make themselves visible. These sequences were replayed a number of times; and
- a scene of a séance in which Derek Acorah was “possessed”, firstly by a nine-year-old boy called “Barney Little”, and spoke in a childlike voice to say he had been treated cruelly and whipped by a woman called “Lizzie”. Secondly, Derek Acorah, who was then “possessed” by “Lizzie”, referred to as “an obnoxious entity”, contorted his face and spoke in a rasping and aggressive voice: “What’s your name, leper?” Bleeps were used to mask offensive language. In response to the “Lizzie” possession, one of the employees at the Dockyard, not associated with the production, started to cry because she recognised “Lizzie” as the person responsible for the death of one of the children who had resided in the building, called Isabelle.

### *Conclusion*

- at the end of the episode, the series’ resident paranormal psychologist Dr Matthew Smith concluded by offering some explanation and interpretation of the paranormal experiences encountered at Chatham Dockyard and viewers were asked to decide if the team had really encountered the supernatural.

Ofcom considered the material raised potential issues under the Code because it was broadcast from 18:00, before the watershed, when children were available to view. It therefore warranted investigation under Rule 1.3 of the Code, which states:

“Children must...be protected by appropriate scheduling from material that is unsuitable for them.”

Given this episode included paranormal practices and was broadcast pre-watershed, Ofcom also considered the broadcast should be investigated under Rule 1.27 of the Code:

“Demonstrations of exorcisms, occult practices and the paranormal (which purport to be real), must not be shown before the watershed (in the case of television) or when children are particularly likely to be listening (in the case of radio). Paranormal practices which are for entertainment purposes must not be broadcast when significant numbers of children may be expected to be watching, or are particularly likely to be listening.”

We therefore sought the Licensee’s comments as to how the material complied with these rules.

## Response

In reply to Ofcom's initial request for comments, Sky provided the following response:

### Rule 1.3

Sky stated that *Most Haunted* was not a series which is significantly attractive to children. The full series of *Most Haunted*, broadcast on Pick TV from July to November 2012, had attracted a total child audience (4 to 15 year-olds) average of "only 7%". However, although this specific episode had attracted a child audience of 14%, this figure was still significantly lower than the threshold of 120 on the child index scale described by Sky as "used by broadcasters across the industry" as a measure of whether a programme attracts a significant proportion of children relative to the population as a whole.

Further, the broadcaster stated that the series was "very well-known" having been broadcast since 2002 on various channels and therefore "viewers and parents would have been well aware of the programme's content".

With regard to the specific episode, the broadcaster stated that it followed the same established pattern as the full series. Firstly, in Part One, presenter Yvette Fielding informed viewers of the historical background and the reported paranormal activity and the investigation began with the series' spiritualist medium Derek Acorah beginning to investigate the location. In Parts Two and Three the investigation commenced in full with the team using various experiments and vigils including séances and drawing by a "psychic artist" and the use of night cameras. In Part Four the investigation concluded and the resident paranormal psychologist, Dr Matthew Smith, provided some counter-arguments as to how the team's experiences could be explained.

In terms of the specific events shown in the episode, the broadcaster explained that the examples of alleged possession experienced by Derek Acorah were brief. For example: the sequence about the first alleged possession of Derek Acorah by "Neville" to his subsequent collapse following the experience lasted about 37 seconds; the second alleged possession by the child "Barney", which took place during the séance, lasted less than a minute; and the third apparent possession by "Lizzie" lasted just under two minutes. Further, the broadcaster explained, these types of sequences are "not atypical and are sequences viewers to the show would be very familiar with". Sky further stated that: "[D]espite being shot on night cameras (hence the green hue of the visuals) these scenes are not very distressing or upsetting." Derek's possession was only visually apparent from his contorted face and the different tone and pitch to his voice and what Derek says was "not gruesome, distressing or shocking".

Finally, the broadcaster stated that Pick TV "consciously took the decision to schedule this series away from times when children were more likely to be watching television unsupervised, i.e. early morning before school and after school hours between 3pm-6pm". Therefore, given the low child index, the time of broadcast and that the nature of the content was "very well-established (if not infamous) amongst UK viewers" the broadcaster was of the view that the episode complied with Rule 1.3.

### Rule 1.27

Sky referred to Ofcom's Decision of 5 December 2005<sup>1</sup>, which stated that the format of *Most Haunted* was "for entertainment purposes" and therefore it was permitted to be scheduled pre-watershed. Further, Sky stated that it had "deliberately scheduled this programme at a time when children were not watching in significant numbers" as demonstrated by the viewing data detailed above. Therefore the broadcaster was not of the view that Rule 1.27 was applicable in this case.

In response to Ofcom's Preliminary View that there were breaches of Rules 1.3 and 1.27 in this case, Sky provided further comments urging Ofcom to reconsider its Preliminary View in this case.

Firstly, Sky challenged Ofcom's concerns regarding the age range of children likely to be affected by this programme, namely those aged 10 to 15. Sky agreed with Ofcom that children in this age range would have understood the programme in terms of its content. However, given this, Sky argued that if one accepts that 10 to 15 year-olds would be "fully aware" of the nature of the content then the potential for the cumulative effect of the malevolent nature of the spirits to cause distress to this age group would be "diluted" because "these viewers...would understand the nature (entertainment) of this programme". Sky said that "given this understanding of both the content and format, we argue that Ofcom's current assertion that this programme would be "distressing" to children in this age group is not correct".

Further, Sky highlighted that Ofcom had made reference in its Preliminary View to its Decision, published in issue 49 of Ofcom's Broadcast Bulletin in December 2005 ("the 2005 Decision") (see footnote 1) which stated that: "[H]aving established the programme over a number of series, it would now be clear to viewers that the intended purpose of these programmes was for entertainment." As this Decision was written in 2005, and a further eight years had passed, the Licensee said that: "[The series has] been repeated many, many times in similar timeslots on general entertainment channels. Therefore, it can only be clearer in viewers' minds as to the entertainment nature of the series." Given this, Sky argued that in reaching a final Decision in this case Ofcom should take account of the average number of child viewers of this series of *Most Haunted*, not the child audience figures for this particular programme, because Sky was of the view that "this programme and series are not significantly attractive to children and it was therefore appropriately scheduled".

### **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". This objective is reflected in Section One of the Code.

### Rule 1.3

Rule 1.3 requires that children must be protected by appropriate scheduling from material that is unsuitable for them. Appropriate scheduling is judged by a number of factors including: the nature of the content; the likely number and age range of the

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<sup>1</sup> Issue 49 of Ofcom's Broadcast Bulletin, 5 December 2005, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/pcb46/issue49.pdf>.

audience; the start and finish time of the programme; and likely audience expectations.

In considering the material in this episode, Ofcom took the view that the subject matter of *Most Haunted*, namely the investigation of paranormal activity in an entertainment format, did not necessarily exceed the boundaries of acceptability for pre-watershed broadcast. Indeed, Ofcom's 2005 Decision (see footnote 1), stated that the series suggested "a high degree of showmanship that puts it beyond what we believe to be a generally accepted understanding of what comprises a legitimate investigation [into psychic phenomena]". Further, Ofcom recognised that: "[H]aving established the programme over a number of series, it would now be clear to viewers that the intended purpose of these programmes was for entertainment."

However, when broadcasting material about the paranormal before the watershed, licensees must ensure that the content complies with Rule 1.3, because material about paranormal activities has the potential to be distressing to children.

Ofcom first considered whether the material was suitable for children. While Ofcom acknowledges that *Most Haunted* has regularly featured séances and alleged possessions as part of its investigations, this particular episode contained three separate sequences featuring the alleged possession of Derek Acorah by the spirits haunting the buildings at Chatham Dockyard. The first of these possessions appeared to take place quite spontaneously, not within a séance, while the others took place in a séance sequence in the style frequently featured in the series, filmed in darkness with night-vision cameras. During the séance, Derek Acorah's face was distorted as he claimed to speak in the menacing gruff voice of "Lizzie", a malevolent spirit of a woman whom, it was said, had been responsible for the mistreatment and murder of young children in the location. In response to this possession, a member of staff at the dockyard was shown crying because she believed she recognised "Lizzie", through Derek Acorah's apparent possession, as the spirit responsible for the death of a child at the dockyard.

Further, this episode's investigation reported on a multitude of spirits allegedly residing in various locations of Chatham Dockyard. Although the programme stated that the majority of spirits in the dockyard were "benign", this episode focused particularly on the "malevolent" forces, for example those responsible for mistreating or murdering children in their care and there were also several reports by current staff working at the dockyard of the presence of these malevolent spirits chilling the air, or appearing as dark shadows, or pushing them over or off chairs, as well as poltergeist activity, such as items being moved. In particular, Richard Felix, a historian, said the Joiner's Shop on the site had "*dark evil shadows wandering around...People get this horrible feeling of foreboding...Whatever haunts that building doesn't want them to be there*". In addition there were specific reports of the spirits of children in the building, including a murdered and decapitated boy wandering the site and a young girl who hanged herself on the stairway.

Ofcom was also of the view that the final five minutes of the episode, which provided a final signpost to the viewer as to the entertainment nature of the programme, presented interpretations about the supernatural events. It did not however explicitly suggest to viewers that the supernatural activity encountered during the *Most Haunted* investigation may not actually have taken place or that the investigation was for entertainment purposes. For example, Dr Matthew Smith stated:

*"One of the most striking things to take place during this investigation is Derek's apparent possession. Now there are three possible explanations of*

*what could be going on here. One is that he really is getting possessed. The second possibility is that he is simply play acting for the cameras and the third possibility is that he really does believe he is getting possessed but there is perhaps some more conventional psychological explanation for what is going on. What I find of perhaps more concern is that these apparent possessions are taking place more often and other members of the crew are also becoming concerned for Derek's well being...We can see that no matter what the explanation is for these possessions - whether it paranormal or not – it takes a lot out of Derek and what might be worth exploring further is why it might be happening more often.”*

The paranormal investigator Ian Whyman also referred to one part of the investigation vigil being “mind over matter” and another suggested interpretation was made by the historian Richard Felix who stated:

*“It's turned out to be a night of possessions. Derek was possessed but the thing I can't understand is that he tends – for some reason – not to be coming up with the people that we know haunt the place.”*

Adults familiar with the long-running series would have sufficiently understood or decoded these statements, in the very last part of the programme, as questions relating to the veracity of the paranormal events, particularly those encountered by Derek Acorah, in this episode. However, in Ofcom's view, these statements would not necessarily have been sufficiently clear to younger members of the audience who may be watching unaccompanied or were less familiar with the series and the background of the contributors appearing in it.

In Ofcom's view, the cumulative effect of the malevolent nature of the spirits who 'appeared' either through Derek's “possessions” or were recounted in the experiences presented, and the repeated references to children being harmed, mistreated or murdered resulted in this particular episode being consistently dark and menacing. Therefore it had the potential to cause distress to younger members of the audience.

Further, while an adult may have picked up on the signposting throughout the programme, and particularly in the last five minutes, and concluded the programme was entertainment, children may not have understood this and could have been left feeling fearful of what they had viewed. Ofcom noted Sky's view that because children aged 10-15 viewing this programme may have been fully aware of the nature of the content, the assertion that this programme would have been “distressing” to this age group “is not correct”. However, it is Ofcom's view that even if children are old enough to understand, and also be scared by, paranormal activity, it does not necessarily follow that they are old enough to understand various statements made by some of the contributors suggesting this programme was for entertainment purposes.

Ofcom therefore considered that this material was unsuitable for children.

Ofcom noted Sky's point that Ofcom's 2005 Decision relating to the *Most Haunted* series said that in that case the format and content of the programmes was *in itself* sufficient for viewers to understand the programme was for entertainment purposes and this therefore “supports our [i.e. Sky's] argument that viewers (including the 10-15 age range) would fully understand the nature of the series”. It is important to highlight, however, that the 2005 finding dealt *only* with programmes which were made and broadcast in the three years prior to December 2005, some of which had a

different editorial format and were ‘live’ events which included a studio audience compared to the *Most Haunted* episode which is the subject of the current case. The 2005 Decision also made clear that it was in “the specific context of these programmes..., which have been established and broadcast for over three years” that Ofcom believed there was an appropriate degree of signposting which appeared “to make it clear to viewers that they are for entertainment purposes”. Significantly, at the time of the 2005 Decision, a key contextual factor Ofcom took into consideration was that most if not all the programmes were scheduled post-watershed from 21:00. The 2005 Decision therefore did not consider the suitability of the material for broadcast pre-watershed when children were available to view.

Ofcom went on to consider whether the material in this current case was appropriately scheduled.

We fully acknowledge that *Most Haunted* is a well-established series with a familiar format known to regular viewers and that it has been repeated pre-watershed regularly in recent years. Ofcom is however aware, as set out above, that, when first shown in 2002, *Most Haunted* was generally scheduled post-watershed, at or after 21:00, on LivingTV.

However, in this case, the fact that it was scheduled at 18:00 meant that it was available to a fairly high number of young people to view, some of whom may have been unaccompanied or less familiar with the format. Indeed, Ofcom noted that BARB data show that some 14% of the total audience for this programme comprised children aged 4 to 14, representing some 32,000 child viewers.

Ofcom noted Sky’s concerns that this episode attracted significantly more child viewers (14%) than the series average (7%) and that as this 14% was exceptional the child audience for the series average should be considered, not the child audience for this particular episode. When investigating material under Rule 1.3, Ofcom considers the content on a case by case basis taking into account the nature of any series as a whole and the individual context of the programme itself, such as the nature of the content and the number and age range of the children in the audience for that programme. Ofcom is therefore of the view that in this case both the child audience figures for the series and for this particular programme were relevant.

We accepted that the child audience for this particular programme was unusually high given the series average. Nevertheless, Ofcom was of the view that the nature of some of the content in this particular case (especially the nature of the alleged possessions by malevolent spirits and the fact they concerned children), and its scheduling in a teatime slot, meant it was likely that the expectations of viewers (and particularly of parents) of this channel at that time would have been exceeded. In the circumstances of this case the material was therefore not appropriately scheduled and breached Rule 1.3.

Broadcasters of content related to paranormal or psychic matters should note that each decision under Rule 1.3 is assessed on a case by case basis, and depends on whether the specific programme includes material unsuitable for children and is appropriately scheduled in the particular context.

#### Rule 1.27

Rule 1.27 requires broadcasters to ensure that demonstrations of exorcisms, occult practices and the paranormal (which purport to be real), must not be shown before



the watershed; and that paranormal practices which are for entertainment purposes must not be broadcast when significant numbers of children may be expected to be watching.

In this particular case, Ofcom noted that this episode did not feature any *demonstrations* of exorcisms, occult practices and the paranormal which purported to be real. We were of the view however that it did include *paranormal practices*, such as “possessions” and a séance, for entertainment purposes. Ofcom also noted that in this case these paranormal practices were broadcast at teatime, when children were likely to be viewing, and on Pick TV, which is a general entertainment channel. Consequently, in Ofcom’s view, a significant number of children could have been expected to view this episode. Therefore, in this case, Ofcom concluded that Rule 1.27 was breached.

This Decision relates to the content of this particular episode, not this whole series of *Most Haunted*. Having viewed other episodes of this series, Ofcom is aware that the nature of the content, and therefore its suitability, differs with every episode. When scheduling programmes that include paranormal practices for entertainment purposes which were originally intended for broadcast later in the schedule, broadcasters should take great care. They should ensure that such programmes are individually complied so they are appropriately scheduled.

#### **Breaches of Rules 1.3 and 1.27**

## In Breach

### Pre-recorded interview with Brian Madderson

Unity 101, 2 December 2012, 07:23, and 4 December 2012, 08:22 and 08:33

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#### Introduction

Unity 101 is a community radio station broadcasting to the Southampton area. Under its licence the station's "key commitments" include promoting and broadcasting "the music and culture of Asian and other ethnic minorities in Southampton". The licence for Unity 101 is held by Cultural Media Enterprise ("CME" or "the Licensee").

Ofcom received a complaint that material broadcast by Unity 101 appeared to promote tobacco by opposing controls on the sale of tobacco products.

The item was a pre-recorded interview with Brian Madderson, Chairman of the Retail Motor Industry – Petrol, who responded to questions about the business outlook for independent petrol retailers and reasons for pressures on the sector. The interview lasted five and a half minutes, during the first part of which the interviewer asked Brian Madderson ("BM") about the financial challenges facing petrol forecourts and Brian Madderson raised the issue of the UK Government's involvement in the regulation of tobacco products, as follows:

Interviewer: *"There are 6,000 fewer forecourts in the UK than in 1998. 400 have closed in the last year alone, and there is concern that key challenges, including excise duty on fuel and the increase in the illicit trade of tobacco products which robs legitimate retailers of sales..."*

\*\*\*\*

BM: *"And now, we've got the issue of the Government getting involved in tobacco products, which is a major part of our forecourt shop. Many retailers tell us that up to 60% of their total forecourt shop sales can be in tobacco products."*

During the rest of the interview, Brian Madderson made some other statements that questioned aspects of, or could be characterised as being critical of, the UK Government's policy towards: the display ban on tobacco products due to come into effect in England in April 2015<sup>1</sup>; and the packaging<sup>2</sup> of tobacco products. For example:

Interviewer: *"And in terms of regulations, what regulations do you feel are working against the retailers?"*

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<sup>1</sup> Ofcom is aware that there are provisions regulating tobacco displays in the Health Act 2009 and related regulations which are being implemented in large shops from 6 April 2012 and for all other businesses selling tobacco to the public on 6 April 2015. See: <http://www.dh.gov.uk/health/search?q=tobacco>.

<sup>2</sup> Ofcom is aware that a consultation on the introduction of standardised packaging for tobacco products closed in August 2012. See: [http://consultations.dh.gov.uk/tobacco/standardised-packaging-of-tobacco-products/consult\\_view](http://consultations.dh.gov.uk/tobacco/standardised-packaging-of-tobacco-products/consult_view).

BM: *"Well as far as tobacco is concerned, we've got the display ban, which is likely to come into effect April 2015. For bigger shops, it came into effect in April this year. One would hope that a sensible, serious Government would actually look at the display ban and what impact it has before they rush ahead and introduce the next stage for smaller shops in 2015. We've also got the consultation which has taken place on plain packaging. Now, 75% of our retailers, and that's 60% of all forecourts across the UK, tell us they feel that the Government has gone too far with tobacco regulations."*

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Interviewer: *"Now you've mentioned just how important tobacco sales are to local retailers but just how important are those sales to their bottom line?"*

BM: *"Well that's really crucial because with sales of fuel going down, margins coming under a squeeze, they're looking for their shop to provide much needed profit. And if tobacco products are starting to decline as a result of Government regulation, which we don't think is really essential, then the chances of them going under are going to be even greater. And that is going to produce yet more rural deserts, fuel deserts across the UK. This is something the Department of Energy is really exercised over."*

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Interviewer: *"And how about other influences to their trade, for example the illicit trade in tobacco, how would this affect local businesses and also the plain packaging?"*

BM: *"Well our members tell us, some 65% of them, that if these regulations [are] brought in about plain packaging, then that would drive sales to the illicit market. That's going to be bad for the Government, loss of tax revenue, perhaps they'll even have to increase fuel duty. So you can see that the Government's got to balance its books on the tax side. Our members, [as] tobacco is a perfectly legal product, need to have their income streams maintained in order to preserve their businesses."*

In the course of the investigation the Licensee explained to us that the material had been supplied to Unity 101 at no cost and with no obligation. Decisions to use the material and how to schedule it were entirely those of the Licensee.

The interview had been broadcast three times, on the days and at the times given at the head of this Finding.

Given CME's explanation of the terms on which the material was made available, most importantly that no consideration was given for its broadcast, Ofcom concluded that the material did not meet the tests for qualification as advertising or as a "commercial reference" in radio programming<sup>3</sup> and should be treated as editorial.

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<sup>3</sup> This is defined in Section Ten of the Code as "a reference in programming to a brand, trade mark, product and/or service that: is subject to a commercial arrangement; or promotes the station/broadcaster's own products or services".

(Had the material qualified as advertising or a commercial reference, Ofcom would have considered the material under a specific statutory prohibition on political advertising.)

Ofcom considered that the content raised issues warranting investigation under Rule 5.13 of the Code, which states:

“Broadcasters should not give undue prominence to the views and opinions of particular persons or bodies on matters of political or industrial controversy and matters relating to current public policy in all the programmes included in any service...taken as a whole.”<sup>4</sup>

This is because the content, in Ofcom’s view, dealt with matters of political controversy and matters relating to current public policy, namely the Government’s policy towards the display and packaging of tobacco products in the UK.

We therefore sought CME’s comments as to how this material complied with Rule 5.13.

## Response

The Licensee explained that the recorded interview had been made available to it by a marketing company. No money or other consideration was offered to the Licensee, or asked for from the Licensee, in connection with the transmission or scheduling of the item. Neither was any condition attached to transmission, such as restrictions on editing.

In the past, CME told us, it had accepted material from the marketing company. Previously, material supplied by the company had been “informative general information slots about matters affecting communities”, but the Licensee had noticed a change in approach such that the items were becoming more like PR pieces for particular businesses and organisations. Following this item, the Licensee said it would no longer be using material from the marketing company. On a related point, CME said that it had contacted the marketing company that had supplied the content in this case. According to the Licensee, the marketing company had stated to CME that:

- the marketing company had supplied the interview featuring Brian Madderson to “around 50” other radio stations nationally;
- most of these stations may have broadcast the content;
- if the stations had broadcast the interview “some stations” would have included “live discussions about the same subject”; and
- no other complaints had arisen from the broadcast of the interview by other radio stations.

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<sup>4</sup> Rule 5.13 applies only to local radio services (including community radio services), local digital sound programme services (including community digital sound programme services) and radio licensable content services. As noted further below, the wording of Rule 5.13 is materially different to (and less restrictive than) the rules concerning due impartiality applicable to other Ofcom licensed services.

On this occasion, the Licensee said, it had listened to the start of the item and “understood it to be a general piece [about] the demise of independent petrol forecourts and the impact of illegal importing of tobacco (something very relevant as Southampton is a city with a port to Europe and beyond)”.

However, CME said, the item was not listened to fully and “an error occurred on this occasion”.

The Licensee had since implemented a procedure where third party content is always fully reviewed by a senior member of the Unity team before broadcast.

CME said further that it recognised that the interviewee was expressing his views on a matter of current public policy, but stressed that its own policy is not to enter into such debates, that it had not intended to do so, and that it did not share or promote the views expressed. The Licensee said that it focuses on topics for the community, especially for the Asian community.

However, on re-examining the item the Licensee did believe it to be partial and said that it accepted and understood the “duty and need” for balanced opinion in editorial content. In this respect CME said it “accept[ed] that editorial control was lacking on this occasion” and that it considered the item was in breach of the Code.

The Licensee told us that it had produced an apology, which it would broadcast (and include on its website) for a period of seven days.

More generally CME told us that it had maintained high standards for the seven years that Unity 101 had been on air and for the two years under its Restricted Service Licence (RSL). It drew attention to its winning a Queen’s Award in 2012 for the service it provides to the community and the city of Southampton.

CME apologised for the errors it had made, emphasising how seriously it took its responsibilities and making clear that new procedures had been put in place. For example, the Licensee said that: “All material sourced from outside will be listened to and must be approved by [a] senior member of the editorial team.”

## **Decision**

Under the Communications Act 2003 (“the Act”), Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, including that the special impartiality requirements set out in section 320 of the Act are complied with. This standard is contained in Section Five of the Code.

Broadcasters are required to comply with the rules in Section Five of the Code to ensure that the impartiality requirements of the Act are complied with, including, in the case of certain radio services, that no undue prominence is given to the views and opinions of particular persons or bodies on matters of political or industrial controversy and matters relating to current public policy.

Ofcom considered the item’s compliance with Rule 5.13<sup>5</sup> of the Code, which states:

“Broadcasters should not give undue prominence to the views and opinions of

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<sup>5</sup> See footnote 4.

particular persons or bodies on matters of political or industrial controversy and matters relating to current public policy in all the programmes included in any service...taken as a whole.”

When applying the requirement to ensure that no undue prominence is given to views and opinions on matters of political or industrial controversy and matters relating to current public policy, 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 to 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 ensure that there is, for example, no undue prominence given to the views and opinions of particular persons or bodies on matters of political or industrial controversy and matters relating to current public policy.

Ofcom recognises that Section Five of the Code, which sets out the requirement to ensure that no undue prominence is given to the views and opinions of particular persons or bodies on matters of political or industrial controversy and matters relating to current public policy, acts to limit to some extent freedom of expression. This is because its application necessarily requires non-national radio broadcasters to ensure that there is not a “significant imbalance of views within coverage of matters of political or industrial controversy and matters relating to current public policy”<sup>6</sup>. 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.

In reaching decisions concerning Rule 5.13, Ofcom underlines that the broadcast of: highly critical comments concerning the policies and actions of any government or public body; and/or viewpoints which voice criticism of restrictions on the sale of tobacco-related products, are not, in themselves, breaches of Section Five. Any broadcaster may do this provided it complies with the Code.

We recognise that the concept of giving “undue prominence to the views and opinions of particular persons or bodies” under Rule 5.13 is different to the requirement for due impartiality set out in other rules in Section Five. Importantly, for Rule 5.13 to be breached, Ofcom has to be satisfied that:

- there has been a *significant* [Ofcom emphasis] imbalance of views and opinions on, for example, controversial matters;
- the relevant views and opinions are those of *particular persons or bodies* [Ofcom emphasis]; and
- the relevant timeframe for a service to show compliance with Rule 5.13 is “all programming on a service dealing with the same or related issues within an appropriate period”<sup>7</sup>.

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<sup>6</sup> This is the Code’s definition of “undue prominence of views and opinions”.

<sup>7</sup> This is the Code’s definition of “all the programmes included in any service...taken as a whole”.

The above requirements contrast with the obligation on national radio broadcasters and all television broadcasters to ensure that “due impartiality” is preserved. If Rule 5.5 is applicable, for example, alternative viewpoints must be reflected on matters of political or industrial controversy and matters relating to current public policy in a series of programmes taken as a whole<sup>8</sup>. Under Rule 5.13 community radio services like Unity 101 (and other local radio services) therefore enjoy greater latitude in the way in which they achieve balance over matters of political and industrial controversy and current public policy, compared to all other services that are subject to Rule 5.5 of the Code.

We considered first whether the requirements of Rule 5.13 should be applied; that is, whether the programme concerned matters of political or industrial controversy or a matter relating to current public policy.

We considered that the interview with Brian Madderson related to two linked Government policies, namely the policy on the display ban on tobacco products due to come into effect in England in April 2015, and the policy on the packaging of tobacco products. We noted that the content included statements concerning these two policies, and what Brian Madderson believed to be the likely negative effects of these policies on the petrol forecourt sector:

*“One would hope that a sensible, serious Government would actually look at the display ban and what impact it has before they rush ahead and introduce the next stage for smaller shops in 2015. We’ve also got the consultation which has taken place on plain packaging. Now, 75% of our retailers, and that’s 60% of all forecourts across the UK, tell us they feel that the Government has gone too far with tobacco regulations.”*

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*“And if tobacco products are starting to decline as a result of Government regulation, which we don’t think is really essential, then the chances of them going under are going to be even greater.”*

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*“Well our members tell us, some 65% of them, that if these regulations [are] brought in about plain packaging, then that would drive sales to the illicit market. That’s going to be bad for the Government, loss of tax revenue...”*

Ofcom therefore considered that the content dealt with matters of political controversy and current public policy. Rule 5.13 was therefore engaged.

We then went on to assess whether the Licensee ensured that there was no undue prominence given to views and opinions of particular persons or bodies on matters of

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<sup>8</sup> The Code defines this as: “[M]ore 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. A series can include, for example, a strand, or two programmes (such as a drama and a debate about the drama) or a ‘cluster’ or ‘season’ of programmes on the same subject.”

political or industrial controversy and matters relating to current public policy in all the programmes included in any service taken as a whole.

What constitutes undue prominence under Rule 5.13 is a question that must be assessed on the facts of each case including, but not limited to: the nature of the subject; the type of service; the nature and broadcast of alternative viewpoints (if any); and likely audience expectations as to the content.

In this case, we noted that: between 2 December 2012 and 4 December 2012, the Licensee broadcast the five and a half minute interview with Brian Madderson, the Chair of the Retail Motor Industry – Petrol, three times. This interview included only the views of Brian Madderson, questioning, through various remarks, the policy of the UK Government concerning particular matters of political or industrial controversy and matters relating to current public policy, namely the Government's related policies on the display and packaging of tobacco products. Importantly, CME provided no evidence to Ofcom of any other programming broadcast on the Unity 101 service taken as whole dealing with the same or related issues which might have demonstrated that other viewpoints on these matters were featured in the service.

We therefore considered that there was a significant imbalance of views as regards coverage of these particular matters of political or industrial controversy and matters relating to current public policy within an appropriate period.

In reaching our Decision in this case, we took into account the Licensee's comments in relation to the marketing company that had supplied the content featuring Brian Madderson to CME. According to the Licensee, the marketing company had informed CME that: the interview featuring Brian Madderson had been supplied to "around 50" other radio stations nationally; if the stations had broadcast the interview "some stations" would have included "live discussions about the same subject"; and no other complaints had arisen from the broadcast of the interview by other radio stations. Ofcom did not receive any other complaints about this pre-recorded interview with Brian Madderson being broadcast. Therefore, Ofcom is not in a position to determine whether, if any other Ofcom licensee did broadcast this content, such licensees had complied with the Code. In any case, whether or not other licensees broadcast this content did not diminish the fact that the Licensee included in its service a significant imbalance of views as regards coverage of particular matters of political or industrial controversy and matters relating to current public policy within an appropriate period.

We also took into account the Licensee's: recognition in comments to Ofcom that the items were partial as to matters relating to current public policy; acceptance and understanding of the "duty and need" for balanced opinion in editorial content; withdrawal of the material from any further broadcast; statement that it would broadcast (and make available on its website) an apology for seven days; and statement of its belief that the items were in breach of the Code. In addition we noted the stress that CME put on: its own policy not to enter into such debates as that covered in this content; the fact that that it had not intended to do so; the fact that it did not share or promote the views expressed in the interview; and the fact that it focuses on topics for the community, especially for the Asian community. Furthermore, we took into account the Licensee's assurance that going forward: "All material sourced from outside will be listened to and must be approved by [a] senior member of the editorial team."



Ofcom underlines that all broadcasters, including those in the community radio sector, are free to discuss controversial matters in their programming. However, in doing so, local radio broadcasters must ensure that they prevent undue prominence being given to a viewpoint of a particular person or body on a matter of political or industrial controversy and a matter relating to current public policy. In this case, given all the above, we considered that the Licensee had not prevented undue prominence being given to a viewpoint of a particular person or body (i.e. Brian Madderson, the Chair of the Retail Motor Industry – Petrol) on a matter of political or industrial controversy and a matter relating to current public policy (i.e. the UK Government's policy on the display and packaging of tobacco products).

Ofcom therefore concluded that Rule 5.13 was breached.

### **Breach of Rule 5.13**

## In Breach

### Trailer for *Star Parivaar Live*

*Star Plus UK, Star Life UK and Star Gold UK, 24 to 25 November 2012, various times*

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#### Introduction

On the weekend of Saturday 24 and Sunday 25 November 2012, Star India PVT Ltd (“Star TV” or “the Licensee”) broadcast a trailer for *Star Parivaar Live* on Star Plus, Star Life and Star Gold. The trailer included promotional references to Air India Limited (“Air India”). Star TV alerted Ofcom to the trailer on 28 November 2012 and explained that the promotional references to Air India had been included in error.

*Star Parivaar Live* was an event held by Star TV networks which featured soap stars from the Star Network, as well as Bollywood musicians and a comedy act. The ticketed event was held at the NEC Birmingham on Sunday 25 November 2012 and was broadcast live from the venue, as well as being shown at other times on the Star Network range of channels. The promotional trailer was broadcast 48 times from approximately 18:00 on Saturday 24 November 2012 until 09:00 on Sunday 25 November 2012, leading up to the broadcast of *Star Parivaar Live*.

Ofcom noted that, in summary, the *Star Parivaar Live* trailer included:

- footage of Air India aircraft;
- celebrities in front of an Air India aircraft talking about flying to the UK with Air India for *Star Parivaar Live*;
- celebrities holding up their air tickets and referring to the Air India aircraft; and
- celebrities shown boarding the Air India aircraft for their flight.

The trailer, which was two minutes long, was entitled the “Road to Birmingham”, and opened with footage of an Air India aeroplane on a runway at night, interspersed with shots of Mumbai airport and various people boarding an Air India aircraft for an overnight flight to the UK.

The celebrities travelling to Birmingham to take part in *Star Parivaar Live* introduced themselves direct to camera, and some of the performers were also identified with on-screen captions. The Star Plus logo remained on the top right of the screen throughout the trailer.

After about 30 seconds Ofcom noted the introductions included significant references to Air India, including the following:

*“Hi this is Khushi and I’m coming to the UK by Air India [glances behind and points to the aircraft]. I’m really excited to see you in Birmingham...See you there.”*

Khushi was then shown having her ticket checked and boarding the Air India flight.

A celebrity introduced on screen as Sooray said:

*"I'm so excited that I'm coming to Birmingham by this flight Air India [holds up flight ticket] and see you soon."*

Sooray was then seen boarding the Air India flight.

Another performer said:

*"Hi this is ...Sandhya....and I'm coming to Birmingham – I'm very excited travelling to the UK with this aircraft, which is behind me [gestures to aeroplane behind her], and see you soon there."*

Musicians Salim-Sulaiman made the following reference:

Salim: *"We're very excited to go Birmingham on this aircraft."*

Sulaiman: *"On this aircraft [points to the Air India aeroplane on the runway]."*

A celebrity called Kokila Modi stated:

*"I'm coming to UK, I'm travelling by Air India Aircraft, see you soon."*

Another performer said:

*"Hi this Pratigya and I'm coming to meet all of you, to Birmingham in this Air India Aircraft, see you soon."*

The trailer then showed some of the celebrities on the aircraft from the runway and further footage of an Air India flight taking off in daylight was also included.

Star confirmed to Ofcom that neither it, the programme producer, nor any person connected with either received payment or other valuable consideration for the inclusion of references to Air India.

Ofcom considered that the material raised issues warranting investigation under Rules 9.4 and 9.5 of the Code, which state:

Rule 9.4: *"Products, services and trade marks must not be promoted in programming."*

Rule 9.5: *"No undue prominence may be given in programming to a product, services 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 therefore sought formal comments from Star TV on how this material complied with these rules.

## **Response**

Star TV apologised for the prominence given to Air India in the promotion of Star Parivaar Live.

Star TV confirmed in its comments that there was no financial or contractual arrangement between it or any third party for the appearance of Air India in the trailer, nor were there any arrangements in place for the supply of tickets, which “were paid for at the normal commercial rates by Star UK”.

Star TV submitted that the issue arose from a misunderstanding by the production team in India following a telephone briefing from the UK about how the start of the stars’ journey should be filmed. Star TV said: “We believed we’d made it absolutely clear that there could only be a brief passing shot of the plane as the stars boarded it, so the viewers would understand that the stars were on their way.” Star TV said that the production team in India “got this completely wrong” and took an approach that is widespread in India to incorporate Air India into the trailer.

The Licensee explained that the trailer was filmed and edited on early Saturday morning in Indian time, during which time the UK staff were already at the Birmingham event, and the trailer was not viewed by the UK staff before it went on air.

The Licensee noted that as soon as it saw the trailer it informed Ofcom about “this unfortunate mistake”, and realised that the promotion “was in breach of [Rules] 9.4 and 9.5”.

Star TV said it is now considering how it can ensure that “all our promotions are delivered to a relevant UK staff member before they go to air, so we can remove them if they are not compliant with the rules”. Star TV also submitted that it will be “re-briefing our production staff in India, to ensure they better understand Section 9”.

## 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 Directive (“the AVMS Directive”) requires, among other things, that television advertising is kept visually and/or audibly distinct from programming.

The purpose of this is to prevent programmes becoming vehicles for advertising and to protect viewers from surreptitious advertising. Further, Article 23 of the AVMS Directive requires that television advertising is limited to a maximum of 12 minutes in any clock hour.

The above requirements are reflected in, among other rules, Rule 9.4 of the Code which states that products, services and trade marks must not be promoted in programming. Rule 9.5 of the Code prohibits undue prominence being given to a product, service or trade mark in programming.

In this case, the references to Air India in the trailer for *Star Parivaar Live* were frequent and repetitive. There may be editorial justification in some circumstances to refer to a company that is being used in the making of a programme, or to show footage of an airport or aeroplanes, and refer to a journey that is being undertaken as part of programme content. However, in this case, the trailer did not simply highlight that the celebrities were travelling overnight from India to the UK to perform at *Star*

*Parivaar Live*, as a preview of the people appearing at the event. Instead it appeared from the way the celebrity introductions were made, and the repetitive and excessive references to the Air India aircraft and flight, that the emphasis of the trailer was to promote and endorse travelling to the UK by Air India. Furthermore, we noted that the production team in India had included footage from daytime flights taking off in the two minute trailer, which was clearly not about highlighting that the performers were on their way and departing in the evening prior to the event.

Ofcom considered that the overall effect of the *Star Parivaar Live* trailer was to promote and endorse Air India. Ofcom therefore considered the material to be promotional and in breach of Rule 9.4 of the Code.

In addition, Ofcom considered that there was insufficient editorial justification for the frequency of these references to Air India within the two minute trailer. Ofcom therefore also found the references to be unduly prominent, in breach of Rule 9.5 of the Code.

We took into account that Star TV had informed Ofcom of the error, and the reasons it had given for relevant staff in the UK not being available to check the trailer prior to broadcast in the UK. However, given that this trailer was broadcast across a number of Star TV's channels on 48 occasions prior to *Star Parivaar Live*, Ofcom was concerned that there appeared to be insufficient monitoring by Star TV staff of the channels' output.

Ofcom noted that Star TV said there was no contractual relationship between Star TV (or any third party) and Air India for the inclusion of these references. We also noted the steps Star India said it would implement to ensure that no such breach occurs in the future. However, in light of the significant breaches in this case, Ofcom is putting Star TV on notice that any breaches of this kind in the future may result in further regulatory action.

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

## Advertising Scheduling Findings

### In Breach

#### Advertising minutage

*LFC TV, 20 December 2012, 11:00*

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#### Introduction

Rule 4 of the Code on the Scheduling of Television Advertising (“COSTA”) states: “[T]ime devoted to television advertising and teleshopping spots on any channel in any one hour must not exceed 12 minutes.”

During monitoring of licensees’ compliance with COSTA, Ofcom noted that on 20 December 2012 LFC TV transmitted three minutes and six seconds more advertising than the amount permitted in a single clock hour.

Ofcom therefore sought comments from the licence holder for LFC TV, Liverpool Football Club & Athletic Grounds Limited (“the Licensee”), as to how the content complied with Rule 4 of COSTA.

#### Response

The Licensee explained that the overrun was a result of human error and a member of staff not following the correct procedures rather than a technical malfunction or inadequate reporting measures.

The Licensee said it would be very willing to reduce the permitted hourly allowance to make-up for the overrun and would be happy “to deduct additional minutage to redress the balance”.

#### 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 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 its licensees’ compliance with COSTA.

In this case, Ofcom found that the amount of advertising broadcast by LFC TV was in breach of Rule 4 of COSTA.

This compliance failure follows previous breaches recorded by Ofcom covering a series of minutage overruns on LFC TV, as follows:

- in issue 206 of Ofcom's Broadcast Bulletin<sup>1</sup>, one breach of Rule 4 was recorded;
- in issue 199 of Ofcom's Broadcast Bulletin<sup>2</sup>, three breaches of Rule 4 were recorded;
- in issue 192 of Ofcom's Broadcast Bulletin<sup>3</sup>, two breaches of Rule 4 were recorded;
- in issue 169 of Ofcom's Broadcast Bulletin<sup>4</sup>, one breach of Rule 4 was recorded; and
- in issue 162 of Ofcom's Broadcast Bulletin<sup>5</sup>, one breach of Rule 4 was recorded.

In those cases, the Licensee provided assurances to Ofcom that, following compliance failures at the time, it had since implemented improved procedures to minimise the risk of a recurrence.

We note the Licensee's willingness to reduce its minutage in recognition of this latest overrun. However, Ofcom is particularly concerned that despite previous repeated assurances by LFC TV, its revised procedures have not proved sufficiently robust to prevent a further breach of Rule 4 of COSTA.

In light of our concerns, Ofcom is requiring the broadcaster to attend a meeting to discuss its compliance processes and procedures.

### **Breach of Rule 4 of COSTA**

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<sup>1</sup> Issue 206 of Ofcom's Broadcast Bulletin, 21 May 2012, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb206/obb206.pdf>.

<sup>2</sup> Issue 199 of Ofcom's Broadcast Bulletin, 6 February 2012, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb199/obb199.pdf>.

<sup>3</sup> Issue 192 of Ofcom's Broadcast Bulletin, 24 October 2011, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb192/obb192.pdf>

<sup>4</sup> Issue 169 of Ofcom's Broadcast Bulletin, 8 November 2010, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb169/issue169.pdf>.

<sup>5</sup> Issue 162 of Ofcom's Broadcast Bulletin, 19 July 2010, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb162/issue162.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.”

Rule 16 of COSTA states that

“Restrictions apply when inserting advertising breaks during the following programmes;

- a) Films and news programmes may only include one advertising or teleshopping break for each scheduled period of at least 30 minutes.

Additionally, Rule 3 f) of COSTA states that

“‘films’ means cinematographic works and films made for television.”

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
ARY News	8 to 16 October 2012, various times	COSTA Rule 4	Ofcom noted, during monitoring, that ARY News exceeded the permitted advertising allowance in six clock hours. These clock hours contained between ten and 130 seconds more advertising than permitted.  <b>Finding: Breaches of Rule 4 of COSTA</b>



Sky News	23 December 2012, 24:30 to 25:00 and 26:30 to 27:00, and 29 December 2012, 24:30 to 25:00, 26:30 to 27:00	COSTA Rule 16(a)	Ofcom noted, during monitoring, that on these dates and times Sky News broadcast one more than the permitted number of advertising breaks for a scheduled period of 30 minutes.  <b>Finding: Breaches of Rule 16(a) of COSTA</b>
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## Fairness and Privacy cases

### Not Upheld

#### Complaint by Mrs Lesley Pilkington

*Channel 4 News, Channel 4, 22 May 2012*

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##### Summary

Ofcom has not upheld Mrs Pilkington's complaint of unjust or unfair treatment and unwarranted infringement of privacy in the programme as broadcast.

Mrs Lesley Pilkington featured in a news report on Channel 4 in relation to a therapy session she had given to an undercover journalist, Mr Patrick Strudwick. On account of that therapy session (of which Mr Strudwick secretly made an audio recording) the British Association of Counsellors and Psychotherapists ("BACP"<sup>1</sup>) suspended her membership. A reconstruction of the therapy session was broadcast in the programme. Mrs Pilkington was then interviewed in the studio by the programme's presenter, Mr Jon Snow.

Following the broadcast of the programme, Mrs Pilkington complained to Ofcom that she was treated unjustly or unfairly in the programme as broadcast and that her privacy was unwarrantably infringed in connection with the obtaining of material included in the programme and in the programme as broadcast.

Ofcom found that:

- The programme makers took reasonable steps to ensure that the news report was fair to Mrs Pilkington and, in doing so, accurately presented the findings made by BACP in its appeal decision against Mrs Pilkington and the therapy session which she had with Mr Strudwick.
- It was not necessary to tell Mrs Pilkington that there would be a reconstruction of the therapy session included in the programme in order to obtain her informed consent.
- Mrs Pilkington was given a timely and appropriate opportunity to respond to the allegations made in the programme during her live studio interview with Mr Snow.
- Mrs Pilkington did not have a legitimate expectation of privacy in relation to the reconstruction of the counselling sessions she had with Mr Strudwick. Ofcom considered that the content of the counselling sessions had already been discussed publicly in a number of national newspaper articles and in the BACP hearing and subsequent appeal hearing.

##### Introduction

On 22 May 2012, Channel 4 broadcast an edition of its evening news programme *Channel 4 News*, presented by Mr Jon Snow. One of the news items discussed was

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<sup>1</sup> According to its website, BACP is a membership organisation and a registered charity that sets standards for therapeutic practice and provides information for therapists, clients of therapy, and the general public.

*“conversion therapy”*<sup>2</sup> and was introduced by Mr Snow as follows:

*“A psychotherapist who claimed to be able to cure gay people has lost her appeal against a decision by her professional association to suspend her. Reparative, or conversion, therapy has been condemned as a serious risk to the health and well-being of gay people. But Lesley Pilkington’s efforts to use the technique were secretly recorded by a journalist who posed as a client.”*

The programme went on to feature a report by Mr Paraic O’Brien. The report showed a group of campaigners who were protesting against conversion therapy outside a conversion therapy conference, which took place in Belfast. The report also featured scenes inside the conference and Mr O’Brien described the attendees as *“a small group of mainly Evangelical Christians”*. Mrs Lesley Pilkington, the complainant, was filmed at the conference and the programme explained that she was a *“key note speaker”*. Mr O’Brien stated that:

*“Mrs Pilkington is a qualified psychotherapist and member of the British Association of Counsellors and Psychotherapists – at least she was until her membership was suspended.”*

Mr O’Brien went on to explain that the British Association of Counsellors and Psychotherapists (“BACP”) suspended Mrs Pilkington’s membership because of counselling sessions she had given to a *“gay Christian called Matthew”* three years before. Mr O’Brien said that “Matthew” was, in fact, *“campaigning gay journalist, Mr Patrick Strudwick”* who had secretly recorded the counselling sessions with Mrs Pilkington. A dramatised reconstruction of such a therapy session was broadcast in the programme. Actors played the parts of Mrs Pilkington and Mr Strudwick and the dialogue was created by *“using a transcript of the tapes”*, i.e. the secretly recorded audio of the therapy session made by Mr Strudwick.

In the dramatic reconstruction, the actress playing Mrs Pilkington asked the actor playing Mr Strudwick, “Matthew”, if he had been separated from his mother soon after birth and she referred to repressed memory of sexual abuse as also being a possible reason why he might be gay. The actress then asked:

*“Is it OK with you if we ask the Holy Spirit to help you to bring these things to your conscious mind?”*

Mr Strudwick told the programme that the counselling sessions were dangerous because they were *“based on the premise that homosexuality is an illness, a mental illness”*. Mr O’Brien then introduced more footage of the dramatic reconstruction, commenting that the session *“gets progressively more bizarre”* before the actress is shown asking “Matthew” whether there was a history of Freemasonry in his family.

Mr O’Brien explained that Mr Strudwick had complained to BACP and, as a result, Mrs Pilkington’s membership was suspended. Mrs Pilkington appealed the decision, but her appeal was rejected by BACP who criticised *“the procedural aspects of the session”*, the association by Mrs Pilkington of homosexuality with depression, and for giving her personal opinion on *“his [i.e. Matthew’s] lifestyle”* and *“sexual orientation”*. Passages from the BACP’s report were shown in the programme as Mr O’Brien discussed some of its findings in more detail.

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<sup>2</sup> Conversion therapy, or reparative therapy, claims to be able to change an individual’s sexual orientation.

Professor Michael King from University College London featured in the programme to comment on his research in relation to people who had undergone conversion therapy. He said that many of them were “traumatised” and “disappointed” by the therapy.

The programme then featured a live interview with Mrs Pilkington who was in the studio with Mr Snow, who commenced the interview as follows:

Mr Snow: *“I suppose the central question is do you think homosexuality is an illness?”*

Mrs Pilkington: *Well, the people who come to us, I have to say, are very distressed – they are very disordered. They come because there are, in fact, quite serious mental health aspects, er, difficulties going on in their lives and there is a lot of depression, there is self-harm, there is a lot of acute anxiety. These are the reasons that people come to us.*

Mr Snow: *But you would accept that there are plenty of homosexuals in the world who don’t suffer from any of those conditions?*

Mrs Pilkington: *Absolutely...I am a person – I care a lot about people and I feel very compassionate about those who are in need and people come to us with a need – we don’t go looking for them but they come to us and this...*

Mr Snow: *But do you as a consequence believe that homosexuality can, to use your words, be cured?*

Mrs Pilkington: *It can be changed for those who are motivated, and for those who want to change, it certainly can be changed and then there is good evidence to show that.”*

Mr Snow continued to interview Mrs Pilkington, asking her what the evidence was which could confirm her position, why she contended that some counsellors regarded homosexuality as an “*aberration from normal*” and why she had brought her own views to, and discussed Christianity in, the therapy sessions.

Following the broadcast of the programme, Mrs Pilkington complained to Ofcom that she was treated unjustly or unfairly in the programme as broadcast and that her privacy was unwarrantably infringed in connection with the obtaining of material included in the programme and in the programme as broadcast.

### **Summary of the Complaint and the broadcaster’s response**

- a) Mrs Pilkington said that material facts were presented, disregarded or omitted in a way that was unfair to her. In particular, Mrs Pilkington said that:
  - i) The reconstruction of the therapy session was biased and only focused on a few, deliberately selected points of the sessions. These snippets were taken out of context and therefore gave a misleading impression. Mrs Pilkington added that the actress who played Mrs Pilkington portrayed her in a way that was offensive to her, her religion, her views and the manner in which she works. Mrs Pilkington also said that her religion was mocked by the actress who played her.

In response, Channel 4 said that the reconstruction was based on the transcript of what was said in the counselling sessions that were secretly recorded. These recordings formed the basis of the complaint to BACP by Mr Strudwick. Channel 4 referred to relevant sections in their statement which it said showed that the quotes used in the programme were not out of context or misleadingly used. Channel 4 also highlighted that the secret recordings were the basis of the complaint and the findings of fact made by BACP. Channel 4 said the BACP adjudication showed that the original panel found unanimously against Mrs Pilkington, as did the BACP Appeal Panel on the facts, and both were highly critical of Mrs Pilkington's counselling technique. Channel 4 added that the adjudication was not ambivalent, nor was there any doubt: Mrs Pilkington's practices were found unanimously to be unprofessional and unacceptable to her professional body. BACP imposed sanctions that eventually led to her being struck off and, in addition, it was so concerned about what had happened that it sent out a Statement of Ethical Practice to its members to underline the inappropriate nature of "reparative" or "conversion" therapy. Channel 4 said Mrs Pilkington's contention that her quotes were taken out of context did not stand up to scrutiny and were completely contrary to the highly critical findings against her by her professional body.

In response to Mrs Pilkington's complaint that the actress who played her portrayed her in a way that was offensive to her, her religion, her views and the manner in which she worked, Channel 4 said that both the report and the interview were presented in a straightforward, serious-minded manner. Channel 4 added that the actress who played Mrs Pilkington spoke in a tone which was appropriate and the content of what was said came from the transcript: the reconstruction was in line with industry practice when a reconstruction is broadcast – reflecting what was said in a transcript, using actors and making it clear to viewers that this was a reconstruction. Channel 4 said that it strongly objected to the suggestion that the report mocked Mrs Pilkington's views, particularly because Channel 4 said they were aware of the sensitivities concerning issues of religion and the need to respect religious belief. Channel 4 added that the issue of religion and religious belief was not the focus of either the news report or the BACP's adjudication. Both the news report and the adjudication were focused on the therapy sessions and the unprofessional practices adopted therein. In Channel 4's view, any reference to religion in the news report was appropriate.

- ii) The BACP report was referenced in the programme in a biased and one-sided way. For example, BACP acknowledged that Mr Strudwick had used deception by claiming to be a Christian and specifically asking for Christian therapy, however this was not mentioned in the programme. In addition, the programme failed to mention a key point of the BACP adjudication, which was that BACP did not prohibit the counselling of individuals with unwanted same-sex attraction, nor did it prohibit the use of reparative therapy or similar approaches.

In response, Channel 4 said that the BACP report was not referred to in a biased or one-sided way. The news report was a fair and accurate account of the proceedings involving Mrs Pilkington. The report made clear that Mr Strudwick was an undercover reporter and that the session had been secretly recorded. Channel 4 disagreed with Mrs Pilkington that a key point of the BACP adjudication was that BACP did not prohibit the counselling of individuals with unwanted same-sex attraction and nor did it prohibit the use

of reparative therapy or similar approaches. Channel 4 referred to BACP's Statement of Ethical Practice which, it said, evidenced how strongly BACP disapproved of conversion therapy.

- b) Mrs Pilkington complained that that she did not provide her informed consent to be in the programme.

Mrs Pilkington said that, before the interview with Mr Snow, she was not told that there would be a reconstruction in the programme of what allegedly took place in the counselling session between herself and Mr Strudwick. Mrs Pilkington said that if she had been informed about this beforehand she would not have agreed to take part in the interview. In addition, Mrs Pilkington said that she was not informed in advance of the questions she would be asked prior to the interview.

In response, Channel 4 said that it did not accept that Mrs Pilkington needed to be informed that one of the constituent parts of the news report was a reconstruction or to give the exact questions to be answered. Channel 4 added that Mrs Pilkington knew what the news report was about (i.e. the complaint by Mr Strudwick, the BACP adjudication and the controversy raised by her therapy methodology), the issues that were to be addressed in the interview (i.e. questions relating to the news report, the adjudication and the therapy methods), and what kind of contribution she was to make (i.e. a live interview).

Channel 4 said that during the interview, Mrs Pilkington was given a fair opportunity to answer the questions and was not browbeaten or unfairly coerced: Mrs Pilkington held herself out as a professional psychotherapist and was able to answer the questions being asked and had detailed knowledge of all the issues relating to the news report, the adjudication and appeal. Channel 4 added that the suggestion that Mrs Pilkington should have been informed about the reconstruction or given exact questions in advance was not accepted. In Channel 4's view, it would set a poor precedent if interviewees were required to be told in advance exact questions and informed of the exact format of a report, such as whether an introduction might include a reconstruction. Channel 4 said that Mrs Pilkington knew full well what the interview was about and was experienced in giving media interviews.

- c) Mrs Pilkington said that she was not given an appropriate and timely opportunity to respond to allegations made in the programme. Mrs Pilkington said that she was interrupted so frequently during her interview that she was not able to complete a sentence or to expand and point out more of the scientific evidence behind reparative therapy.

In response, Channel 4 said that Mrs Pilkington was given a full opportunity to respond to the issues raised in the report and was treated fairly. In addition, it said that Mrs Pilkington was given significant time in the programme to give her perspective. Channel 4 said that the interview was calm and appropriate in the circumstances and that it did not accept that Mrs Pilkington was unfairly interrupted or not given a fair chance to put her points across. Channel 4 said that the format of the interview itself (such as the fact that it was live, lasted a substantial time, and there was no other interviewee to give an opposing view) meant that Mrs Pilkington was afforded a sufficient opportunity to put forward her case.

### Unwarranted infringement of privacy

- d) Mrs Pilkington complained that her privacy was unwarrantably infringed in connection with the obtaining of material included in the programme in that the therapy session, which was recorded by the undercover journalist Mr Strudwick, was confidential and recording the session was an infringement of her privacy. Mrs Pilkington added that the professional and confidential trust between a therapist and client had been seriously eroded.

In response, Channel 4 said that they did not accept that the situation was private. Further, Channel 4 said that the professional confidence that is in the trust of a professional person did not belong to the professional person, but to the client who, in this case, was Mr Strudwick.

Channel 4 said that, in any event, there can be no confidentiality in wrongdoing. Here BACP found squarely against Mrs Pilkington based on the recordings. Channel 4 did not accept that there was any privacy attached to the clear findings of wrongdoing. Channel 4 also said that the public interest in the story was significant (i.e. the unprofessional methods used by a professional counsellor that many would find offensive and methods against which the public should be protected).

- e) Mrs Pilkington also complained that her privacy was unwarrantably infringed in the programme as broadcast in that the therapy session, which was recorded by the undercover journalist Mr Strudwick and subsequently broadcast in the programme, was confidential. Mrs Pilkington added that the professional and confidential trust between a therapist and client had been seriously eroded.

In response, Channel 4 said that the programme did not include footage from the therapy session. It included a reconstruction of an audio recording made by the independent freelance journalist, Mr Strudwick, which formed the basis of the evidence in the BACP disciplinary proceedings brought against Mrs Pilkington. Channel 4 said that it did not accept that the audio recording of the therapy session and the broadcast of the reconstruction of that recording in any way amounted to a breach of confidentiality for the following reasons:

- The report relied on information (i.e. the recording made by Mr Strudwick) that was used as evidence in the disciplinary hearing against Mrs Pilkington. Channel 4 did not accept that such information was confidential.
- There was no confidentiality in iniquity. Channel 4 said that is an accepted principle of law that there can be no confidentiality in information that highlights improper acts and wrongdoing. It said that it would be wrong in principle if Mrs Pilkington was to use the issue of confidentiality to prevent information coming into the public domain that highlighted practice that was deemed unacceptable by her professional body, BACP.
- Channel 4 said that if there was any confidentiality attached to what was said in the therapy session, then it belonged to Mr Strudwick and not to Mrs Pilkington. Professional people have an ethical and legal duty to safeguard their clients from unauthorised disclosures of information. This principle protects the client, not the professional adviser. If Mr Strudwick wished to disclose the contents of the therapy session, that was a matter for him. Mr Strudwick was entitled at all times to waive any confidence in the session.

- A significant amount of information about the nature of the therapy Mrs Pilkington had offered was in the public domain. Channel 4 said that the issues surrounding this particular case had been written about extensively in many national newspapers, including *The Guardian*, *The Daily Telegraph* and *The Independent*.

Channel 4 said that if it was accepted by Ofcom that there was any confidentiality in the therapy session, then it was justified in the public interest to record and broadcast parts of the recording (by way of a reconstruction) in the news report since the recording highlighted matters of professional malpractice by Mrs Pilkington. It said that the contents of the audio recording formed the evidence in the disciplinary proceedings taken against Mrs Pilkington by BACP. Channel 4 said that the seriousness with which BACP viewed the matter, and the general public importance of the issues raised, was highlighted by the facts that: Mrs Pilkington's membership of BACP was terminated; a general advisory Statement of Ethical Practice was issued to its membership to underline the inappropriate nature of "reparative" or "conversion" therapy; and, both the original BACP hearing and the subsequent appeal found unanimously against Mrs Pilkington and were highly critical of her practices.

## 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 transcript of the programme as broadcast, both parties' written submissions and a transcript of the secretly recorded audio of the therapy sessions. The parties chose not to make any representations on Ofcom's Preliminary View.

### Unjust or unfair treatment

When considering complaints of unjust or 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, which states that: "Broadcasters must avoid unjust or unfair treatment of individuals or organisations in programmes." Ofcom had regard to this rule when reaching its Preliminary View on the head and individual sub-heads of the complaint below.

Section Seven (Fairness) of the Code contains a series of "Practices to be followed" by broadcasters when dealing with individuals or organisations participating in or otherwise directly affected by programmes as broadcast. It is important to note that following the Practices will not necessarily avoid a breach of Rule 7.1. However, failure to follow the Practices will only constitute a breach where it results in unfairness to an individual or organisation in the programme as broadcast.



- a) Ofcom first considered Mrs Pilkington's complaint that material facts were presented, disregarded or omitted in a way that was unfair to her.

The Code recognises the importance of freedom of expression and the need to allow broadcasters the freedom to investigate and report on matters of public interest. However, reasonable care must be taken not to present material in a manner that causes unfairness to individuals or organisations.

When considering this head of complaint, Ofcom had 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.

Ofcom considered the following sub-heads of complaint in order to reach an overall Preliminary View as to whether material facts were presented, disregarded or omitted in a way that portrayed Mrs Pilkington unfairly in the programme as broadcast.

- i) Mrs Pilkington complained that the reconstruction of the therapy session was biased and only focused on a few, deliberately selected points of the sessions. These snippets were taken out of context and therefore gave a misleading impression. Mrs Pilkington added that the actress who played Mrs Pilkington portrayed her in a way that was offensive to her, her religion, her views and the manner in which she works. Mrs Pilkington also said that her religion was mocked by the actress who played her.

The programme informed viewers that the reconstruction of the therapy session was produced "*using a transcript of the tapes*". Ofcom observed the (dramatic) reconstruction broadcast in the programme and, in particular, noted the following exchange between the actress playing Mrs Pilkington and the actor playing Mr Strudwick:

Actress: *"It can sometimes mean days, weeks of actual isolation, so they may internalise it. There's not a lot in the literature about it but it's something I've noticed often in my work."*

Mr O'Brien  
(the reporter): *About halfway through the session she seems to suggest some sort of repressed memory of sexual abuse."*

Actor: *You mention sexual abuse. Again, nothing comes to mind. But then, there's a lot in life that is not immediately apparent."*

Actress: *Yes, I think it is in there. It's something within you, but outside your mind. Is it OK with you if we ask the Holy Spirit to help you to bring these things to your conscious mind?"*

Actor: *Fine."*

In the reconstruction, the actress playing Mrs Pilkington also asked the actor playing Mr Strudwick whether there was a history of Freemasonry in the family.

Ofcom recognised that selecting and editing material for inclusion in the programme was an editorial decision for the programme makers and the broadcaster and that such editing and selection should have been done in a fair manner. In light of this, Ofcom took note that the extract above was described as a “*reconstruction*” which used a transcript of the secretly recorded audio of the therapy session. It also compared whether what was represented in the programme was a fair representation of the transcript of the secretly recorded audio, which was provided to Ofcom by the broadcaster, and noted the following extracts from the transcript of the recording. Ofcom has highlighted in bold the wording in the transcript which appeared (or was very similar to) the dialogue broadcast in the programme.

Mrs Pilkington: “...but it is often quite traumatic, the baby wasn’t born properly and was put into intensive care...because of the separation from the mother...”

Mr Strudwick: Right, and that can trigger a whole process of a relationship?

Mrs Pilkington: That’s right, the whole issue of bonding.

Mr Strudwick: So she becomes anxious because of the problems so over-compensates?

Mrs Pilkington: Can do. Can very often do. Or there can be just that lack of attachment when the child should have been attached...**So there can be weeks, days of actual isolation and they internalise that. It’s not actually much in the literature but I have often noticed it in my work.**

Mr Strudwick: Interesting.

Mrs Pilkington: It’s definitely there. That’s why I asked that question. I do want to know a little bit more as we go on about how it was as a child growing up. Your parents, are they Catholic?

Mr Strudwick: [nods]

Mrs Pilkington: They’re both Catholic. Any other issues around who they are or what they do? **Any Freemasonry**, anything like that in the family?”

Ofcom noted that Mrs Pilkington then went on to ask Mr Strudwick about his early family life and whether he was subjected to physical or sexual abuse. Mr Strudwick said he was not, and went on to say:

Mr Strudwick: “Yeah so subtle things that you don’t always have in your immediate awareness. When you say to me bullying, nothing comes to mind. **But you mentioned**

**sexual abuse, and again nothing comes to mind. But then there's a lot in life that's not immediately apparent.**

Mrs Pilkington: **That's right and I think it will be there. Some of this is there within you, out of your mind. Again is it okay with you to allow the Holy Spirit to bring these things to your conscious mind?**

Mr Strudwick: Absolutely."

Having carefully compared the content of the transcript of the secretly recorded audio with what was broadcast in the reconstruction, Ofcom observed that the reconstruction replicated almost identically what Mrs Pilkington had said in the therapy session with Mr Strudwick. Ofcom also considered that content of the conversation that was broadcast in the reconstruction was representative of the issues discussed in the news report and had been considered in the BACP decision concerning Mrs Pilkington's professional conduct and standards. Ofcom recognised that the order of what was said differed slightly in the reconstruction, however, in Ofcom's view, the content of what was said was not misrepresented in a way that was unfair to Mrs Pilkington. Ofcom therefore considered that the broadcaster presented a dramatic reconstruction which was based very closely on the transcript of the recording and selecting that part of the counselling session (as set out above) to be reconstructed in the programme was not unfair.

With respect to Mrs Pilkington's complaint about the actress's portrayal of her, Ofcom again noted the part of the programme which featured the reconstruction of the therapy session (as set out above). In Ofcom's view, it was evident that what the actress said was almost identical to what Mrs Pilkington had said in the counselling session with Mr Strudwick. Consequently, Ofcom considered that the content of what the actress said was a fair and accurate representation of what Mrs Pilkington had said and set out in the transcript. In addition, the actress did not appear, in Ofcom's view, to have emphasised words or represented what Mrs Pilkington had said in a way which could have suggested that Mrs Pilkington's views were being mocked or derided. Therefore, Ofcom did not consider that the actress portrayed or misrepresented Mrs Pilkington in a way that was unfair to her. While Ofcom acknowledged that the programme reported on the BACP adjudication which expressed one of its concerns with the counselling sessions as being Mrs Pilkington's disclosure of "her personal views on lifestyle and sexual orientation"<sup>3</sup>, Ofcom did not consider that any part of the programme was offensive to Mrs Pilkington or appeared to mock her, her views, her religion or the way she worked.

Ofcom therefore found that the material facts were not presented, disregarded or omitted in a way that was unfair to Mrs Pilkington.

- ii) The BACP report was referenced in the programme in a biased and one-sided way. For example, BACP acknowledged that Mr Strudwick had used deception by claiming to be a Christian and specifically asking for Christian therapy, however this was not mentioned in the programme. In addition, the programme failed to mention a key point of the BACP appeal decision, which

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<sup>3</sup> Quoted from the BACP Professional Conduct Hearing.

was that BACP did not prohibit the counselling of individuals with unwanted same-sex attraction, nor did it prohibit the use of reparative therapy or similar approaches.

As set out in sub-head i) above, Ofcom recognises that broadcasters have editorial discretion when selecting and editing material, as long as in doing so they do not create unfairness to an individual. Ofcom was provided with a copy of the BACP appeal judgement and reviewed the content of it in order to reach a view on whether material facts were presented, disregarded or omitted in a way that was unfair to Mrs Pilkington. Ofcom observed that the procedural aspects of the counselling session were criticised by BACP as was Mrs Pilkington for allowing “her preconceived views about gay lifestyle and sexual orientation to affect her professional relationship with the complainant”. However, as referred to by Mrs Pilkington in her complaint, Ofcom also noted that BACP recognised that Mr Strudwick had asked “leading questions” and, as a point of mitigation in relation to Mrs Pilkington’s appeal, BACP stated the following:

“The complainant was not open about his true intention in engaging the services of Mrs Pilkington and in significant ways deliberately misled her into believing that he was comfortable and accepting of her approach, such as saying “Amen” at the end of prayers and making statements such as “I’ve become more religious again recently”, lulling Mrs Pilkington into a false sense of security. In his persistent questioning he manipulated the content of the sessions to a considerable extent in order to meet his own agenda.”

Consequently, Ofcom considered that BACP did (as Mrs Pilkington said in her complaint) criticise, to some extent, the methods used by Mr Strudwick in the counselling session. This criticism was not mentioned specifically by the reporter when he summarised what BACP had found in the news report. Ofcom took the view that omitting this piece of information did have the potential to cause unfairness to Mrs Pilkington in that, as BACP acknowledged, it had some bearing on the way that Mrs Pilkington conducted the counselling session and was a mitigating factor recognised by BACP. However, Ofcom noted that at the start of the news report Mr Snow stated the following:

*“But Lesley Pilkington’s efforts to use the technique was secretly recorded by a journalist who posed as a client.”*

Shortly after this statement, the reporter said:

*“Three years ago a gay Christian called Matthew went for counselling with Mrs Pilkington. He told her he didn’t want to be gay any more. But Matthew wasn’t Matthew. He was campaigning gay journalist, Patrick Strudwick. He secretly recorded what happened. We asked actors to reconstruct the session using a transcript of the tapes...”*

In Ofcom’s view, the programme clearly conveyed to viewers that Mrs Pilkington was secretly recorded by a “campaigning gay journalist” who “posed as a client” and lied to her by telling her he “didn’t want to be gay anymore”. In these circumstances, Ofcom considered that viewers were likely to have understood the nature of undercover journalism and taken into account the fact that deception was used by Mr Strudwick. Although the news

report itself did not mention the BACP point in relation to this specific issue, the fact that Mr Strudwick had used deception in the counselling session with Mrs Pilkington was apparent from the programme itself. In addition, Mrs Pilkington stated in her interview with Mr Snow that Mr Strudwick had said that he *“was depressed and unhappy and he wanted to change, that he had had enough of the lifestyle and I believed him”*. In Ofcom’s view, this was another signpost to viewers which indicated the deception in which Mr Strudwick had engaged in order to obtain the secretly recorded material of Mrs Pilkington.

In relation to Mrs Pilkington’s complaint that the programme did not mention other material points in the BACP judgement (e.g. that BACP did not prohibit the counselling of individuals with unwanted same-sex attraction, nor did it prohibit the use of reparative therapy or similar approaches), Ofcom again reviewed the BACP appeal decision. In particular, Ofcom noted the following passages in the appeal decision:

“The Appeal Panel’s opinion is that even in a therapy session when both the client and practitioner both share the same beliefs, the “style” in which Mrs Pilkington approached counselling was dogmatic and this in itself fell below the standard expected of a reasonably competent practitioner irrespective of the model of counselling adopted.”

In addition, the Appeal Panel set out what the focus of its investigation was:

“The case is not about the freedom of Mrs Pilkington to hold what it acknowledges are a particular set of religious beliefs both deeply and sincerely held, nor the complainant’s equally sincerely held opinions as to the nature of homosexuality and the wrongness of Mrs Pilkington’s religious beliefs about it...This case is first and foremost about whether or not the Appeal Panel should uphold the Professional Conduct Panel’s findings that Mrs Pilkington, in providing her services, fell below the standards that would reasonably be expected of a practitioner exercising reasonable care and skill.”

In determining whether Mrs Pilkington should be subject to a sanction, the BACP appeal decision stated:

“The Appeal Panel upheld some but not all of the findings of professional malpractice by the Professional Conduct Panel. These fall into three main areas. Firstly there was a failure to adequately ensure that the complainant truly shared Mrs Pilkington’s belief system, understanding of the nature of homosexuality and consequences of these for therapy. This is viewed as poor assessment and contracting. Secondly, there were inappropriate assumptions that the complainant’s symptoms of depression and unhappiness were necessarily caused by an unwanted Same Sex Attraction. Thirdly, statements were made within the two sessions that fell below the standard expected of a reasonably competent practitioner. These findings are serious.”

Ofcom compared the BACP appeal decision with what the reporter, Mr O’Brien, stated in the programme:

*“Mr Strudwick complained to the British Association of Counselling and Psychotherapy, and in May last year her membership was suspended.*

*Lesley Pilkington appealed the Association's decision, but today the Association decided to reject that appeal. They started by criticising some of the procedural aspects of the counselling session, but went on then into the meat of the issue. They criticised Mrs Pilkington for associating homosexuality with depression and for disclosing her personal views on his lifestyle and sexual orientation. They wrote: "Accordingly, this panel has unanimously agreed that the findings amount to professional malpractice, in that Mrs Pilkington failed to provide the complainant with adequate professional services that could reasonably be expected of a practitioner exercising reasonable care and skill."*

Ofcom noted that BACP imposed sanctions on Mrs Pilkington and severely criticised the ways in which her counselling session was conducted. The Professional Conduct Appeal Panel had made it clear that it was not part of the hearing, nor was it part of the hearing before the Professional Conduct Panel, to comment on the efficacy of reparative therapy. It was only subsequently, in September 2012 (i.e. four months after the Channel 4 news report was broadcast) that BACP issued its general advisory Statement of Ethical Practice in which it stated its opposition to reparative therapy.

When taking into account all the factors above, Ofcom considered that the programme's summary of the BACP appeal decision reflected the substance of its findings adequately and fairly. Ofcom found that in respect of sub-head a) ii) of the complaint, the broadcaster took reasonable steps to ensure that material facts were presented in a way that was not unfair to Mrs Pilkington.

- b) Mrs Pilkington complained that she did not provide her informed consent to be in the programme. Mrs Pilkington said that, before the interview with Mr Snow, she was not told that there would be a reconstruction in the programme of what allegedly took place in the counselling session between herself and Mr Strudwick. Mrs Pilkington said that if she had been informed about this beforehand she would not have agreed to take part in the interview. In addition, Mrs Pilkington said that she was not informed in advance of the questions she would be asked prior to the interview.

In considering this head of complaint, Ofcom had regard to whether the programme makers were fair in their dealings with Mrs Pilkington as a potential contributor to the programme, as outlined in Practice 7.2 of the Code. In particular, it considered whether Mrs Pilkington gave informed consent to participate in the programme, as outlined in Practice 7.3 of the Code. This states that for a potential contributor to a programme to be able to make an informed decision about whether to take part, they should be given sufficient information about: the programme's nature and purpose; their likely contribution; the areas of questioning and wherever possible, the nature of other likely contributions; and any changes to the programme that might reasonably affect their decision to contribute.

Ofcom took into account Mrs Pilkington's complaint that she would not have agreed to be interviewed had she known that there would be a reconstruction of the counselling session. Ofcom also took into account Channel 4's representations that Mrs Pilkington was told that the news report concerned: the complaint by Mr Strudwick; the BACP appeal decision; and the controversy raised by her therapy methods.

Ofcom noted that the news report focused on the findings of the BACP appeal panel, the secretly recorded material obtained by Mr Strudwick during a counselling session with Mrs Pilkington, and the issues raised by reparative/conversion therapy. In this respect, the description provided by Channel 4 to Mrs Pilkington appeared, in Ofcom's view, to accurately summarise the content of the news report. Ofcom acknowledged that Mrs Pilkington was not specifically told in advance about the reconstruction of the counselling session and was not informed about the exact questions she would be asked. However, Ofcom also took into account that Mrs Pilkington had appealed the original decision by BACP and therefore would be familiar with the issues related to the complaint made against her by Mr Strudwick as evidenced by the secretly recorded material which he submitted as part of his complaint to BACP. Mrs Pilkington was told that Mr Strudwick's complaint and the BACP adjudication would be discussed in the news report. Therefore, Ofcom considered that it would be reasonable to assume that the content of the secretly obtained recording was likely to be referred to in the programme, not only because of the central importance it played in the BACP adjudication, but because it was this material which instigated the complaint against Mrs Pilkington.

In these circumstances, Ofcom did not consider it was incumbent on the broadcaster to tell Mrs Pilkington in advance the format in which the counselling session would be featured (i.e. a dramatic reconstruction) in order to obtain Mrs Pilkington's informed consent to participate in the programme. Ofcom also took into account that Mrs Pilkington was provided with an appropriate opportunity to respond to the issues raised in the reconstructed counselling session (see head c) below). For these reasons, Ofcom found that there was no unfairness to Mrs Pilkington in this respect.

- c) Ofcom next considered the complaint that Mrs Pilkington was not given an appropriate and timely opportunity to respond to allegations made in the programme. Mrs Pilkington said that she was interrupted so frequently during her interview that she was not able to complete a sentence or to expand and point out more of the scientific evidence behind reparative therapy.

In considering this head of complaint, Ofcom had regard to Practice 7.11 of the Code, which states that if a programme alleges wrongdoing, incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond. The provisions of the Code require broadcasters to put allegations of wrongdoing, incompetence or other significant allegations to those concerned. The Code also recognises the importance of freedom of expression and the need to allow broadcasters the freedom to broadcast matters of a genuine public interest. However, in presenting significant allegations, reasonable care must be taken not to do so in a way that causes unfairness to individuals or organisations and to provide an opportunity for the individual to respond to such allegations.

Ofcom took into account that the news report concerned the BACP decision to suspend Mrs Pilkington and the reasons for that suspension. Given that part of the news report concerned the complaint made by Mr Strudwick which led to her suspension by BACP, Ofcom considered that Mrs Pilkington should have been offered a timely and appropriate opportunity to respond.

Mrs Pilkington was given an opportunity to respond to the allegations by appearing live on the programme and was duly interviewed by Mr Snow. Ofcom took into account that Mrs Pilkington's complaint was that she was interrupted so

frequently that she felt she was unable to “complete a sentence or to expand and point out more of the scientific evidence behind reparative therapy”. In relation to this particular point, Ofcom watched the interview footage that appeared in the programme and noted that at several points during the interview, Mrs Pilkington was interrupted by Mr Snow. By way of illustration

Ofcom noted the following exchange:

- Mr Snow: *“But would you accept that the Association is absolutely right in saying that you introduced your own views into all of this, because for example, knowing that his parents were both Catholics you actually wondered whether he was a Freemason?”*
- Mrs Pilkington: *Well, in fact, what we were trying to do, what my intention to do was to get an understanding that we have the same values and we talked about...[interrupted]*
- Mr Snow: *But, you suggested...you said...*
- Mrs Pilkington: *And he agreed that this was what he wanted, in fact...[interrupted]*
- Mr Snow: *You said – you said on the tape – Freemasonry often encourages homosexuality.*
- Mrs Pilkington: *That is a part – that is a part of a Biblical Christian world view-viewpoint – is to talk about Freemasonry... [interrupted]*
- Mr Snow: *But it couldn’t possibly be seen as a part of the Association of Psychotherapists, could it?*
- Mrs Pilkington: *It’s a part of the biblical Christian framework and...[interrupted]*
- Mr Snow: *But...[interrupted]*
- Mrs Pilkington: *That is a part of BACP. I belong to an organisation that is a sub-branch of BACP...”*

Ofcom took into account that the interview with Mrs Pilkington was live and formed part of the news report contained within that evening’s daily news programme. As such, it also took account of the facts that the time restrictions on news programmes and the need for Mr Snow to direct the interview in a timely manner would, inevitably, involve some interruptions and challenges by the presenter in order to cover a variety of points in a limited amount of time. However, notwithstanding the time limitations of a live interview, Ofcom considered that it is important for contributors to be able to respond to questions and allegations in a way which conveys, at least, the substance of their response in order to avoid unfair treatment in a programme.

Ofcom considered the interview in its entirety and noted that Mrs Pilkington was able to express her views on the following points:



- some of the reasons why people seek reparative therapy;
- her belief that at the time that Mr Strudwick wanted to change his sexuality;
- the “biblical Christian framework” which she said was the reason for raising Freemasonry; and
- her assertion that change therapy had been practiced in the USA for a number of years without receiving any complaints.

Ofcom recognised that the interview appeared at times to be a robust exchange of points and views between Mr Snow and Mrs Pilkington. While Mrs Pilkington may not have felt that she had been able to go into as much detail as she wished, her views on the substance of the issues (summarised above) were clearly presented from what she said in her interview. Ofcom considered that Mrs Pilkington’s views on her counselling technique and her justifications for it were discussed in the interview. Notwithstanding the firm and robust nature of the interview, Ofcom took the view that Mrs Pilkington was given an appropriate and timely opportunity to respond to the allegations made in the news report and that her ability to respond was not unduly hindered by Mr Snow’s interviewing style.

Taking all the above points into consideration, Ofcom found that Mrs Pilkington was not treated unfairly in this respect.

#### Unwarranted infringement of privacy

In Ofcom’s view, the individual’s right to privacy has to be balanced against the competing rights of broadcasters 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 intensely 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 Code which states that any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

Section Eight (Privacy) of the Code contains “Practices to be followed” by broadcasters when dealing with individuals or organisations participating in or otherwise directly affected by programmes as broadcast. It is important to note that following the Practices will not necessarily avoid a breach of Rule 8.1. However, failure to follow the Practices will only constitute a breach where it results in an unwarranted infringement of privacy to an individual or organisation in a programme as broadcast, or in connection with the obtaining of material included in a programme.

- d) Ofcom next considered the complaint that Mrs Pilkington’s privacy was unwarrantably infringed in connection with the obtaining of material included in the programme. Mrs Pilkington said that the therapy session, which was secretly recorded by Mr Strudwick, was confidential and that secretly recording it was an infringement of her privacy. Mrs Pilkington added that the professional and confidential trust between a therapist and client had been seriously eroded.

In considering the complaint, Ofcom had regard to Practices 8.5 and 8.9 of the Code. Practice 8.5 of the Code states that any infringement of privacy in the making of a programme should be with the person's and/or organisation's consent or be otherwise warranted. Practice 8.9 of the Code states that the means of obtaining material must be proportionate in all the circumstances and in particular to the subject matter of the programme.

Ofcom took into account that Mr Strudwick was an independent journalist and that, at the time he secretly recorded Mrs Pilkington, he was not acting on behalf of Channel 4. It noted too that Channel 4 had obtained a transcript of those recordings from Mr Strudwick but did not have the recordings themselves. Ofcom considers that the obtaining of material from a third party in circumstances such as these does not absolve a broadcaster from ensuring that the material has not been obtained in a manner that could be in breach of Rule 8.1 of the Code. Therefore, Ofcom considered whether Mrs Pilkington had a legitimate expectation of privacy in relation to obtaining of the transcript of the counselling session she had had with Mr Strudwick.

Ofcom noted that Mrs Pilkington was secretly recorded by Mr Strudwick while conducting a therapy session with him. At the time, as Mrs Pilkington stated in her complaint, she was under the impression that Mr Strudwick was a genuine client who wanted to have change therapy. In the circumstances of this particular case, it was evident from the transcript of the secretly recorded audio that personal matters (such as Mr Strudwick's family life and personal feelings) were discussed in the session. Ofcom also took into consideration representations made by Channel 4 that there could be no confidentiality in wrongdoing and that the benefit of any duty of confidentiality vested with the client (i.e. Mr Strudwick) rather than the counsellor (i.e. Mrs Pilkington). In addition, Ofcom also took into account that Mr Strudwick had used the recordings (which were recorded in 2009) as the basis for his complaint to BACP, which decided to suspend Mrs Pilkington from practice in May 2011. Ofcom was also provided with a copy of an article which Mr Strudwick wrote for *The Independent* newspaper on 1 February 2010 and another article he wrote for *The Guardian* newspaper on 27 May 2011, both of which reported on the outcome of Mrs Pilkington's BACP hearing.

Ofcom read the article published in *The Independent* newspaper on 1 February 2010 and noted that while Mrs Pilkington was not named in it, Mr Strudwick gave a detailed account of the counselling sessions with Mrs Pilkington that he had secretly recorded. Ofcom also observed that a number of quotes of what Mrs Pilkington had said in their counselling sessions also appeared either verbatim, or very closely represented the comments that appeared in the transcript. Ofcom also took note that in the article published in *The Guardian* newspaper (the same week in which in BACP concluded its hearing in relation to Mrs Pilkington), Mr Strudwick commented on the BACP hearing and the counselling sessions and referenced the article he wrote for *The Independent* on 1 February 2010 in which he described the counselling sessions.

Ofcom considered that, although the counselling sessions did discuss personal issues (such as Mr Strudwick's sexuality, family background and upbringing), any confidentiality vested with Mr Strudwick as the "client" rather than Mrs Pilkington, who was acting in her capacity as a professional counsellor in discussing Mr Strudwick's issues in the sessions. There was no information in the transcripts of the secretly recorded counselling sessions that Ofcom considered to be of a personal or sensitive nature to Mrs Pilkington. Mr Strudwick had already volunteered the information in those counselling sessions in the newspaper

articles he had written (as described above) and had provided a transcript of the recordings he had made to Channel 4, thereby waiving any expectation of privacy he had in relation to the material contained in the transcripts. Therefore, taking all the above factors into account, Ofcom considered that Mrs Pilkington did not have a legitimate expectation of privacy in the circumstances.

Ofcom found, therefore, that Mrs Pilkington did not have a legitimate expectation of privacy in relation to the material contained in the transcript. Given this conclusion, it was not necessary for Ofcom to consider whether any infringement in to Mrs Pilkington's privacy was warranted.

- e) Ofcom next considered the complaint that Mrs Pilkington's privacy was unwarrantably infringed by broadcasting the counselling session secretly recorded by Mr Strudwick.

In relation to this head of complaint, Ofcom had regard to Practices 8.6 and 8.14 of the Code. Practice 8.6 of the Code 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. Practice 8.14 of the Code states that material gained by surreptitious filming and recording should only be broadcast when it is warranted.

In considering whether Mrs Pilkington's privacy was unwarrantably infringed in the programme as broadcast, Ofcom first considered the extent to which she had a legitimate expectation of privacy that some of the content of the secretly recorded audio of her counselling session with Mr Strudwick would not be broadcast in the form of a reconstruction in the programme to a wider audience without her consent.

Ofcom noted the reconstruction was broadcast in the programme as follows:

- |                              |   |
|------------------------------|---|
| Actress:                     | <i>"It can sometimes mean days, weeks of actual isolation, so they may internalise it. There's not a lot in the literature about it but it's something I've noticed often in my work."</i>  |
| Mr O'Brien<br>(the reporter) | <i>About halfway through the session she seems to suggest some sort of repressed memory of sexual abuse."</i>   |
| Actor:                       | <i>You mention sexual abuse. Again, nothing comes to mind. But then, there's a lot in life that is not immediately apparent."</i>   |
| Actress:                     | <i>Yes I think it is in there. It's something within you, but outside your mind. Is it ok with you if we ask the Holy Spirit to help you to bring these things to your conscious mind?"</i> |
| Actor:                       | <i>Fine."</i>   |

After this excerpt, the reconstruction then showed the actress playing Mrs Pilkington asking the actor playing Mr Strudwick whether there was a history of Freemasonry in the family.

Ofcom took into account the factors, as set out in head d) above, that the existence of a recording of the counselling session with Mr Strudwick and a

substantial amount of what was discussed in those sessions, was already in the public domain before the programme was broadcast. In particular, Ofcom noted that the part of the counselling session which was reconstructed for the programme had already appeared in *The Independent* newspaper article. At the time of the broadcast of the programme, Mr Strudwick's complaint about Mrs Pilkington and the content of the recordings had been discussed widely in the national press (some of which was described in head d) above), at the BACP hearing and in the subsequent appeal hearing – whose decision was made public on the day the programme was broadcast. In addition, Mrs Pilkington had been invited on to the programme to respond to the BACP decision (in which the counselling sessions with Mr Strudwick had been central) and was therefore aware that the content of the counselling sessions she had had with Mr Strudwick were likely to be discussed on the programme.

Taking all the factors set out above into consideration, Ofcom considered that Mrs Pilkington did not have a legitimate expectation of privacy in relation to broadcast of the reconstruction of the counselling session with Mr Strudwick. Having concluded that Mrs Pilkington did not have a legitimate expectation of privacy in the circumstances, it was not necessary for Ofcom to go on to consider whether the infringement into her privacy was warranted.

**Accordingly, Ofcom has not upheld Mrs Pilkington's complaint of unjust and unfair treatment and unwarranted infringement of privacy in the programme as broadcast.**

## Not Upheld

### Complaint by Mrs Helen Ellis

*The Hoarder Next Door, Channel 4, 17 May 2012*

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#### Summary

Ofcom has not upheld this complaint of unjust or unfair treatment and unwarranted infringement of privacy made by Mrs Helen Ellis.

The programme looked at the reasons for hoarding and its impact on sufferers. This edition featured Mrs Ellis' story and charted her progress in addressing her problem with the help of psychotherapist Mr Stelios Kiosses.

Ofcom found that:

- Mrs Ellis was not misled about the nature of the programme.
- Mrs Ellis was portrayed sympathetically as someone suffering from a hoarding problem that stemmed from trauma, which she was taking steps to address. The programme showed that she and her son had a strong and loving relationship.
- The programme included positive footage of Mrs Ellis and her son and did not dwell unduly on the impact of the hoarding on their home.
- It was not suggested that a diary belonging to Mrs Ellis' deceased husband had been found under rubbish.
- Mrs Ellis did not have a legitimate expectation of privacy in relation to filming of her first discussion with Mr Kiosses, as she had given permission for this.

#### Introduction

On 17 May 2012, Channel 4 broadcast an edition of *The Hoarder Next Door*, a four part documentary series that explored the psychological reasons for, and the practical impact of, chronic hoarding. The series featured four principal hoarders, each with a particular goal or reason for wanting to change. With the help of psychotherapist Mr Kiosses and his specialist team, the hoarders tried to achieve positive changes in their lives. This episode included the story of Mrs Helen Ellis and her 18-year-old son, Jack. The programme explored the reasons for Mrs Ellis' hoarding habits and included footage of the family home before and after Mr Kiosses' involvement. Mr Kiosses concluded that Mrs Ellis' hoarding was explained by trauma following the death of her husband when Jack was two years old and then helped her confront this and work towards changing her habits. The programme showed how Mrs Ellis and Jack were able to de-clutter their home and the positive impact the changes had on the quality of their lives.

#### Summary of the complaint and broadcaster's response

##### Unjust or unfair treatment

In summary, Mrs Ellis complained that she was treated unjustly or unfairly in the programme as broadcast in that:

- a) Mrs Ellis was misled about the nature of the programme, as she was led to believe that it would be a serious documentary about Mr Kiosses' groundbreaking treatment for hoarders. Instead, the programme showed very little of the treatment, sensationalised the issues and exploited her vulnerability.

Before responding to Mrs Ellis' specific complaints, Channel 4 said that both it and the production company considered the sensitivities of developing and producing a programme which dealt with hoarding and recognised that hoarding may be caused by complex issues the potential contributors were likely to have, whether emotional, physical and/or psychological. Channel 4 and the production company discussed and agreed the most appropriate, sensitive and responsible way to proceed for this series, including agreeing that all contributors had a psychological assessment to ensure that they were suitable and putting in place appropriate support during and after filming.

In response to the complaint that Mrs Ellis had been misled about the nature of the programme, Channel 4 said Jack had emailed the production company and asked for help, saying that he was concerned about the state of their home due to their hoarding. The production company discussed the nature and proposed content of the programme with Mrs Ellis and Jack, together with details of what may have been required of them for the filming, treatment or therapy as part of the production, with a view to them participating in the programme. The nature and content of the programme was described to them at this stage. The production company ensured that both had a psychological assessment before agreeing to participate and Mrs Ellis was offered psychological support before, during and after filming. Channel 4 said that the production company hoped that her contribution to the programme would help both her and Jack to get control of their hoarding and improve their day-to-day quality of life.

Channel 4 said that at no point did the production company claim that the programme was a "serious documentary about Mr Kiosses' ground-breaking treatment for hoarders" and that in all discussions and contracts, it was clear that the series was a documentary series featuring hoarders who "through the support of a psychotherapist and his specialist team...underwent intensive therapy as they tried to achieve positive changes in their lives". Mrs Ellis also signed a Contributor's Agreement dated 30 October 2011, which included a description of the programme. This referred to the "psychological and practical impact of hoarding" and clearly envisaged an examination of both the reasons why Mrs Ellis began to hoard and how the hoarding exhibited itself, both in terms of what her home looked like and how this affected her and Jack's day-to-day life. The production company discussed with Mrs Ellis what her involvement in the programme would be and the Contributor's Agreement clearly set out what would be required in respect of Mrs Ellis attending therapy sessions, allowing the production company access to her home for the purposes of filming, and being encouraged as part of the therapy to de-clutter her home.

Channel 4 said that the treatment of the psychological impact of hoarding was a significant part of the programme, with visits to Mr Kiosses and the resulting tasks that he set for Mrs Ellis and Jack. The therapy and the impact of hoarding were featured throughout the programme and were a constant theme, in line with the programme description provided to Mrs Ellis.

Channel 4 said that Mrs Ellis and Jack co-operated fully during filming, allowing cameras to film inside their home throughout the entire process. They were also

filmed during therapy sessions with Mr Kiosses and others and participated in interviews about their thoughts on the causes of their hoarding and the therapy process. Both seemed positive throughout the filming and treatment process and at the resulting outcome in their lives, including the de-cluttering of their home. Channel 4 said that Mrs Ellis seemed genuinely pleased in the programme when the team of specialists who had assisted with the de-cluttering and cleaning left, saying how grateful she was to them and that she was glad the mess had gone, and that Jack said that his mother was now motivated and upbeat, looking forward to a brighter future.

Channel 4 said that Mr Kiosses explained in the programme that trauma was generally the trigger for a behavioural activity known as hoarding and that clutter is the outward symptom of this. Both the death of Mrs Ellis' husband and the extent of her hoarding were key elements of the therapy and process of recovery, which were handled sensitively and sympathetically and not sensationalised.

- b) Mrs Ellis was unfairly portrayed as a bad, uncaring mother and lazy, filthy slob.

In response, Channel 4 said that the programme was a sensitive and sympathetic portrayal that showed how circumstances and traumas in Mrs Ellis' life had triggered the hoarding, and showed the positive steps that she and Jack were taking to improve their lives and home. Mrs Ellis' relationship with Jack was shown to be touching, emotional and strong, despite both their frustrations of living in a cluttered home. The programme showed the effect on both of their lives of the death of a beloved husband and father.

Channel 4 said that the programme explored Mrs Ellis' hoarding habits, which necessarily involved scrutiny of the possible reasons behind her behaviour, including the trauma that Mr Kiosses believed had triggered it and the outward symptoms of hoarding, namely leaving her home neglected and cluttered. In order to explain the journey that Mrs Ellis and Jack had been on, the footage showed the house before, during and after the therapy, as well as the various stages of the therapy itself. This included Mr Kiosses addressing the symptoms of the hoarding by giving both Mrs Ellis and Jack therapy specific to their needs and requirements, part of which involved different tasks to tackle the hoarding symptoms.

Channel 4 said that Mrs Ellis acknowledged in the programme that, after her husband's death, she lost the ability to tidy up and that the kitchen was so cluttered that it was impossible to cook. However, Channel 4 said that, while it was important editorially to show the extent of Mrs Ellis' hoarding, there was never any suggestion or statement in the programme that the state of Mrs Ellis' house was due to laziness or to her being a bad mother. Mr Kiosses was shown in the programme saying that hoarding was a mental illness, often caused by trauma, which makes the sufferers unable to clear clutter. Mr Kiosses also stated that hoarders needed to be understood and not judged.

Channel 4 said that, given the sensitivities in this series, the production company offered Mrs Ellis the opportunity to view the programme twice before broadcast. On the first occasion, Mrs Ellis was nervous about seeing the programme as she was concerned that it would feature some of the therapy that she felt was "too personal to show on national television" and was relieved that the therapy was a minimal part of the show. Having considered Mrs Ellis' comments, the production company agreed to make several changes to the programme. The production

company felt that the viewing had gone well, however later the same day Mrs Ellis emailed the production company, saying she felt she had been portrayed as a “dirty lazy slob”. The production manager replied that day, saying she was sorry that Mrs Ellis was unhappy with how she was portrayed, but that “everyone who has seen the film feels nothing but empathy with your predicament, and your relationship with Jack is very heartwarming”. The production manager confirmed that she had removed some footage and commentary in light of Mrs Ellis’ comments and said she felt viewers would sympathise and understand why the clutter got so out of control.

Channel 4 said that there were further conversations and correspondence between Mrs Ellis and the production company. The production company arranged a second viewing with Mrs Ellis, which was also attended by Mr Kiosses. There was discussion of the changes made after the first viewing and further changes were made to the programme as a result of Mrs Ellis’ additional comments. Some wording was changed and more footage of psychotherapy sessions was added. The production company removed footage of Mrs Ellis smoking but did not agree to remove all shots of cigarettes and cigarette butts, as these were a considerable part of the hoard and an integral part of the editorial story.

After the second viewing but prior to broadcast, Mrs Ellis had a further session with a psychologist to consider the potential impact of the broadcast on her. In addition to the viewings and emotional and psychological support provided by the production company, the production manager was in frequent contact with Mrs Ellis throughout the period of filming as well as before and after broadcast. She noted that, although Mrs Ellis had concerns about the broadcast of the programme, she was also worried that there was no publicity surrounding the programme and that it may not be seen by many people. The production company believed that this supported Mr Kiosses’ view (expressed after the second viewing) that Mrs Ellis would want the programme to be aired. Channel 4 said that the week before the programme featuring Mrs Ellis was broadcast, she watched the first programme in the series and told the production company that she enjoyed the programme and liked the fact that there was more therapy in it. Channel 4 said that Mrs Ellis said that she “supposed she was” broadly happy with her programme going out and was looking forward to coming to London to see it with members of the production company.

- c) The programme was unfairly edited, omitting extensive positive footage of Jack and Mrs Ellis and focusing, for example, on a pile of cigarette butts.

In response, Channel 4 said that it was incorrect to say that the programme “focused” on a pile of cigarette butts. Channel 4 considered that it would have been within Mrs Ellis’ expectations that the way the house looked would be shown and she had agreed to that when she signed the Contributor’s Agreement. Mr Kiosses felt it was important to see the results of the hoarding as this may have been representative of the trauma that Mrs Ellis had suffered and showed the extent of the problem, however at all times the production company tried to ensure the portrayal of Mrs Ellis and Jack was sympathetic and sensitive whilst remaining factually accurate. Channel 4 said that some aspects of the hoarding were never included and others were edited out due to concerns raised by Mrs Ellis. However, to unduly sanitise the hoarding would have been to mislead viewers and provide an inaccurate portrayal of the situation.



Channel 4 said that the production company selected relevant footage to convey the reality of the situation to the viewers. The programme included many examples of positive footage of Mrs Ellis and Jack, including them tidying up the house together, discussing Mr Ellis' death, and reading a magazine article written about him after his death. The programme also showed Mrs Ellis and Jack having their first home-cooked meal in many years. Given the sensitivities in this case, the production company and Channel 4 ensured that the programme highlighted the fact that the hoarding was a symptom of underlying issues and traumas.

As regards the footage of cigarette butts, Channel 4 said that Mr Kiosses asked about the pile of cigarettes in the corner of Jack's room when he first visited the house. The footage was left in the programme as Mrs Ellis was a heavy smoker and did not use ashtrays, often leaving large piles of cigarette butts in piles throughout the house, including in Jack's room where they filled an entire table. This was a relevant aspect of her hoarding, a source of frustration to Jack and integral to the story. To remove the footage of Mr Kiosses asking about them would have inaccurately portrayed the nature and content of the hoarding. Jack had mentioned to the production company that he felt that clearing out the cigarette butts was a pivotal moment in the treatment process. However, certain footage of Mrs Ellis smoking was removed from the programme at her request.

- d) The programme's commentary unfairly stated that Mrs Ellis' deceased husband's diary was found under the rubbish, when in fact it was found in a neat pile of objects on a shelf in a cupboard.

In response, Channel 4 said that there was no suggestion that the diary was under rubbish or not neatly stored, only that perhaps, like the magazine article about his father that Jack also found, the clearing up had enabled him to rediscover important souvenirs from his life.

#### Unwarranted infringement of privacy

In summary, Mrs Ellis complained that her privacy was unwarrantably infringed in connection with obtaining of material included in the programme in that:

- e) During the first meeting with Mr Kiosses, the programme makers filmed him asking Mrs Ellis about subjects from her medical records, without her giving permission for this.

In response, Channel 4 said both it and the production company took their obligations regarding privacy seriously and took all reasonable and necessary steps to ensure that there were no unwarranted infringements of privacy.

In her Assessment/Consultation Consent Form, Mrs Ellis agreed to grant full access to her medical records and for these to be provided to the psychologist for the purposes of them assessing her suitability for the programme and to the psychotherapist providing services during production of the programme, which might include consultations and therapy sessions. Mrs Ellis also agreed that the consultations, assessments, treatments and findings might be recorded.

Channel 4 said that it was important for Mr Kiosses' therapy that he was able to understand about Mrs Ellis' health problems. He required access to her medical records in order to assist him in delivering the most suitable treatment and

therapies and, if necessary, refer her to specialist care, to help her address the issue of her hoarding.

However, in order to safeguard Mrs Ellis' vulnerability and confidentiality, it was agreed that off camera time would be given to more sensitive questioning during Mrs Ellis' clinical assessment (especially information relating to her medical notes). Channel 4 said that at the beginning of each therapy session, the director asked Mrs Ellis to indicate whenever she wanted filming to stop so that she could talk to Mr Kiosses openly about personal medical issues that she did not want to be included in the programme. As a result, none of her more complex history was ever discussed in any detail during filming. Notes from the therapy sessions show instances of when Mrs Ellis met with Mr Kiosses and requested that sensitive medical issues be discussed off camera.

## **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 unjust or unfair treatment and unwarranted infringement of privacy in, or in connection with the obtaining of material included in, programmes 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 of the programme, and both parties' written submissions. The parties chose not to make any representations on Ofcom's Preliminary View.

### **Unjust or unfair treatment**

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. Ofcom had regard to this Rule when reaching its Decision on the individual heads of complaint detailed below.

- a) Ofcom first considered the complaint that Mrs Ellis was misled about the nature of the programme.

When considering this complaint, Ofcom took account of Practice 7.3 of the Code, which states that in order for potential contributors to a programme to be able to make an informed decision about whether to take part, they should normally, at an appropriate stage, be given sufficient information about: (i) the programme's nature and purpose; (ii) their likely contribution; (iii) the likely areas of questioning, and, wherever possible, the nature of other likely contributions; (iv) any significant changes to the programme that might reasonably affect their decision to contribute and might cause material unfairness; and (v) the contractual rights and obligations of both parties. In addition, if offered an opportunity to preview the programme, Practice 7.3 of the Code states that

contributors should be given clear information about whether they will be able to effect any changes to it.

Ofcom noted that Mrs Ellis signed an Assessment/Consultation Consent Form dated in 2 September 2011, in which she agreed to “undergo a psychiatric/psychological consultation and/or assessment” in order to assess her suitability to participate in the programme. On 30 October 2011, Mrs Ellis signed a Contributor’s Agreement, in which she agreed to participate in the programme. The Contributor’s Agreement included a programme description as follows:

*“A ground-breaking 4 part documentary series that explores the psychological and practical impact of hoarding through the people who live with the condition. The series will feature four principal hoarders, each with a particular goal or reason for wanting to change. Through the support of a psychotherapist and his specialist team, these central characters will undergo intensive therapy as they try to achieve positive changes in their lives.”*

The Assessment/Consultation Consent Form also included a programme description in almost identical terms.

In Ofcom’s view, this description did not differ significantly from Mrs Ellis’ understanding of the programme as set out in her complaint, as Ofcom considered that the programme was a serious one which focused to a large extent on Mr Kiosses’ treatment for hoarders. While neither the agreements referred to above nor the programme itself referred to Mr Kiosses’ treatment as “ground-breaking”, it was clear from the commentary that he believed he could help people with long-standing problems with hoarding that had not been previously addressed. For example, after Mrs Ellis and Jack were introduced, the commentary said:

*“Hoarding disorder is on the increase and due to be recognised as a separate mental health condition. But one man who believes he can help is leading psychotherapist Stelios Kiosses. He has been treating hoarders for the past 15 years and has some unusual methods of therapy.”*

It was also clear from the description of the programme given above that the programme would look at the “practical impact” of hoarding. In Ofcom’s view, this description and the nature of the material filmed with Mrs Ellis and Jack made it clear that the programme would include material not only relating to the therapy, but also footage of Mrs Ellis and Jack in their home.

Ofcom took the view that the programme did not sensationalise the story and presented Mrs Ellis’ situation in a sympathetic way, setting out the nature of the problem in her home, the explanation for how the problem had started and developed and how she had responded to Mr Kiosses’ treatment. For example, early on in the programme Mr Kiosses said:

*“Hoarding is a mental health disorder really. It’s not because they want to live in a dirty environment or surround themselves with clutter and filth. It is an outcome of their mental health problem. So, it’s very important that we don’t judge hoarders from what we see but be open and try and understand who they are.”*

The commentary then explained that Mr Kiosses believed that Mrs Ellis' hoarding was as a result of *"the painful memory of her husband's death"*. The programme explained that Mrs Ellis' husband had died 16 years earlier from cancer at the age of 33, leaving Mrs Ellis with two-year-old Jack. Mr Kiosses said:

*"Helen has been depressed from the trauma she's experienced. For hoarders this is very important, because their hoard is a representation of trauma really. Basically what she is actually saying is that she doesn't want to re-live the trauma again, so I'm building an emotional defence but also I'm building a physical defence."*

Ofcom considered that it was legitimate to include some footage of Mrs Ellis' home to demonstrate the extent of the problem and we did not consider that the programme focused unduly on such images of her home. Ofcom noted that footage was included of Mr Kiosses' first visit to the home and also of Mrs Ellis and Jack as they set about tackling the situation. Viewers therefore saw that there was extensive hoarding that very much limited Mrs Ellis' and Jack's use of their home. It was also clear that at times Mrs Ellis struggled with the treatment and the tasks Mr Kiosses set for her. However, the programme then went on to show the vast improvements Mrs Ellis and Jack made with the assistance of Mr Kiosses and his team, such that they were able to enjoy their home, with Jack studying there and them enjoying home-cooked meals together.

The programme also included footage of the therapy, showing Mrs Ellis in conversation with Mr Kiosses and his team or undertaking tasks set for her by Mr Kiosses, such as starting to tackle the hoard by focusing on clearing paper from her house. At the end of the programme, Mr Kiosses was shown visiting Mrs Ellis and Jack again to see how they had transformed their home and commenting:

*"This is what makes my job worthwhile. Seeing two individuals, mother and son, finding themselves again. Really well done to them, I'm extremely happy."*

Taking all the above factors into account, Ofcom considered that Mrs Ellis was not misled about the nature of the programme and that the programme as broadcast was in keeping with the description given to her. Further, Ofcom did not consider that the programme sensationalised the issues or exploited Mrs Ellis, but told her story in a sympathetic way.

Ofcom therefore found no unfairness to Mrs Ellis in this respect.

- b) Ofcom then considered the complaint that Mrs Ellis was unfairly portrayed as a bad, uncaring mother and lazy, filthy slob.

When considering this complaint, Ofcom had regard to whether reasonable care was taken by the broadcaster to satisfy itself that material facts had not been presented, disregarded or omitted in a way which was unfair to Mrs Ellis (as outlined in Practice 7.9 of the Code).

Ofcom noted the extensive steps taken by the programme makers to reassure Mrs Ellis throughout the process and to take on board her comments when she saw the programme on two occasions before broadcast, which had resulted in certain changes to the programme.

As regards the complaint that Mrs Ellis was portrayed as a bad mother, Ofcom considered that it was clear from the programme that she and Jack had a very close relationship. Although the programme showed a couple of incidents in which Mrs Ellis and Jack argued, it was very clear that they had a strong and loving relationship and that, despite her problems, Mrs Ellis had brought up a son who was articulate, thoughtful, supportive and understanding of his mother's problems. It was clear from the outset that Jack loved his mother, had a mature insight into the underlying reasons for the hoarding, and considered it to be a problem they shared and needed to work on together. It was apparent that he was genuinely touched when he found some wedding photographs and said:

*"I don't think I've ever seen mum that happy. Well of course she was, she was marrying the person she loved. She looks beautiful."*

Later, Jack was shown commenting on how happy he was to eat his mother's home-cooked food and to have her back. In these circumstances, Ofcom considered it was highly unlikely that viewers would have perceived Mrs Ellis to be a bad mother or uncaring towards her son, but would have seen them as having a strong relationship despite the difficulties they faced.

Ofcom also considered that Mrs Ellis was not portrayed as a "lazy filthy slob" in the programme as broadcast. The programme made it very clear that her hoarding was a form of mental health disorder and that with the help Mrs Ellis was given she was able to tackle it. In Ofcom's view, there was no suggestion whatsoever in the programme that the hoarding suggested that Mrs Ellis was either lazy or filthy. Rather she was shown to be someone whose struggle with the aftermath of her husband's death for 16 years had given rise to her problems with hoarding, who had recognised the need for help, and had taken up Mr Kiosses' offer of help. Although she was shown to have had doubts at times about her ability to make the changes, she was also shown to be insightful about her situation and willing and able to change. At the beginning and during the process there were times when she felt unable to deal with the situation, for example after a session with Mr Kiosses she said:

*"I'm scared, I can't see any light at the end of the tunnel...I can't even think of imagine it being tidy again. This is my last chance, so yeah I'm scared that it's not all going to come together."*

Later, Mrs Ellis was seen working with her son and the de-cluttering team to successfully clean and transform her home. One member of the de-cluttering team was shown commenting on how "*focused*" and "*motivated*" Mrs Ellis had been towards the project.

In these circumstances, Ofcom took the view that the programme presented a sympathetic portrayal of Mrs Ellis and Jack, the reasons for the hoarding and their challenging but successful journey in addressing their problems. Ofcom therefore considered that viewers would have understood the reasons for the hoarding, and appreciated the bravery she showed in deciding to confront it and the extent of support she had from her son.

Ofcom therefore found no unfairness to Mrs Ellis in this respect.

- c) The programme was unfairly edited, omitting extensive positive footage of Jack and herself and focusing, for example, on a pile of cigarette butts.

In considering this part of the complaint, Ofcom had regard to Practice 7.6 of the Code, which states that when a programme is edited, contributions should be represented fairly.

Ofcom noted that extensive footage of Mrs Ellis and Jack was filmed, both in their home and with Mr Kiosses and other therapists. It would not have been possible for all the material filmed to be included in the programme. In Ofcom's view, the selection of material for inclusion in the programme was an editorial matter for the programme makers, provided that selection did not result in unfairness.

Ofcom took the view that the programme included extensive positive footage that explained the reasons for the hoarding and demonstrated that Mrs Ellis and Jack had a strong and loving relationship. When they discussed the situation at the beginning of the programme, it was clear that they felt it was a shared problem that they wanted to address together. Although both were frustrated at times, they worked together and were shown as a happy and united family. It was clear at the end of the programme how happy Jack was to have his mother back and to be eating a home-cooked meal with her.

As regards the footage of cigarette butts in various rooms in Mrs Ellis' home, Ofcom accepted that these were an important part of the story, because they were a significant element of the hoarding problem and one about which Jack felt strongly. Ofcom took the view that it was therefore not unreasonable to include them in the programme, despite the fact that Mrs Ellis had asked for this footage to be removed. However, Ofcom considered that viewers would have appreciated that the cigarette butts were a part of the hoarding problem, but that it would also have been clear that, having sought Mr Kiosses' help, she was willing and able to confront this problem. Further, Ofcom noted that the programme only focused on the cigarettes a couple of times, first during Mr Kiosses' initial visit to Mrs Ellis when he was considering the nature of the hoarding problem, and again when Mrs Ellis and Jack were de-cluttering. Ofcom did not consider that the programme dwelt on these unduly.

In Ofcom's view, the hoarding in Mrs Ellis' home was an integral part of the story and it was legitimate for the programme to include footage of how the home looked when Mr Kiosses first visited and then to chart the progress made by Mrs Ellis and Jack as they tackled their hoarding problem and de-cluttered their home.

Ofcom therefore found no unfairness to Mrs Ellis in this respect.

- d) The programme's commentary unfairly stated that Mrs Ellis' deceased husband's diary was found under the rubbish, when, in fact, it was found in a neat pile of objects on a shelf in a cupboard.

In considering this part of the complaint, Ofcom had regard to Practice 7.9 of the Code, as set out under head b) above.

Ofcom noted that this footage was in the fourth and final part of the programme, which showed the huge progress Mrs Ellis and Jack had made with their therapy and de-cluttering. As Jack was shown clearing his bedroom, the commentary stated that:

*“Helen and Jack’s flat is also starting to return to its original state with the help of cleaners sent in as the final part of Stelios’ plan. And the clearing has revealed a precious find for Jack in the back of his cupboard.”*

Jack then said: *“Oh my god...This is my dad’s diary that he left to me.”*

The commentary went on to say:

*“Before he died, Jack’s father, Barry, wanted to leave a journal of his life for his son to remember him by, including the day of Jack’s birth.”*

Jack was shown reading from the diary and commenting on how amazing it was to hear about his birth from his father’s diary.

Ofcom noted that the programme did not state that the diary had been found under the rubbish, nor did Ofcom consider that there was any such implication. Jack was shown finding the diary at the back of his cupboard while clearing his room, so it would have been clear to viewers that the diary had not been under the rubbish on his floor. It was clear that Jack had not seen the diary before and was thrilled to have found it. In Ofcom’s view, and in the context of the sympathetic portrayal of Mrs Ellis and Jack and their quest to change their ways, viewers were unlikely to have thought the diary was found under rubbish and would have seen the finding of the diary as another positive step in the story. Ofcom considered that this section of the programme added to the picture of Mrs Ellis and Jack confronting their problems and reaching a positive solution.

Ofcom therefore found no unfairness to Mrs Ellis in this respect.

#### Unwarranted infringement of privacy

- e) During her first meeting with Mr Kiosses, the programme makers filmed him asking Mrs Ellis about subjects from her medical records, without her giving permission for this.

In Ofcom’s view, the individual’s right to privacy has to be balanced against the competing rights of the broadcasters 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 intensely 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 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 part of the complaint, Ofcom had regard to Practice 8.5 of the Code, which states that any infringement of privacy in the making of a programme should be with the person’s consent or be otherwise warranted.

In order to establish whether or not Mrs Ellis’ privacy was unwarrantably infringed in connection with obtaining material included in the programme, Ofcom first assessed the extent to which she had a legitimate expectation of privacy in the particular circumstances in which the meeting with Mr Kiosses was filmed.

Ofcom noted that this complaint relates to the first meeting Mrs Ellis had with Mr Kiosses, during which they discussed matters that arose from her medical records.

Ofcom noted the terms of the Assessment/Consultation consent form, in which Mrs Ellis agreed to grant access to her medical records as part of undertaking treatment with consultants and also agreed that the assessments/treatments by the consultants could be recorded. In addition, Ofcom noted the terms of the Contributor's Agreement, in which Mrs Ellis agreed that she would attend and be filmed taking part in therapy sessions provided to assist her in addressing her urge to collect or hoard objects, and agreed to provide the production company with relevant information from her medical, psychological and behavioural history.

Ofcom also noted Channel 4's comments that the programme makers offered "off camera" time during the consultations for the discussion of more sensitive subjects (especially information relating to her medical notes).

In Ofcom's view, Mrs Ellis would have had a legitimate expectation that matters relating to her medical records would not be discussed or filmed without her permission. However, Ofcom considered that Mrs Ellis had given her informed consent (within the meaning of Practice 7.3 of the Code set out under head a) above) that discussions relating to matters arising from her medical history could be filmed during therapy sessions with Mr Kiosses insofar as these related to her problems with hoarding which were the subject matter of the programme.

In these circumstances, Ofcom took the view that Mrs Ellis did not have a legitimate expectation of privacy in relation to the particular circumstances of the filming of the meeting with Mr Kiosses. Given this conclusion, it was not necessary for Ofcom to consider whether any intrusion into Mrs Ellis' privacy in connection with the obtaining of material included in the programme was warranted.

Ofcom therefore found that there was no unwarranted infringement of Mrs Ellis' privacy in connection with the obtaining of material included in the programme.

**Accordingly, Ofcom has not upheld Mrs Ellis' complaint of unfair treatment and unwarranted infringement of privacy in connection with the obtaining of material used in the programme as broadcast.**



## Not Upheld

### **Complaint by Mrs Debbie Amour made on behalf of Ms Zoe Lacey, Miss Chantelle Lacey and Miss Danielle Lacey**

*Cutting Edge: Lifers, Channel 4 and Channel 4+1, 25 June 2012*

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#### **Summary**

Ofcom has not upheld this complaint of unwarranted infringement of privacy in the programme as broadcast made by Mrs Debbie Amour.

This programme looked at the experience of several individuals convicted of murder who were serving life sentences in HMP Gartree in Leicestershire. One of these individuals was Mr Gary Osbourne who had been convicted of murdering Mr Gary Hunt (the former partner of Ms Zoe Lacey and the father of Miss Chantelle and Miss Danielle Lacey).

Ofcom found that:

- The complainants had a legitimate expectation of privacy in respect of the particular material broadcast by the programme about the murder of their close relative/connection.
- However, Channel 4 took more than sufficient steps to inform the Mr Hunt's immediate family of its plans for the intended broadcast and, although the complainants' privacy was infringed by the broadcast of information about the murder of Mr Hunt, this infringement was warranted by the public interest which was served by the inclusion of this information in the context of a programme examining the experience of individuals serving life sentences for murder.

#### **Introduction**

On 25 June 2012, Channel 4 broadcast an episode of its *Cutting Edge* documentary series called *Lifers*. This programme looked at the experiences of several individuals convicted of murder who were serving life sentences in HMP Gartree in Leicestershire.

One of the individuals included in the programme was Mr Gary Osbourne who had been convicted of murdering Mr Gary Hunt (Ms Lacey's former partner and the father of her children).

Mr Osbourne (who was referred to in the programme as "Ozzy") was shown on a number of occasions. On the first occasion he said: *"I'm in here because I killed my best friend over a stupid argument."* He subsequently spoke in more detail about the murder. He identified the date on which it occurred and said that he had gone to his friend Gary's flat to buy drugs and stabbed him after they had argued about whether he was being given the right amount of drugs for the money he was paying.

In the second half of the programme Mr Osbourne was shown mopping the floor and saying, *"Today is the seventh anniversary of me killing my mate Gary"*, and telling one of the programme makers that he thinks about it *"most days not just today because of the date"*. He was also shown recollecting happy occasions he had shared with Gary in the past.

In addition the programme showed him saying, *"I feel like shit knowing that I lost it seven years ago today at roughly 7:30 tonight"*, before lighting a candle in the prison chapel and telling the chaplain, *"I do miss him"*.

At the end of the programme, Mr Osbourne was shown leaving HMP Gartree for a lower security prison because he had been deemed a lower risk prisoner.

Following the broadcast of the programme, Mrs Amour complained that the privacy of her sister, Ms Zoe Lacey (who is a former partner of Mr Gary Hunt and the mother of two of his children), and that of her nieces, Miss Chantelle and Miss Danielle Lacey (who are Mr Gary Hunt's daughters), was unwarrantably infringed in the programme as broadcast.

### **Summary of the complaint and broadcaster's response**

The details of Mrs Amour's complaint on behalf of Ms Lacey and her two daughters ("the Lacey family") are set out below, followed by the response to particular points provided by Channel 4.

In summary, Mrs Amour complained that the privacy of the Lacey family was unwarrantably infringed in the programme as broadcast in that they were not informed about the plan to broadcast this programme. In particular, she said that prior to the programme Ms Lacey and her children had never heard Mr Osborne admit to killing Mr Gary Hunt.

Mrs Amour added that during a meeting with a police liaison team which took place on 10 July 2012 (i.e. after the broadcast) they (the Lacey family and the Hunt family – i.e. the immediate relations and connections of Mr Gary Hunt) were informed that the police had advised Century Films (the production company which made the programme) that because the police had been unable to make contact with any members of Mr Hunt's family Mr Osborne should not be included in the documentary. She also said that in post-broadcast correspondence Channel 4 had informed her that the programme makers were unable to find any members of Mr Hunt's family but that she had found a listing for Miss Sarah Hunt (Mr Gary Hunt's sister) on Facebook, the social networking website, after a short search.

Mrs Amour explained that although Ms Lacey's relationship with Mr Gary Hunt had ended long before he was killed they remained close for the sake of their daughters. By way of background to the complaint, Mrs Amour also said that as a result of seeing the programme Ms Lacey had been diagnosed with post-traumatic stress and one of her daughters had suffered a setback in her battle with mental illness from which she had suffered since her father's death.

In response to this complaint Channel 4 said that before the programme was commissioned, the production company, Century Films ("Century"), first had to negotiate access to Gartree Prison via the Ministry of Justice ("the MoJ") and its dedicated press office, which facilitates all documentary filming projects. Century, Channel 4 and the MoJ agreed that every effort should be made to contact the families of victims whose killers were going to appear in the programme. Following its standard procedure for all UK prison documentaries, the MoJ insisted that the Home Office's Public Protection Unit ("the PPU") should take responsibility for informing the victims' families about the documentary through its network of victim liaison officers ("VLOs") and that Century should not have access to any contact or family details because of data protection issues.

Century provided the MoJ press office with a list of the 27 prisoners who appeared on screen during the documentary. Mr Osbourne was one of the names given. During the editing of the programme, the director was informed by the MoJ press office that all of the necessary letters/emails and/or phone calls to the victims' families had been sent out/made. Some victims' families responded to this communication, while others, including Mr Hunt's family, did not. The MoJ press office considered that this was normal because its experience indicated that some families choose not to acknowledge communications about this type of documentary. It also said that as far as it and the PPU, for whom it was speaking, were concerned, it was "fine" for Century to include Mr Osbourne in the programme.

However, the production team decided that Century would make additional efforts to ensure that the families of the victims of the seven main prisoners featured in the programme (from whom the MoJ had not received any response to its communications) were made aware of the programme. Given that the MoJ remained unable to provide contact details for the victims' families due to data protection issues, the producer spent six weeks using a variety of methods to try to contact Mr Hunt's family. These included:

- Searching press coverage of the trial and the internet for more details of the victim's family.
- Obtaining a copy of Mr Hunt's death certificate (which confirmed the address at which he was living at the time of his death) and checking the electoral roll to see if anyone else lived at this address at the same time.
- Contacting Mr Osbourne at his new prison to ask if he knew where any members of Mr Hunt's family now lived.
- Speaking to Derby Probation Service because Mr Osbourne suggested that it might have contact details for the victim's family.
- Contacting the *Derby Evening Telegraph* which had reported on the case.
- Trying to contact the Victim Focus Unit for Family Liaison at Enfield Police Station (Enfield was where the crime took place).
- Trying to contact Mr Mark Dennis QC, the Crown Prosecution Service's barrister during the case.

None of these efforts was successful and therefore, as a last resort, the producer posted a message on a page on a memorial website, set up by Mr Hunt's mother (Mrs Jennifer Springall – formerly Mrs Jennifer Hunt) which had been used by the family to commemorate Mr Hunt's life. The posting, which was made three weeks before the broadcast of the documentary, read:

"Dear Jennifer,

My name is [name given]; I'm a producer at a television company called Century Films ([www.centuryfilmsltd.com](http://www.centuryfilmsltd.com)). I'm contacting you in regard to a documentary that we are currently making for Channel 4 which examines the impacts of very serious crimes on both the victims and the perpetrators who are imprisoned for their crimes. I'd be very grateful if you could e-mail me [email address given] –

and I can explain what it's about. I apologise for contacting you via this site – it's the only contact address that I could find for you.”

The programme makers received no response to this message.

Channel 4 said that the information above demonstrated that the production team made extensive efforts to contact Mr Hunt's family, going some way beyond the established protocols already put in place by the MoJ, and noted that it had no way of knowing whether the various messages it had sent about the programme had been received by the family and whether they had chosen not to respond.

It also said that senior executives at the MoJ press office and the PPU viewed the programme on two occasions prior to broadcast to ensure that it was fair, factually accurate, and did not contain material liable to offend or upset the victims' families. During these viewings the efforts which had been made to contact Mr Hunt's family were discussed and all parties were satisfied that everything reasonably possible had been done to inform them about the programme.

With regard to the complaint the programme was the first occasion on which members of Mr Hunt's family heard Mr Osbourne admit to killing Mr Hunt (and Mrs Amour's implicit assertion that this information was private to the Lacey family), Channel 4 said that while Mr Osbourne had publicly denied having committed the crime, he had previously confessed his guilt to a friend. Channel 4 added that this information was disclosed at the trial and was a key factor in securing his conviction. Channel 4 included a link to a BBC news report on the day on which Mr Osbourne was sentenced (4 October 2005) which included this information<sup>1</sup>, and noted that Miss Sarah Hunt (Mr Gary Hunt's sister) was aware of this earlier confession, as she had mentioned *“the threats [Mr Osbourne] made to the person he confessed to”* in a letter she sent to the MoJ dated 10 July 2012.

Channel 4 also said that the programme did not unquestioningly accept Mr Osbourne's claims of remorse and contrition. It included a sequence with the prison's psychology team, which explained that *“lifers”* must show remorse and admit their crimes if they are to progress through their sentence, as well as Mr Osbourne saying: *“Psychology run the lifers. You've got to agree with them; if you don't, you stay.”* Channel 4 said that this sequence clearly invited the audience to question Mr Osbourne's behaviour and claims of contrition.

Channel 4 then noted the need to balance an individual's right to privacy against the competing rights of the broadcaster, programme makers and audience to freedom of expression. It said that the programme's examination of the treatment of serious offenders in Britain's prisons was an important matter of public interest in that it considered how society deals with criminals guilty of the most serious crimes; how they are treated; whether they should be punished; and whether they can ever be rehabilitated into society. Channel 4 also said that the offenders who featured in the programme were a central part of that examination and added that the programme gave an unprecedented insight into the lives of convicted killers facing a lifetime in prison, including a look at the behavioural courses and psychological interventions that they are expected to undergo as part of any rehabilitation and the role of the parole board, which has to decide whether individual offenders can be safely released back into society.

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<sup>1</sup> See: <http://news.bbc.co.uk/1/hi/england/derbyshire/4309432.stm>.

The broadcaster added that during post-broadcast contact with Mr Hunt's family both it and Century had repeatedly expressed their deep regret that the family was apparently unaware of the documentary before the first broadcast on 25 June 2012.

Channel 4 noted that Mr Hunt's family (a group which included the Lacey family) raised several points about the efforts made by Century to contact them within their complaints to Ofcom. It responded to these points in turn.

With regard to the complaint that after the programme was broadcast the family had a meeting with a local probation team during which they were told that probation officers had advised Century not to include Mr Gary Osbourne in the programme, the broadcaster said that at no point did anyone at the MoJ press office (Century's point of contact with the Home Office's probation-facing PPU) suggest that Mr Osbourne should not be included in the programme. On the contrary, Century was repeatedly told that in the MoJ's opinion it was "fine" to include him. Channel 4 reiterated that Century liaised closely with the MoJ over the offenders who featured in the programme, and said that in one case, where the MoJ notified Century of problems with the inclusion of a particular offender, Channel 4 and Century agreed that he should be removed from the programme.

With regard to the complaint that Century had not tried hard enough to contact the family via the social networking site Facebook, Channel 4 said that although the complaint indicated that it took under two hours to find Miss Sarah Hunt on the website, Century had made several attempts to track down members of the Hunt family via Facebook, but encountered the problem that the surname "Hunt" is very common, the programme makers did not know what any members of the family looked like, and it was also possible that members of the family had changed their names.

Finally, Channel 4 said that it did not accept that there was an infringement of the complainants' privacy in the broadcast of the programme but said that if there was any such infringement it was warranted in the public interest.

It argued that the programme makers took all reasonably practicable steps to contact the Hunt family and that it could not be right that, in the absence of direct contact having been made with the family, Channel 4 should be prevented from including Mr Osbourne's important contribution in the programme. The broadcaster added that if this were the case, it would constitute an unacceptable restriction of the right to freedom of expression of Channel 4 and Century and the right of Channel 4's audience to receive information, and would have the wider effect of potentially restricting the ability of all broadcasters to feature individuals convicted of serious crimes generally.

The broadcaster concluded by saying that notwithstanding its position as set out above, both it and Century sincerely regretted any distress caused to the complainants and their family.

### **Representations on Ofcom's Preliminary View**

Ofcom prepared a Preliminary View on this case that the Lacey family's complaint should not be upheld. Both the complainants and Channel 4 commented on that Preliminary View. The main points made by the complainants which are relevant to the complaint as entertained and Channel 4's responses to those points were, in summary, as follows.

The complainants repeated their view that the efforts which the programme makers made to contact the family of Mr Gary Hunt after the PPU had failed to do so were insufficient. In particular, they argued that, contrary to Channel 4's assertions in its response to the complaint, it would have been possible for the programme makers to have contacted a member of Mr Hunt's family (notably his mother or sister) using Facebook.

The complainants also said that having been unable to contact the family the broadcaster should not have included the sections relating to Mr Gary Osbourne in the programme and that Channel 4 was wrong to argue that the inclusion of this material did not result in an infringement of their privacy.

In response to Ofcom's Preliminary View and the complainants' comments on it, Channel 4 said that although the complainants reiterated their claims that the programme makers made insufficient efforts to contact them they provided no new substantive evidence to support this view. The broadcaster also reproduced a list of the actions taken by programme makers to try to contact Mr Hunt's family and again observed that they had made several attempts to track down members of Mr Hunt's family via Facebook but encountered the problem that there were a very high number of matches for searches under the names of people belonging to this family.

In addition, Channel 4 said that although the complainants had repeated the claim that their privacy was infringed by the broadcast of the details of Mr Hunt's murder they had not provided any new evidence which should affect Ofcom's Preliminary View that the infringement of the complainants' privacy in this respect was warranted by the public interest.

## **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 unjust or unfair treatment and unwarranted infringement of privacy in, or in connection with the obtaining of material included in, programmes 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. Ofcom also took careful account of the representations made by the complainants and by Channel 4 in response to Ofcom's Preliminary View on this complaint. However, it concluded that the representations did not raise any substantive points which affected Ofcom's Preliminary View not to uphold the complaint.

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.

### Legitimate expectation of privacy

Miss Amour complained that the privacy of the Lacey family was unwarrantably infringed in the programme as broadcast in that they were not informed about the plan to broadcast this programme. In particular, she said that prior to the programme Ms Lacey and her children had never heard Mr Osborne admit to killing Mr Gary Hunt.

Ofcom noted that the programme looked at the experience and impact of life sentences, both on those serving these sentences and their families and from the perspective of prison staff (notably a forensic psychology unit) and a parole board. It did this through the first-hand relating of the specific experiences of several inmates of HMP Gartree who had been convicted of murder and sentenced to life in prison. These prisoners discussed: the crimes for which they had received their life sentences; how they coped with long-term imprisonment; their interactions with prison staff and the psychology unit in particular; contact with their families; and, in some cases, the experience of applying for parole. One of the prisoners whose testimony was included in the programme was Mr Osbourne, referred to throughout as “Ozzy”, who had been convicted of murdering Mr Hunt.

Mr Osbourne was first shown saying: *“I’m in here because I killed my best friend over a stupid argument.”* He subsequently spoke in more detail about the murder. He identified the date on which it occurred and said:

*“Nothing’s ever gonna get that day out of my head, nothing. I went to Gary’s flat to buy some drugs, the amount that was on the scales wasn’t what I’d paid for, we argued, it got out of hand, I took a knife out of the kitchen and I killed him. I just snapped. That’s when the two words came out fuck it! And that was the end of Gary’s life. I honestly I can’t say why I done it. I didn’t even take the drugs I paid for after I killed him. I just walked out the flat. If I could go back, that’s what I say all the time, if, if, if, you know you can’t, not at all.”*

During a section of the programme looking at the role of the forensic psychologists, in which it was stated that *“Lifers will only be released at the end of their tariff if they can prove they no longer pose a risk to the public”*, Mr Osbourne was shown saying: *“Psychology run the lifers. You’ve got to agree with them; if you don’t, you stay.”*

In addition, Mr Osbourne was shown on the seventh anniversary of the murder talking about his grief for the loss of Mr Hunt and his grief for the fact that he had caused that loss. He indicated that he thought about it most days, but particularly so on the anniversary. Mr Osbourne also described various good memories he had of time he had spent with Mr Hunt. He was subsequently heard saying *“I feel like shit, knowing that I lost it seven years ago today”* as he walked towards the prison chapel, where he was shown lighting a candle and saying to the Chaplain: *“I do miss him.”*

Ofcom’s guidance on the meaning of “legitimate expectation of privacy”<sup>2</sup> makes clear that such expectations depend on the circumstances and “will vary according to the place and nature of the information, activity or condition in question, the extent to

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<sup>2</sup> See: <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/privacy/>.

which it is in the public domain (if at all) and whether the individual concerned is already in the public eye". The guidance continues: "There may be circumstances where people can reasonably expect privacy even in a public place...People under investigation or in the public eye, and their immediate family and friends, retain a right to a private life, although private behaviour can raise issues of legitimate public interest."

Practice 8.3 of the Code also makes clear that: "When people are caught up in events which are covered by the news they still have a right to privacy in both the making and the broadcast of a programme, unless it is warranted to infringe it. This applies both to the time when these events are taking place and to any later programmes that revisit those events."

In Ofcom's view, these provisions make clear that persons are not necessarily deprived of expectations of privacy under Section Eight of the Code if information in respect of which they claim a right to privacy has been put into the public domain in the past.

In considering whether the Lacey family had a legitimate expectation of privacy with regard to the information broadcast in the programme, Ofcom noted that:

- The subject matter of the programme concerned Ms Lacey's former partner and the father of her children Miss Danielle Lacey and Miss Chantelle Lacey.
- Information about Mr Hunt's murder was personal to them and related to intensely traumatic events, which self-evidently would have caused them substantial grief.
- While information on the case, which included some specific details about Mr Hunt's murder, remained retrievable on the internet for the public to seek out, the effect of the broadcast of the programme on Channel 4 was to resurrect the case for the audience in a new way which could have a significant effect on the Lacey family.

Taking these three factors together, Ofcom considered that the Lacey family had a legitimate expectation of privacy with regard to the broadcast of information about Mr Hunt's murder.

Ofcom recognised that Miss Amour complained specifically that the inclusion of footage of Mr Osbourne confessing to the killing of Mr Gary Hunt caused the Lacey family particular distress.

With regard to this particular element of the complaint, Ofcom noted that as part of its response to the complaint Channel 4 provided a copy of a BBC news report on the day Mr Osbourne was sentenced which made it clear that, although he later denied it, prior to his arrest Mr Osbourne admitted the killing to a friend. Channel 4 also said that this information was a key element of the evidence brought against Mr Osbourne during his trial.

Notwithstanding that this information, namely that Mr Osbourne had confessed to the killing prior to denying it after his arrest, was seemingly placed in the public domain prior to the broadcast of this programme, Ofcom considered that because of the nature of this footage – i.e. a direct confession from the mouth of the person who murdered Mr Hunt, which also included the information that Mr Hunt was stabbed to



death after an argument over a drug deal (and taking into account the fact Mr Osbourne's earlier confession to a friend was not a current topic of public concern at the time of this broadcast), the Lacey family had a legitimate expectation of privacy with regard to footage of Mr Osbourne making a direct confession in public for the first time that he killed a member of their immediate family.

Therefore, Ofcom concluded that the Lacey family had a legitimate expectation of privacy with regard to the information about the murder of Mr Hunt, including Mr Osbourne's confession.

### Was the infringement warranted?

Given its conclusion that the complainants had a legitimate expectation of privacy in relation to the information about the murder of Mr Hunt, including Mr Osbourne's confession, Ofcom formed the view that their privacy had been infringed by the broadcast of this material. It therefore then went on to consider whether the infringement of the Lacey family's legitimate expectation of privacy in this respect was warranted.

In this context "warranted" has a particular meaning. It means that, where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why, in the particular circumstances of the case, it is warranted. If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy<sup>3</sup>.

In determining whether an infringement of privacy is warranted, Ofcom needs to consider a number of factors and, in the circumstances of this case:

- whether the broadcast was in the public interest;
- the broadcaster's right to freedom of expression; and
- the extent to which the broadcaster sought to mitigate the effects of any infringement.

Ofcom accepted that the information about Mr Hunt's murder (including the footage of his confessing to the crime) was shown in the context of a programme which sought to examine the reality of serving a life sentence for murder in Britain and the factors that influence the lives of the prisoners serving these sentences (notably their relationships with their families, the prison rules and arrangements, the continuous assessment by forensic psychologists, and the possibility of parole). Ofcom considered that this purpose was clear throughout the programme.

In Ofcom's view, these were legitimate matters of public interest for examination in the context of the programme. As noted above, Ofcom is mindful that in particular Mr Osbourne's confession was personal to the Lacey family. However, it was also an integral part of Mr Osbourne's story and the process he, as a prisoner serving a life sentence, was expected to go through as part of serving his term. In this context, Ofcom noted that the programme made it very clear on a number of occasions that people serving life sentences would only be eligible for parole if *"they can prove they no longer pose a risk to the public"*. The programme also made it clear that decisions

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<sup>3</sup> Examples of public interest would include revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence that affects the public.

regarding the level of risk posed by specific prisoners depended largely upon the assessment of forensic psychologists. In addition, one of the forensic psychologists at HMP Gartree was shown saying: *“What I want to see is genuine remorse, I want to see that someone can actually stand in somebody’s shoes, stand in the victim’s shoes, and really feel what they felt like.”*

In light of the above, Ofcom therefore considered that the broadcast was in the public interest. Ofcom also went on to consider whether, in light of the Practices set out in the Code, Channel 4 had taken sufficient action to mitigate the effects of the infringement.

Practice 8.6 of the Code states that: “[I]f the broadcaster 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 is warranted.”

Practice 8.19 of the Code addresses the potential suffering and distress which might be caused to “victims and/or relatives when broadcasters make or broadcast programmes intended to examine past events that involve trauma to individuals (including crime)”. It requires that “[b]roadcasters should try to reduce the potential distress to such victims and/or relatives...unless it is warranted to do otherwise” and sets out the particular steps that are contemplated in this respect. It states that (emphasis added by Ofcom):

- “In particular, so far as is reasonably practicable, surviving victims and/or the immediate families of those whose experience is to feature in a programme, should be informed of the plans for the programme and its intended broadcast, even if the events or material to be broadcast have been in the public domain in the past.”

It is clear from the terms of the bullet point to Practice 8.19 that it does not guide or require broadcasters to obtain (prior) consent or permission from relevant surviving victims and/or immediate relatives to broadcast material in certain circumstances. It simply contemplates broadcasters seeking to reduce potential distress to victims and/or relatives by, “so far as is reasonably practicable”, informing them of the “plans for the programme and its intended broadcast”. The bullet point is expressed to apply “even if the events or material to be broadcast have been in the public domain in the past”, which was the case in the circumstances of this complaint.

Ofcom considered that Practice 8.6 may be relevant to the extent that consent had not been obtained from a member of Mr Hunt’s immediate family. Given the subject matter of the footage in question (i.e. information about the murder of Mr Hunt given directly by the man convicted of murdering him), Ofcom considers that the programme clearly had potential to cause severe distress to the Lacey family and therefore Practice 8.19 was also a relevant Practice to take into account.

Ofcom noted that within her complaint Mrs Amour also said that after the broadcast Mr Hunt’s immediate relations were informed that the police had advised Century that because they had been unable to make contact with any members of Mr Hunt’s family Mr Osborne should not have been included in the documentary. However, Ofcom also noted that from Channel 4’s submission, it appeared that Century was repeatedly told that in the MoJ’s opinion it was “fine” to include him.

Mrs Amour also said that she had undertaken a test on Facebook and found a listing for Miss Sarah Hunt (Mr Gary Hunt’s sister) after a short search. In this context, Ofcom noted Channel 4’s assertion that it had not been able to replicate this

successful search because there were so many people listed under the name Sarah Hunt and that even with the advantage of knowing what Miss Hunt looked like it had taken Mrs Amour just under two hours to complete a successful Facebook search for her.

Ofcom also recognised that the programme makers not only took the steps required by the MoJ and PPU protocols to inform Mr Hunt's family of the plan to broadcast this programme but, when they received no response from the family to their messages through these official channels, the programme makers also made extensive further efforts to contact the family through alternative means (to which they also received no response). In addition, at the end of the process senior executives at both the MoJ press office and the PPU indicated that they were satisfied that everything reasonably possible had been done to inform them about the programme.

Ofcom took note of the complainants' position, repeated within the post Preliminary View representations, that the efforts taken by the programme makers to contact a member of Mr Hunt's family were insufficient. However, in light of the extent of the actions taken by the programme makers, and notwithstanding the fact that it appears that none of the multiple messages sent to Mr Hunt's family about the planned programme were received by them, Ofcom considered that, within the bounds of what could be considered reasonably practicable, Century/Channel 4 took more than sufficient steps to inform Mr Hunt's immediate family of the plans for the programme and thereby seek to reduce potential distress to any members or close connections of this family (including the complainants) as a result of the broadcast of the programme. In respect of Practice 8.6, Ofcom considered that the steps taken by Century/Channel 4 in seeking to contact members of Mr Hunt's immediate family demonstrated that it would not have been possible to obtain consent since, despite efforts to do so, Century/Channel 4 had not been able to contact Mr Hunt's mother or another member of his immediate family. In those circumstances, Ofcom considered that it was warranted to broadcast the material without having obtained consent.

Accordingly, having due regard to broadcasters' freedom of expression, Ofcom considers that the infringement of the complainants' privacy in the broadcasting of this particular footage was warranted in the public interest.

Therefore, Ofcom found that in the circumstances of this particular case the privacy of Ms Lacey and her daughters was not unwarrantably infringed in this respect.

**Accordingly, Ofcom has not upheld Mrs Amour's complaint of unwarranted infringement of privacy in the programme as broadcast on behalf of the Lacey family.**

## Not Upheld

### **Complaint by Miss Sarah Hunt made on her own behalf and on behalf of the following members of her immediate family: Mr A Springall and Mrs Jennifer Springall; Mr Christopher Hunt and Mrs Vanessa Hunt; Mr Jayson Hunt, Miss Lianne Hunt and Miss Amy Norwood**

*Cutting Edge: Lifers, Channel 4 and Channel 4+1, 25 June 2012*

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#### **Summary**

Ofcom has not upheld this complaint of unwarranted infringement of privacy in the programme as broadcast made by Miss Sarah Hunt.

This programme looked at the experience of several individuals convicted of murder who were serving life sentences in HMP Gartree in Leicestershire. One of these individuals was Mr Gary Osbourne who had been convicted of murdering Mr Gary Hunt (Miss Hunt's brother).

Ofcom found that:

- The complainants had a legitimate expectation of privacy in respect of the particular material broadcast by the programme about the murder of their close relative. However, this expectation did not apply to information included in the programme which allegedly rendered the Hunt family identifiable (i.e. images of Mr Osbourne, references to Mr Osbourne's nickname and the references to Mr Hunt's first name).
- Channel 4 took more than sufficient steps to inform the complainants of its plans for the intended broadcast and although their privacy was infringed by the broadcast of information about the murder of Mr Hunt this infringement was warranted by the public interest which was served by the inclusion of this information in the context of a programme examining the experience of individuals serving life sentences for murder.

#### **Introduction**

On 25 June 2012, Channel 4 broadcast an episode of its *Cutting Edge* documentary series called *Lifers*. This programme looked at the experiences of several individuals convicted of murder who were serving life sentences in HMP Gartree in Leicestershire.

One of the individuals included in the programme was Mr Gary Osbourne who had been convicted of murdering Mr Gary Hunt (Miss Hunt's brother).

Mr Osbourne (who was referred to in the programme as "Ozzy") was shown on a number of occasions. On the first occasion he said: *"I'm in here because I killed my best friend over a stupid argument."* He subsequently spoke in more detail about the murder. He identified the date on which it occurred and said that he had gone to his friend Gary's flat to buy drugs and stabbed him after they had argued about whether he was being given the right amount of drugs for the money he was paying.

In the second half of the programme Mr Osbourne was shown mopping the floor and saying, *"Today is the seventh anniversary of me killing my mate Gary"*, and telling one of the programme makers that he thinks about it *"most days not just today because of the date"*. He was also shown recollecting happy occasions he had shared with Gary in the past.

In addition the programme showed him saying, *"I feel like shit knowing that I lost it seven years ago today at roughly 7:30 tonight"*, before lighting a candle in the prison chapel and telling the chaplain, *"I do miss him"*.

At the end of the programme, Mr Osbourne was shown leaving HMP Gartree for a lower security prison because he had been deemed a lower risk prisoner.

Following the broadcast of the programme, Miss Hunt (Mr Gary Hunt's sister) complained that her privacy was unwarrantably infringed in the programme as broadcast, as was that of the following members of Mr Gary Hunt's family: Mr and Mrs Springall (Mr Gary Hunt's mother and stepfather); Mr and Mrs Hunt (Mr Gary Hunt's father and stepmother); Mr Jayson Hunt and Miss Lianne Hunt (Mr Gary Hunt's brother and sister); and Miss Amy Norwood (Mr Gary Hunt's daughter) ("her family").

As part of her complaint, Miss Hunt supplied Ofcom with a page from a website commemorating her brother's life which included a message to Mrs Jennifer Hunt (Mr Gary Hunt's mother who is now known as Mrs Jennifer Springall) from one of the programme makers in which she briefly described the planned programme and invited "Mrs Hunt" to contact her.

### **Summary of the complaint and broadcaster's response**

The details of Miss Hunt's complaint are set out below, followed by the response to particular points provided by Channel 4.

In summary, Miss Hunt complained that her privacy and that of her family was unwarrantably infringed in the programme as broadcast in that Channel 4 did not contact the family prior to the programme being broadcast. Miss Hunt said the programme should not have been broadcast without the family's knowledge and that it was unacceptable for the programme makers to presume that, because the family had not responded to a message about the planned programme on an internet memorial page dedicated to Mr Gary Hunt, information that was private to the family could be broadcast.

Miss Hunt also said that given that Mr Osbourne had pleaded not guilty at his trial the programme was the first occasion on which members of the family had heard him confess to the killing of Mr Gary Hunt and that this caused them particular distress.

In response to this complaint Channel 4 said that, before the programme was commissioned, the production company, Century Films ("Century"), first had to negotiate access to Gartree Prison via the Ministry of Justice ("the MoJ") and its dedicated press office, which facilitates all documentary filming projects. Century, Channel 4 and the MoJ agreed that every effort should be made to contact the families of victims whose killers were going to appear in the programme. Following its standard procedure for all UK prison documentaries, the MoJ insisted that the Home Office's Public Protection Unit ("the PPU") should take responsibility for informing the victims' families about the documentary through its network of victim liaison officers

("VLOs") and that Century should not have access to any contact or family details because of data protection issues.

Century provided the MoJ press office with a list of the 27 prisoners who appeared on screen during the documentary. Mr Osbourne was one of the names given. During the editing of the programme, the director was informed by the MoJ press office that all of the necessary letters/emails and/or phone calls to the victims' families had been sent out/made. Some victims' families responded to this communication, while others, including Mr Hunt's family, did not. The MoJ press office considered that this was normal because its experience indicated that some families choose not to acknowledge communications about this type of documentary. It also said that as far as it and the PPU, for whom it was speaking, were concerned, it was "fine" for Century to include Mr Osbourne in the programme.

However, the production team decided that Century would make additional efforts to ensure that the families of the victims of the seven main prisoners featured in the programme (from whom the MoJ had not received any response to its communications) were made aware of the programme. Given that the MoJ remained unable to provide contact details for the victims' families due to data protection issues, the producer spent six weeks using a variety of methods to try to contact Mr Hunt's family. These included:

- Searching press coverage of the trial and the internet for more details of the victim's family.
- Obtaining a copy of Mr Hunt's death certificate (which confirmed the address at which he was living at the time of his death) and checking the electoral roll to see if anyone else lived at this address at the same time.
- Contacting Mr Osbourne at his new prison to ask if he knew where any members of Mr Hunt's family now lived.
- Speaking to Derby Probation Service because Mr Osbourne suggested that it might have contact details for the victim's family.
- Contacting the *Derby Evening Telegraph* which had reported on the case.
- Trying to contact the Victim Focus Unit for Family Liaison at Enfield Police Station (Enfield was where the crime took place).
- Trying to contact Mr Mark Dennis QC, the Crown Prosecution Service's barrister during the case.

None of these efforts was successful and therefore, as a last resort, the producer posted a message on Jennifer Hunt's page on a memorial website which had been used by the family to commemorate Mr Hunt's life. The posting, which was made three weeks before the broadcast of the documentary, read:

"Dear Jennifer,

My name is [name given]; I'm a producer at a television company called Century Films ([www.centuryfilmsltd.com](http://www.centuryfilmsltd.com)). I'm contacting you in regard to a documentary that we are currently making for Channel 4 which examines the impacts of very serious crimes on both the victims and the perpetrators who are imprisoned for

their crimes. I'd be very grateful if you could e-mail me [email address given] - and I can explain what it's about. I apologise for contacting you via this site - it's the only contact address that I could find for you."

The programme makers received no response to this message.

Channel 4 said that the information above demonstrated that the production team made extensive efforts to contact Mr Hunt's family, going some way beyond the established protocols already put in place by the MoJ, and noted that it had no way of knowing whether the various messages it had sent about the programme had been received by the family and whether they had chosen not to respond.

It also said that senior executives at the MoJ press office and the PPU viewed the programme on two occasions prior to broadcast to ensure that it was fair, factually accurate, and did not contain material liable to offend or upset the victims' families. During these viewings the efforts which had been made to contact Mr Hunt's family were discussed and all parties were satisfied that everything reasonably possible had been done to inform them about the programme.

With regard to the complaint that the programme was the first occasion on which members of Mr Hunt's family heard Mr Osbourne admit to killing Mr Hunt (and Miss Sarah Hunt's implicit assertion that this information was private to the family), Channel 4 said that while Mr Osbourne had publicly denied having committed the crime, he had previously confessed his guilt to a friend. Channel 4 added that this information was disclosed at the trial and was a key factor in securing his conviction. Channel 4 included a link to a BBC news report on the day on which Mr Osbourne was sentenced (4 October 2005) which included this information<sup>1</sup>, and noted that Miss Sarah Hunt was aware of this earlier confession, as she had mentioned "*the threats [Mr Osbourne] made to the person he confessed to*" in a letter she sent to the MoJ dated 10 July 2012.

Channel 4 also said that the programme did not unquestioningly accept Mr Osbourne's claims of remorse and contrition. It included a sequence with the prison's psychology team, which explained that "*lifers*" must show remorse and admit their crimes if they are to progress through their sentence, as well as Mr Osbourne saying: "*Psychology run the lifers. You've got to agree with them; if you don't, you stay.*" Channel 4 said that this sequence clearly invited the audience to question Mr Osbourne's behaviour and claims of contrition.

Miss Hunt also complained that her family was clearly identifiable as that of Mr Osbourne's murder victim from the information included in the programme.

In response Channel 4 said that no reference was made to the Hunt family in programme. The victim was only referred to by his first name and there was no photograph of him. In addition, the prisoner was only referred to by his nickname "*Ozzy*" and there was no mention of the location of the crime. It added that prior to the broadcast both the MoJ press office and the PPU told the programme makers that they were satisfied that victims could not be identified from the content of the programme.

Finally, Channel 4 said that it did not accept that there was an infringement of the complainants' privacy in the broadcast of the programme but that if Ofcom

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<sup>1</sup> See: <http://news.bbc.co.uk/1/hi/england/derbyshire/4309432.stm>.

considered that there was any such infringement it was warranted in the public interest.

It argued that the programme makers took all reasonably practicable steps to contact the Hunt family and that it could not be right that, in the absence of direct contact having been made with the family, Channel 4 should be prevented from including Mr Osbourne's important contribution in the programme. The broadcaster added that, if this were the case, it would constitute an unacceptable restriction of the right to freedom of expression of Channel 4 and Century and the right of Channel 4's audience to receive information, and would have the wider effect of potentially restricting the ability of all broadcasters to feature individuals convicted of serious crimes generally.

Channel 4 also said that the programme's examination of the treatment of serious offenders in Britain's prisons was an important matter of public interest in that it considered how society deals with criminals guilty of the most serious crimes; how they are treated; whether they should be punished; and whether they can ever be rehabilitated into society. Channel 4 also said that the offenders who featured in the programme were a central part of that examination and added that the programme gave an unprecedented insight into the lives of convicted killers facing a lifetime in prison including a look at the behavioural courses and psychological interventions that they are expected to undergo as part of any rehabilitation and the role of the Parole Board which has to decide whether individual offenders can be safely released back into society.

The broadcaster concluded by saying that notwithstanding its position as set out above, both it and Century sincerely regretted any distress caused to the complainants and their family.

### **Representations on Ofcom's Preliminary View**

Ofcom prepared a Preliminary View on this case that the Hunt family's complaint should not be upheld. Both the complainants and Channel 4 commented on that Preliminary View. The main points made by the complainants which are relevant to the complaint as entertained and Channel 4's responses to those points were, in summary, as follows.

The complainants repeated their view that the efforts which the programme makers made to contact the family of Mr Gary Hunt after the PPU had failed to do so were insufficient. In particular, they argued that, contrary to Channel 4's assertions in its response to an associated complaint about this programme made on behalf of Mr Hunt's former partner and two of his daughters (the Lacey family), it would have been possible for the programme makers to have contacted a member of Mr Hunt's family (notably his mother or sister) using Facebook.

The complainants also said that having been unable to contact the family the broadcaster should not have included the sections relating to Mr Gary Osbourne in the programme and that Channel 4 was wrong to argue that the inclusion of this material did not result in an infringement of their privacy.

In response to Ofcom's Preliminary View and the complainants' comments on it, Channel 4 said that, although the complainants reiterated their claims that the programme makers made insufficient efforts to contact them, they provided no new substantive evidence to support this view. The broadcaster also reproduced a list of the actions taken by programme makers to try to contact Mr Hunt's family and again



observed that they had made several attempts to track down members of Mr Hunt's family via Facebook but encountered the problem that there were a very high number of matches for searches under the names of people belonging to this family.

In addition, Channel 4 said that, although the complainants had repeated the claim that their privacy was infringed by the broadcast of the details of Mr Hunt's murder, they had not provided any new evidence which should affect Ofcom's Preliminary View that the infringement of the complainants' privacy in this respect was warranted by the public interest.

## **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 unjust or unfair treatment and unwarranted infringement of privacy in, or in connection with the obtaining of material included in, programmes 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, a transcript of the same, and both parties' written submissions. Ofcom also took careful account of the representations made by the complainants and by Channel 4 in response to Ofcom's Preliminary View on this complaint. However, it concluded that the representations did not raise any substantive points which affected Ofcom's Preliminary View not to uphold the complaint.

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.

### Legitimate expectation of privacy

Miss Hunt said that the programme should not have been broadcast without the family's knowledge and that it was unacceptable for the programme makers to presume that, because the family had not responded to a message about the planned programme on an internet memorial page dedicated to Mr Gary Hunt, information that was private to the family could be broadcast.

Miss Hunt also said that that, given that Mr Osbourne had pleaded not guilty at his trial, the programme was the first occasion on which members of the family had heard him confess to the killing of Mr Gary Hunt and that this caused them particular distress.

Ofcom noted that the programme looked at the experience and impact of life sentences, both on those serving these sentences and their families and from the perspective of prison staff (notably a forensic psychology unit) and a parole board. It did this through the first-hand relating of the specific experiences of several inmates of HMP Gartree who had been convicted of murder and sentenced to life in prison. These prisoners discussed the crimes for which they had received their life sentences, how they coped with long-term imprisonment, their interactions with prison staff and the psychology unit in particular, contact with their families; and, in some cases, the experience of applying for parole. One of the prisoners whose testimony was included in the programme was Mr Osbourne, referred to throughout as “Ozzy”, who had been convicted of murdering Mr Hunt.

Mr Osbourne was first shown saying: *“I’m in here because I killed my best friend over a stupid argument.”* He subsequently spoke in more detail about the murder. He identified the date on which it occurred and said:

*“Nothing’s ever gonna get that day out of my head, nothing. I went to Gary’s flat to buy some drugs, the amount that was on the scales wasn’t what I’d paid for, we argued, it got out of hand, I took a knife out of the kitchen and I killed him. I just snapped. That’s when the two words came out fuck it! And that was the end of Gary’s life. I honestly I can’t say why I done it. I didn’t even take the drugs I paid for after I killed him. I just walked out the flat. If I could go back, that’s what I say all the time, if, if, if, you know you can’t, not at all.”*

During a section of the programme looking at the role of the forensic psychologists, in which it was stated that *“Lifers will only be released at the end of their tariff if they can prove they no longer pose a risk to the public”*, Mr Osbourne was shown saying: *“Psychology run the lifers. You’ve got to agree with them; if you don’t, you stay.”*

In addition, Mr Osbourne was shown on the seventh anniversary of the murder talking about his grief for the loss of Mr Hunt and his grief for the fact that he had caused that loss. He indicated that he thought about it most days, but particularly so on the anniversary. Mr Osbourne also described various good memories he had of time he had spent with Mr Hunt. He was subsequently heard saying, *“I feel like shit, knowing that I lost it seven years ago today”* as he walked towards the prison chapel, where he was shown lighting a candle and saying to the Chaplain, *“I do miss him”*.

Ofcom’s guidance on the meaning of “legitimate expectation of privacy”<sup>2</sup> makes clear that such expectations depend on the circumstances and “will vary according to the place and nature of the information, activity or condition in question, the extent to which it is in the public domain (if at all) and whether the individual concerned is already in the public eye”. The guidance continues: “There may be circumstances where people can reasonably expect privacy even in a public place...People under investigation or in the public eye, and their immediate family and friends, retain a right to a private life, although private behaviour can raise issues of legitimate public interest.”

Practice 8.3 of the Code also makes clear that: “When people are caught up in events which are covered by the news they still have a right to privacy in both the making and the broadcast of a programme, unless it is warranted to infringe it. This applies both to the time when these events are taking place and to any later programmes that revisit those events.”

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<sup>2</sup> See: <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/privacy/>.

In Ofcom's view, these provisions make clear that persons are not necessarily deprived of expectations of privacy under Section Eight of the Code if information in respect of which they claim a right to privacy has been put into the public domain in the past.

In considering whether Miss Hunt and her family had a legitimate expectation of privacy with regard to the information broadcast in the programme, Ofcom noted that:

- The subject matter of the programme concerned a close member of their immediate family, namely Miss Hunt's brother.
- Information about Mr Hunt's murder was personal to them and related to intensely traumatic events, which self-evidently would have caused them substantial grief.
- While information on the case, which included some specific details about Mr Hunt's murder, remained retrievable on the internet for the public to seek out, the effect of the broadcast of the programme on Channel 4 was to resurrect the case for the audience in a new way which could have a significant effect on Mr Hunt's family.

Taking these three factors together, Ofcom considered that Mr Hunt's family had a legitimate expectation of privacy with regard to the broadcast of information about Mr Hunt's murder.

Miss Hunt also complained specifically that the inclusion of footage of Mr Osbourne confessing to the killing of Mr Gary Hunt caused her family particular distress.

With regard to this particular element of the complaint, Ofcom noted that as part of its response to the complaint Channel 4 provided a copy of a BBC news report on the day Mr Osbourne was sentenced which made it clear that, although he later denied it, prior to his arrest Mr Osbourne admitted the killing to a friend. Channel 4 also said that this information was a key element of the evidence brought against Mr Osbourne during his trial.

Notwithstanding that this information, namely that Mr Osbourne had confessed to the killing prior to denying it after his arrest, was seemingly placed in the public domain prior to the broadcast of this programme, Ofcom considered that because of the nature of this footage – i.e. a direct confession from the mouth of the person who murdered Mr Hunt, which also included the information that Mr Hunt was stabbed to death after an argument over a drug deal (and taking into account the fact Mr Osbourne's earlier confession to a friend was not a current topic of public concern at the time of this broadcast) – Miss Hunt's family had a legitimate expectation of privacy with regard to footage of Mr Osbourne making a direct confession in public for the first time that he killed a member of their immediate family.

Therefore, Ofcom concluded that Miss Hunt and her family had a legitimate expectation of privacy with regard to the information about the murder of Mr Hunt, including Mr Osbourne's confession.

Ofcom observed that Miss Hunt also complained that her family's privacy was infringed specifically in that the information in the programme made them identifiable. With regard to this aspect of Miss Hunt's complaint, Ofcom noted that Mr Osbourne was referred to in the programme only as "Ozzy", and his victim (Miss Hunt's brother)

was referred to only by his first name “Gary”. In addition, while Mr Osbourne was shown clearly in the programme on a number of occasions, no other information relating to Mr Osbourne’s identity, Mr Hunt’s identity, or the identity of Mr Hunt’s family was included in the programme. Therefore, Ofcom considers that the family of the victim in question (Mr Hunt) would only have been identifiable to people to whom Mr Osbourne, and in particular both his appearance and his past associates, were very well known.

In light of these considerations, Ofcom concluded that Mr Hunt’s family did not have a legitimate expectation of privacy specifically in relation to the inclusion in the programme of information which might have rendered them identifiable to this small group of people to whom Mr Osbourne was very well known. Given this conclusion, it was not necessary for Ofcom to consider whether any intrusion into the family’s privacy in this respect was warranted.

### Was the infringement warranted?

Given its conclusion that the complainants had a legitimate expectation of privacy in relation to the information about the murder of Mr Hunt, including Mr Osbourne’s confession, Ofcom formed the view that their privacy had been infringed by the broadcast of this material. It therefore then went on to consider whether the infringement of the Hunt family’s legitimate expectation of privacy in this respect was warranted.

In this context “warranted” has a particular meaning. It means that, where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why, in the particular circumstances of the case, it is warranted. If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy<sup>3</sup>.

In determining whether an infringement of privacy is warranted, Ofcom needs to consider a number of factors and, in the circumstances of this case:

- whether the broadcast was in the public interest;
- the broadcaster’s freedom of expression; and
- the extent to which the broadcaster sought to mitigate the effects of any infringement.

Ofcom accepted that the information about Mr Hunt’s murder (including the footage of his confessing to the crime) was shown in the context of a programme which sought to examine the reality of serving a life sentence for murder in Britain and the factors that influence the lives of the prisoners serving these sentences (notably their relationships with their families, the prison rules and arrangements, the continuous assessment by forensic psychologists, and the possibility of parole). Ofcom considered that this purpose was clear throughout the programme.

In Ofcom’s view, these were legitimate matters of public interest for examination in the context of the programme. As noted above, Ofcom is mindful that in particular Mr Osbourne’s confession was personal to Miss Hunt and her family. However, it was

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<sup>3</sup> Examples of public interest would include revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence that affects the public.

also an integral part of Mr Osbourne's story and the process he, as a prisoner serving a life sentence, was expected to go through as part of serving his term. In this context, Ofcom noted that the programme made it very clear on a number of occasions that people serving life sentences would only be eligible for parole if *"they can prove they no longer pose a risk to the public"*. The programme also made it clear that decisions regarding the level of risk posed by specific prisoners depended largely upon the assessment of forensic psychologists. In addition, one of the forensic psychologists at HMP Gartree was shown saying: *"What I want to see is genuine remorse, I want to see that someone can actually stand in somebody's shoes, stand in the victim's shoes, and really feel what they felt like."*

In light of the above, Ofcom therefore considered that the broadcast was in the public interest. Ofcom also went on to consider whether, in light of the Practices set out in the Code, Channel 4 had taken sufficient action to mitigate the effects of the infringement.

Practice 8.6 of the Code states that: "[I]f the broadcaster 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 is warranted."

Practice 8.19 of the Code addresses the potential suffering and distress which might be caused to "victims and/or relatives when broadcasters make or broadcast programmes intended to examine past events that involve trauma to individuals (including crime)". Practice 8.19 requires that "[b]roadcasters should try to reduce the potential distress to such victims and/or relatives...unless it is warranted to do otherwise" and sets out the particular steps that are contemplated in this respect. It states that (emphasis added by Ofcom):

- "In particular, so far as is reasonably practicable, surviving victims and/or the immediate families of those whose experience is to feature in a programme, should be informed of the plans for the programme and its intended broadcast, even if the events or material to be broadcast have been in the public domain in the past."

It is clear from the terms of the bullet point to Practice 8.19 that it does not guide or require broadcasters to obtain (prior) consent or permission from relevant surviving victims and/or immediate relatives to broadcast material in certain circumstances. It simply contemplates broadcasters seeking to reduce potential distress to victims and/or relatives by, "so far as is reasonably practicable", informing them of the "plans for the programme and its intended broadcast". The bullet point is expressed to apply "even if the events or material to be broadcast have been in the public domain in the past", which was the case in the circumstances of this complaint.

Ofcom considered that Practice 8.6 may be relevant to the extent that consent had not been obtained from Miss Hunt or another member of Mr Hunt's immediate family. Given the subject matter of the footage in question (i.e. information about the murder of Mr Hunt given directly by the man convicted of murdering him), Ofcom considered that the programme clearly had potential to cause severe distress to Mr Hunt's family, and therefore Practice 8.19 was also a relevant Practice to take into account.

Ofcom recognised that the programme makers not only took the steps required by the MoJ and PPU protocols to inform Mr Hunt's family of the plan to broadcast this programme but, when they received no response from the family to their messages through these official channels, the programme makers also made extensive further efforts to contact the family through alternative means (to which they also received

no response). Ofcom also observed that at the end of the process senior executives at both the MoJ press office and the PPU indicated that they were satisfied that everything reasonably possible had been done to inform them about the programme.

Ofcom took note of the complainants' position, repeated within the post Preliminary View representations, that the efforts taken by the programme makers to contact a member of Mr Hunt's family were insufficient. However, in light of the extent of the actions taken by the programme makers, and notwithstanding the fact that it appears that none of the multiple messages sent to Mr Hunt's family about the planned programme were received by them, Ofcom considered that, within the bounds of what could be considered reasonably practicable, Century/Channel 4 took more than sufficient steps to inform the complainants of the plans for the programme and thereby seek to reduce their potential distress as a result of the broadcast of the programme. In respect of Practice 8.6, Ofcom considered that the steps taken by Century/Channel 4 in seeking to contact Mr Hunt's immediate family demonstrated that it would not have been possible to obtain consent since, despite efforts to do so, Century/Channel 4 had not been able to contact Miss Hunt or Mr Hunt's immediate family. In those circumstances, Ofcom considered that it was warranted to broadcast the material without having obtained consent.

Accordingly, having due regard to broadcasters' freedom of expression and Channel 4's attempts to ensure compliance with the relevant Practices of the Code, Ofcom considers that the infringement of the complainants' privacy in the broadcasting of this particular footage was warranted in the public interest.

Therefore, Ofcom found that in the circumstances of this particular case the privacy of Mr Hunt's family was not unwarrantably infringed in this respect.

**Accordingly, Ofcom has not upheld the Hunt family's complaint of unwarranted infringement of privacy in the programme as broadcast.**

## Not Upheld

### Complaint by Mr A

*999: What's Your Emergency?, Channel 4, 10 September 2012*

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#### Summary

Ofcom has not upheld this complaint of unwarranted infringement of privacy made by Mr A.

This edition of *999: What's Your Emergency?*, a series which follows the work of Blackpool's emergency services, included the police dealing with men who were found naked behind the Metropole Hotel in Blackpool. One of the men (the complainant) was shown being arrested and subsequently being taken out of a police van at the police station.

Ofcom found that Mr A had a legitimate expectation of privacy in the circumstances; however, the public interest in broadcasting footage showing the work of the police outweighed the intrusion into Mr A's privacy. His privacy was therefore not unwarrantably infringed in the programme as broadcast.

#### Introduction

On 10 September 2012, Channel 4 broadcast an edition of its series *999: What's Your Emergency?* The series follows the work of Blackpool's emergency services from the point an emergency call is taken at the control centre to the deployment of the police, ambulance teams and fire crews.

In this edition of the programme one of the call outs shown was of the police dealing with two soldiers serving in the British Army who were found naked behind a hotel in Blackpool. One of the men (the complainant) was shown being brought to the ground by the police and arrested after he resisted their initial approach to him. He was subsequently shown being taken out of a police van at the police station and was offered a jacket to cover himself with as he walked into the police station.

In addition, the opening credits of the programme included another image of the complainant being arrested.

Mr A was not named in the programme. However, his voice was audible when he spoke. For example, he was heard saying, "*I don't know where my clothes are*" as he approached a police officer and, "*There's no need for that...Is there any need?*" as he resisted being arrested. In addition, his face was clearly visible in a close-up shot for approximately five seconds as he emerged from the police van.

Following the broadcast of the programme, Mr A complained to Ofcom that his privacy was unwarrantably infringed in the programme as broadcast.

#### Summary of the complaint and broadcaster's response

Mr A complained that his privacy was unwarrantably infringed in the programme as broadcast in that the programme included footage of him being arrested while naked in a public place without his consent, and without pixellating his face or genitals, and/or otherwise disguising his identity in an appropriate way.

By way of background, Mr A said that the inclusion of this footage in the programme could result in his losing his job as a result of bringing his employer into disrepute. He added that for this reason he had contacted Channel 4 prior to the broadcast and asked for the footage of him not to be included in the programme.

In response, Channel 4 said that following a report that two naked men were causing a disturbance behind the Metropole Hotel in Blackpool, the police attended the scene and found that the two naked men were inebriated. The men were then filmed while being arrested for drunk and disorderly behaviour.

Channel 4 said that earlier in the evening, while the camera crew was filming general shots in the town centre, these same men had co-operated with being filmed and that one of them had taken his shirt off and posed semi-naked for the camera in order to show off his arm muscles. However, during the later incident, which is the subject of this complaint, one of the men swung a punch at the camera operator who stood back to avoid being assaulted. Given the violent demeanour of the men, the camera operator and the assistant producer who accompanied him decided that it would be counter-productive and potentially dangerous for them to engage with the men further regarding the filming and their view of it.

The camera operator then continued to film the work of the police officers, who detained Mr A on the ground in order to control him, and then arrested the two men for being drunk and disorderly before taking them in to custody.

Channel 4 said that both men were openly filmed in a public place where they were seen by passers-by. They had lost their clothes and were in an inebriated state. It added that the production company was informed by members of the police custody team that both men were charged with being drunk and disorderly and given an £80 fixed penalty notice, which was not appealed.

The broadcaster said that Mr A contacted the programme makers the day after the filming to say that he did not want to be identified in the programme. It was too early to know exactly which sequences would be included in the programme as broadcast, so the production company could not tell Mr A whether he would be featured. However, his representation was noted and reported to the Series Producer and the Series Director, who in turn notified the Executive Producer.

Prior to the broadcast, the programme was shown to Lancashire Police which made no representation regarding the conduct of the film crew during the incident or about the inclusion of footage of Mr A and his friend. In accordance with the established procedures for this series the production company liaised with Channel 4 regarding the editorial, legal and compliance position of the programme, and, in particular, the identification and inclusion of individuals featured in the programme.

Channel 4 noted that in the main body of his complaint Mr A said that: "[The programme i]nfringed my human rights by broadcasting me getting arrested naked in a public place without my consent [and] also without censoring my face or genitals. This could cause me to lose job[.]" In response, Channel 4 said that the complainant, an adult, was responsible for his actions and should have considered the potential consequences of those actions before he got drunk in a public place, took off all his clothes and then resisted arrest, especially given his position as a member of the armed forces.



Channel 4 did not accept that there was an infringement of Mr A's privacy in the broadcast of the programme but argued that, if there was any such infringement of privacy, it was warranted in the public interest.

In particular, the broadcaster said that given that Mr A was guilty of highly antisocial behaviour in a public place to the extent that he was charged with being drunk and disorderly and fined, his inclusion in the programme was clearly warranted in that it revealed antisocial behaviour which amounted to a criminal offence and, in the wider context of the series as a whole, demonstrated the sort of behaviour with which the UK's emergency services have to deal (notably in alcohol and drug related incidents) on a daily basis.

## **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 unjust or unfair treatment and unwarranted infringement of privacy in, or in connection with the obtaining of material included in, programmes 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, a transcript of the same, and both parties' written submissions, as well as a section of unedited footage of the complainant. Neither the complainant nor the broadcaster chose to make any representations on Ofcom's Preliminary View.

Ofcom considered Mr A's complaint that his privacy was unwarrantably infringed in the programme as broadcast.

In Ofcom's view, the individual's right to privacy has to be balanced against the competing rights of the broadcasters 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 intensely 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 Code, which states that any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

In considering whether or not there had been an unwarranted infringement of Mr A's privacy in the broadcast of the programme, Ofcom considered the extent to which he could have legitimately expected that the footage of his arrest for drunk and disorderly behaviour would not be broadcast without his consent. Ofcom 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, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted.

Ofcom noted that Mr A first appeared in the programme in footage of him while he was naked in a public place and resisting being arrested by the police. Specifically, the police were shown: bringing Mr A to the ground in order to control him; questioning him about the location of his clothing; and subsequently raising him up and escorting him towards a police vehicle. Both Mr A's face and genitals were visible during sections of this footage. Later in the programme Mr A was shown being escorted from a police van into the police station. During this section of footage a police officer offered Mr A a jacket to cover himself with so he could "*maintain a bit of dignity*" as he entered the police station. However, the footage showed that Mr A was still partially uncovered. Ofcom noted that all of the footage of Mr A which was shown in the programme had been filmed openly. Ofcom took the view that the footage of the complainant in these circumstances showed him in a vulnerable state and in a sensitive situation.

Although Mr A was not referred to by his proper name in the programme his friend could be heard saying "*Ozzy, just leave it mate*" when he resisted being arrested. In addition, Ofcom noted that the complainant's face was shown unobscured and his voice was heard during both sections of footage. In particular, as Mr A emerged from the police van, his face was clearly visible in the centre of the screen for several seconds. Ofcom considered therefore that Mr A was identifiable from the footage of him included in the programme. We also had regard to the fact that Mr A chose (albeit while drunk) to take off his clothes in a public place and walk around naked.

Ofcom considered on balance that Mr A had a legitimate expectation of privacy in the footage of his arrest by the police, although this expectation was limited by the factors referred to above.

Having found that the complainant had a legitimate expectation of privacy in this respect, Ofcom assessed whether his consent had been secured before the footage was broadcast in accordance with Practice 8.6.

Ofcom noted that in its response Channel 4 said that earlier the same evening both Mr A and his companion had co-operated with being filmed and that this claim was supported by the unedited recording of this earlier footage. However, Channel 4 also acknowledged that the programme makers did not ask either Mr A or his friend for permission to film or subsequently broadcast the relevant footage (i.e. the footage of Mr A being arrested and the footage of him at the police station) because the programme makers considered that, given their state at the time of filming, it would have been potentially dangerous to do so. Channel 4 also acknowledged that on the day after filming Mr A called the production company to say that he did not want to be identified in the programme.

In light of the above factors, and taking into account its view that Mr A was filmed while in a sensitive situation and in a vulnerable state, Ofcom considered that Mr A had not consented to the relevant footage of him being broadcast.

Ofcom then went on to weigh the broadcaster's competing right to freedom of expression and the public interest in examining the work of the police and the audience's right to receive information and ideas without unnecessary interference against Mr A's right to privacy. In this respect, Ofcom considered whether, in the circumstances, there was a sufficient public interest to justify the infringement of Mr A's privacy.

Ofcom noted that prior to the broadcast of the relevant footage the programme makers were told by the police that Mr A and his companion were charged with being

drunk and disorderly and given an £80 fixed penalty notice which was not appealed. We also noted that the relevant footage of Mr A illustrated the difficulty regularly experienced by the police when individuals drink alcohol to excess and behave in a highly antisocial manner.

Ofcom considered that showing this footage as an example of the varied and often difficult incidents experienced by police officers in dealing with alcohol and drug related offences served the public interest, as did showing viewers the adverse consequences for the individuals themselves of drinking too much alcohol and then engaging in highly antisocial behaviour. Showing such material, in Ofcom's view, helps develop the public's understanding of the range of situations dealt with by the police and the systems in place to cope with these situations. Ofcom also took account of the public interest in showing the work of the police in circumstances which illustrated the challenges faced by police officers when arresting individuals who were drunk and resisting arrest.

Ofcom therefore concluded that the broadcaster's right to freedom of expression and the public interest in broadcasting this material in these particular circumstances outweighed Mr A's legitimate expectation of privacy in relation to the broadcast of the footage of him in the programme without his consent. Therefore, Ofcom found that there was no unwarranted infringement of Mr A's privacy in the broadcast of the programme.

Ofcom recognises that there is a genuine public interest in broadcasting programmes of this nature and, as already explained above, in the particular circumstances of this case concluded that the infringement of Mr A's privacy was warranted. However, it should not be assumed by broadcasters that a public interest justification will exist in all circumstances for all broadcasts of a particular programme of this type. Broadcasters and programme makers must consider whether it is appropriate to identify individuals who feature in such programmes (e.g. someone who is questioned, detained, arrested or charged). Regard should be given to, for instance, the actions of the individual (including the relative seriousness of any antisocial or criminal behaviour on his/her part), what details about the individual are to be featured, and any public interest justification for breaching any expectation of privacy the individual may have. For example, there may be a difference between broadcasting the name and unobscured face of an individual who is subsequently found guilty of a criminal offence and broadcasting details of someone who is subsequently not charged with a criminal offence, or someone who is acquitted, or someone who is interviewed as a possible witness. Broadcasters must also have regard to when a programme is broadcast and they should periodically review repeat broadcasts of programmes such as *999: What's Your Emergency?* in this light. For instance, where at the time of the original broadcast the public interest in revealing the identity, conviction and sentence of an individual may have outweighed the individual's expectation of privacy, the balancing exercise may produce a different result when undertaken some time later, taking account all the relevant circumstances of when the programme is repeated.

**Accordingly, Ofcom has not upheld Mr A's complaint of unwarranted infringement of privacy in the programme as broadcast.**

## Other Programmes Not in Breach

Up to 4 March 2013<sup>1</sup>

Programme	Broadcaster	Transmission Date	Categories
Advertising minutage	Aaj Tak	n/a	Advertising minutage
Channel 4 News	Channel 4	07/12/2012	Generally accepted standards
Channel 4 Racing	Channel 4	01/01/2013	Advertising scheduling
I'm a Celebrity, Get Me Out of Here Now!	ITV2	07/12/2012	Offensive language
MadBid	Controversial TV	n/a	Teleshopping
Midsomer Murders	ITV	30/01/2013	Violence and dangerous behaviour
Saray Aam	ARY World News	04/11/2012	Disability discrimination/offence

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<sup>1</sup> This table was amended after publication to correct a factual inaccuracy.

## Complaints Assessed, not Investigated

### Between 19 February and 4 March 2013

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
4thought.tv	Channel 4	16/02/2013	Scheduling	1
8 Out of 10 Cats	Channel 4	15/02/2013	Generally accepted standards	1
8 Out of 10 Cats	Channel 4	15/02/2013	Religious/Beliefs discrimination/offence	2
8 Out of 10 Cats	Channel 4	20/02/2013	Generally accepted standards	1
Absolute Radio 90s	Absolute Radio	16/02/2013	Race discrimination/offence	1
Ace Ventura: Pet Detective	Channel 5	17/02/2013	Scheduling	1
Africa	BBC 1	06/02/2013	Outside of remit / other	1
All Star Family Fortunes	ITV	17/02/2013	Crime	1
Almost Naked Animals	CITV	12/02/2013	Scheduling	1
Almost Naked Animals	ITV	16/02/2013	Generally accepted standards	1
Animal Practice	ITV2	11/02/2013	Animal welfare	4
Animal Practice	ITV2	11/02/2013	Outside of remit / other	29
Animal Practice	ITV2	18/02/2013	Outside of remit / other	1
Ant and Dec's Saturday Night Takeaway	ITV	23/02/2013	Materially misleading	3
Asian Sound Radio	Asian Sound Radio	12/02/2013	Generally accepted standards	1
BBC News	BBC News Channel	22/02/2013	Outside of remit / other	2
BBC News	BBC Radio 4	21/02/2013	Outside of remit / other	1
BBC News at Ten	BBC 1	15/02/2013	Generally accepted standards	1
BBC News at Ten	BBC 1	18/02/2013	Religious/Beliefs discrimination/offence	1
Best Friends	CITV	30/12/2012	Scheduling	1
Bitchin' Kitchen (trailer)	Food Network	11/02/2013	Scheduling	1
Blackberry's sponsorship of Sky Atlantic	Sky Atlantic	n/a	Materially misleading	1
Bombardier's sponsorship of Dave	Dave	14/02/2013	Generally accepted standards	1
Boogie in the Morning	Forth One	01/02/2013	Competitions	1
Breakfast	BBC 1	15/02/2013	Scheduling	1

Bridesmaids	Sky Comedy HD	14/02/2013	Scheduling	1
Brit Cops: Zero Tolerance	Pick TV	05/02/2013	Race discrimination/offence	1
Britain's Natural World	BBC 4	16/02/2013	Animal welfare	1
Call the Midwife	BBC 1	17/02/2013	Violence and dangerous behaviour	9
Capital Breakfast	Capital FM	14/02/2013	Offensive language	1
Celebrity Big Brother	Channel 5	15/01/2013	Flashing images/risk to viewers who have PSE	1
Celebrity Juice	ITV2	30/01/2013	Generally accepted standards	1
Channel 4 News	Channel 4	19/02/2013	Due accuracy	1
Channel promotion	Comedy Central	14/02/2013	Hypnotic and other techniques	1
Channel promotion	Comedy Central	21/02/2013	Generally accepted standards	1
Channel promotion	Sky1	07/02/2013	Materially misleading	1
Charlie Brooker's Weekly Wipe	BBC 2	14/02/2013	Sexual orientation discrimination/offence	1
Come Dine with Me	Channel 4	13/02/2013	Generally accepted standards	1
Coronation Street	ITV	11/02/2013	Generally accepted standards	5
Coronation Street	ITV	13/02/2013	Materially misleading	2
Coronation Street	ITV	18/02/2013	Animal welfare	3
Coronation Street	ITV	20/02/2013	Animal welfare	1
Countdown	Channel 4	n/a	Generally accepted standards	1
Dancing on Ice	ITV	10/02/2013	Voting	1
Dancing on Ice	ITV	17/02/2013	Competitions	2
Dangerous Drivers' School	Channel 5	07/02/2013	Undue prominence	1
Dangerous Drivers' School	Channel 5	14/02/2013	Undue prominence	1
Dare to Ask	PeaceTV	11/02/2013	Sexual orientation discrimination/offence	1
Daybreak	ITV	15/02/2013	Generally accepted standards	24
Daybreak	ITV	18/02/2013	Disability discrimination/offence	1
Daybreak	ITV	20/02/2013	Generally accepted standards	1
Deal or No Deal	Channel 4	22/02/2013	Materially misleading	1
Derek	Channel 4	20/02/2013	Offensive language	1
Derek	Channel 4	n/a	Disability discrimination/offence	1
Desert Island Discs	BBC Radio 4	15/02/2013	Drugs, smoking, solvents or alcohol	1
Dispatches	Channel 4	11/02/2013	Due impartiality/bias	1
Donkey Punch	Film4	08/02/2013	Generally accepted standards	1

Dr Pol's Animal Hospital	Nat Geo Wild	06/02/2013	Animal welfare	1
EastEnders	BBC 1	15/02/2013	Product placement	1
EastEnders	BBC 1	18/02/2013	Generally accepted standards	1
Embarrassing Bodies (trailer)	Channel 4	11/02/2013	Generally accepted standards	13
Embarrassing Bodies (trailer)	Channel 4	13/02/2013	Generally accepted standards	3
Embarrassing Bodies (trailer)	Channel 4	14/02/2013	Generally accepted standards	1
Embarrassing Bodies (trailer)	Channel 4	18/02/2013	Scheduling	1
Embarrassing Bodies (trailer)	Channel 4 HD	16/02/2013	Violence and dangerous behaviour	1
Embarrassing Bodies (trailer)	E4+1	18/02/2013	Scheduling	1
Emmerdale	ITV	29/01/2013	Scheduling	2
Emmerdale	ITV	15/02/2013	Offensive language	2
Entertainment News	ITV2	23/01/2013	Scheduling	1
Fake Peers	Ummah TV	12/02/2013	Fairness	1
Food Inspectors	BBC 1	23/01/2013	Outside of remit / other	1
Formula 1 promotions	BBC	n/a	Outside of remit / other	1
Foxy and Giuliano	Free Radio Birmingham	12/02/2013	Generally accepted standards	1
Glee	Sky1	10/02/2013	Harm	1
GOD TV	GOD TV	n/a	Outside of remit / other	1
Golden Hour	Smooth Radio	n/a	Competitions	1
Grand Designs	More4	12/02/2013	Offensive language	1
Great British Railway Journeys Goes to Ireland	BBC 2	08/02/2013	Materially misleading	1
Heart FM competition	Heart FM	12/02/2013	Competitions	1
Holby City	BBC 1	12/02/2013	Offensive language	2
Inside the Titanic	Channel 5	10/02/2013	Materially misleading	1
International Football Live	ITV	06/02/2013	Outside of remit / other	1
ITV News at Ten and Weather	ITV	11/02/2013	Due accuracy	1
ITV Sport (trailer)	ITV	14/02/2013	Materially misleading	1
James O'Brien	LBC 97.3FM	18/02/2013	Generally accepted standards	1
James Whale	LBC 97.3 FM	07/02/2013	Competitions	1
Jeremy Vine	BBC Radio 2	31/01/2013	Generally accepted standards	2
Jeremy Vine	BBC Radio 2	13/02/2013	Outside of remit / other	1
Jezz on Kiss	Kiss 100	14/02/2013	Race discrimination/offence	1
Judge Judy	CBS Reality	15/02/2013	Advertising minutage	1

Ken Livingstone	LBC 97.3 FM	23/02/2013	Religious/Beliefs discrimination/offence	1
Ken Livingstone and David Mellor	LBC	16/02/2013	Race discrimination/offence	1
Kevin McCloud's Man Made Home	Channel 4	23/02/2013	Offensive language	1
Killers Behind Bars: The Untold Story	Channel 5	20/02/2013	Generally accepted standards	1
Kindergarten Cop	ITV2	17/02/2013	Outside of remit / other	1
League Cup Final	Sky Sports 1	24/02/2013	Outside of remit / other	1
Let's Dance for Comic Relief	BBC 1	16/02/2013	Charity appeals	1
Let's Dance for Comic Relief	BBC 1	16/02/2013	Race discrimination/offence	2
Let's Dance for Comic Relief	BBC 1	16/02/2013	Scheduling	1
Lewis	ITV3	12/02/2013	Drugs, smoking, solvents or alcohol	1
Lincs FM	Lincs FM	02/02/2013	Materially misleading	1
Live Ford Football Special	Sky Sports 1	09/02/2013	Generally accepted standards	1
Loose Women	ITV	16/01/2013	Generally accepted standards	1
Loose Women	ITV	12/02/2013	Generally accepted standards	1
Meet the Izzards	BBC 1	20/02/2013	Offensive language	1
Michael and Clara	Kiss 100	19/02/2013	Competitions	1
Mock the Week	Dave	12/02/2013	Generally accepted standards	2
My Daughter the Teenage Nudist	Channel 4	11/02/2013	Gender discrimination/offence	1
My Daughter the Teenage Nudist	Channel 4	12/02/2013	Gender discrimination/offence	1
New Yes, Prime Minister	GOLD	12/01/2013	Due impartiality/bias	1
News programming	Various	n/a	Generally accepted standards	1
Nick Ferrari	LBC 97.3 FM	21/02/2013	Due impartiality/bias	1
Nick Grimshaw	BBC Radio 1	15/02/2013	Race discrimination/offence	1
North and South	True Movies 2	09/02/2013	Race discrimination/offence	1
Nursing the Nation	ITV	31/01/2013	Materially misleading	1
Panorama	BBC 1	18/02/2013	Offensive language	1
People Like Us	BBC 3	13/02/2013	Outside of remit / other	1
People Like Us	BBC 3	19/02/2013	Materially misleading	1
Phones 4U's sponsorship of Films on 4	Channel 4	n/a	Generally accepted standards	1
Police Interceptors	Channel 5	11/02/2013	Materially misleading	1
Postman Pat	CBeebies	18/02/2013	Generally accepted standards	1
Pramface	BBC 3	19/02/2013	Product placement	1



Premier League Football	ESPN	09/02/2013	Generally accepted standards	1
Press Review	Sky News	18/02/2013	Generally accepted standards	1
Programme information	Movie Mix	n/a	Information/warnings	1
Programming	BBC channels	n/a	Outside of remit / other	1
Programming	BBC Radio 1	n/a	Race discrimination/offence	1
Programming	Capital FM	19/02/2013	Offensive language	1
Programming	n/a	14/02/2013	Violence and dangerous behaviour	1
Programming	Various	n/a	Outside of remit / other	1
Question Time	BBC 1	14/02/2013	Outside of remit / other	1
Red Dwarf	Dave	16/02/2013	Generally accepted standards	1
River City	BBC 1 Scotland	05/02/2013	Sexual orientation discrimination/offence	1
Road Wars	Pick TV	15/02/2013	Outside of remit / other	1
Roany Robinson and Paulette Edwards	BBC Radio Sheffield	11/02/2013	Outside of remit / other	1
Saturday Cookbook	ITV	16/02/2013	Materially misleading	1
Saw: The Final Chapter	Channel 5	24/02/2013	Voting	1
Sexcetera	Sky Livingit	14/02/2013	Sexual material	1
Sky 3D services promotion	Sky channels	n/a	Materially misleading	1
Sky Broadband's sponsorship of ITV1 Showcase Drama	ITV	11/02/2013	Generally accepted standards	1
Sky News	Sky News	05/02/2013	Disability discrimination/offence	1
Sky News	Sky News	13/02/2013	Due accuracy	1
Sky News	Sky News	n/a	Generally accepted standards	1
Sky News with Dermot Murnaghan	Sky News	13/02/2013	Violence and dangerous behaviour	1
Sky News with Kay Burley	Sky News	15/02/2013	Due impartiality/bias	3
Sky Sports News	Sky Sports News	23/02/2013	Due impartiality/bias	1
Snatch	Channel 5	17/02/2013	Advertising scheduling	1
Soul Sundays	Ujima Bristol 98FM	10/02/2013	Sexual orientation discrimination/offence	1
Steve Wright in the Afternoon	BBC Radio 2	18/02/2013	Outside of remit / other	1
Storage Hunters	Dave	16/02/2013	Offensive language	1
Streak! The Man Who Can't Keep His Clothes on	Channel 4	14/02/2013	Generally accepted standards	1

Streak! The Man Who Can't Keep His Clothes on	Channel 4	14/02/2013	Nudity	1
Sun, Sex and Suspicious Parents	BBC 3	19/02/2013	Generally accepted standards	1
The Agenda	ITV	18/02/2013	Due impartiality/bias	1
The Alan Titchmarsh Show	ITV	24/01/2013	Animal welfare	1
The Alan Titchmarsh Show	ITV	28/01/2013	Scheduling	1
The Alan Titchmarsh Show	ITV	14/02/2013	Offensive language	1
The Alan Titchmarsh Show	ITV	18/02/2013	Disability discrimination/offence	3
The BRIT Awards 2013	ITV	20/02/2013	Generally accepted standards	2
The BRIT Awards 2013	ITV	20/02/2013	Offensive language	18
The BRIT Awards 2013	ITV	20/02/2013	Outside of remit / other	1
The British Academy Film Awards	BBC 1	10/02/2013	Generally accepted standards	1
The Chris Evans Breakfast Show	BBC Radio 2	12/02/2013	Generally accepted standards	1
The Fried Chicken Shop: Life in a Day	Channel 4	19/02/2013	Disability discrimination/offence	1
The Fried Chicken Shop: Life in a Day	Channel 4	19/02/2013	Materially misleading	1
The Graham Norton Show	BBC 1	15/02/2013	Gender discrimination/offence	1
The Infidel	BBC 2	16/02/2013	Race discrimination/offence	1
The Jeremy Kyle Show	ITV2	13/02/2013	Generally accepted standards	2
The Jeremy Kyle Show	ITV2	14/02/2013	Generally accepted standards	1
The Jonathan Ross Show	ITV	16/02/2013	Religious/Beliefs discrimination/offence	1
The Last Boy Scout	ITV	15/02/2013	Offensive language	1
The Last Leg	Channel 4	08/02/2013	Generally accepted standards	1
The National Lottery: In It to Win It	BBC 1	16/02/2013	Materially misleading	1
The News Quiz	BBC Radio 4	08/02/2013	Generally accepted standards	1
The Official UK Top 20	MTV Hits	14/02/2013	Drugs, smoking, solvents or alcohol	1
The Official UK Top 40	Viva	12/02/2013	Generally accepted standards	1
The One Show	BBC 1	06/02/2013	Outside of remit / other	1
The One Show	BBC 1	07/02/2013	Outside of remit / other	1
The One Show	BBC 1	08/02/2013	Generally accepted standards	2

The One Show	BBC 1	11/02/2013	Religious/Beliefs discrimination/offence	1
The Radio 1 Breakfast Show with Nick Grimshaw	BBC Radio 1	14/02/2013	Drugs, smoking, solvents or alcohol	1
The Secret of My Succe\$s	ITV	09/02/2013	Scheduling	1
The Simpsons	Channel 4	13/02/2013	Generally accepted standards	1
The Simpsons	Channel 4	17/02/2013	Offensive language	1
The Spa	Sky Living	09/02/2013	Generally accepted standards	1
The Spa	Sky Living	09/02/2013	Materially misleading	1
The Water Horse: Legend of the Deep	Channel 5	10/02/2013	Violence and dangerous behaviour	1
The Wright Stuff	Channel 5	15/02/2013	Race discrimination/offence	1
The Wright Stuff	Channel 5	21/02/2013	Generally accepted standards	1
The Year Britain Flooded	Channel 4	12/02/2013	Generally accepted standards	1
This Morning	STV	11/02/2013	Nudity	5
This Week	BBC 1	07/02/2013	Privacy	1
Time Team	Channel 4	10/02/2013	Violence and dangerous behaviour	1
Top Gear	BBC 2	27/01/2013	Offensive language	1
Top Gear	BBC 2	17/02/2013	Generally accepted standards	2
Top Gear	BBC 2	17/02/2013	Offensive language	1
Top Gear	BBC 2	17/02/2013	Scheduling	1
Top Gear	BBC 2	24/02/2013	Offensive language	1
Top Gear	BBC 3	18/02/2013	Offensive language	1
UEFA Europa League Live	ITV	14/02/2013	Gender discrimination/offence	1
Utopia	Channel 4	15/01/2013	Violence and dangerous behaviour	6
Utopia	Channel 4	22/01/2013	Violence and dangerous behaviour	1
v. by Tony Harrison	BBC Radio 4	18/02/2013	Race discrimination/offence	1
Waterloo Road	BBC 1	07/02/2013	Disability discrimination/offence	1
Waterloo Road	BBC 1	07/02/2013	Violence and dangerous behaviour	3
Wendy and Lucy	Film4	11/02/2013	Outside of remit / other	1
Wildlife SOS	Channel 5	16/02/2013	Animal welfare	1
Worlds End	Channel 4	n/a	Outside of remit / other	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 21 February and 6 March 2013.

Programme	Broadcaster	Transmission Date
Advertising minutage	Star Life OK	21 January 2013
BuzMuzik	BuzMuzik	2 January 2013
CBS News	Sky News	23 December 2012
Channel sponsorship	Cartoon Network	n/a
Desperate Midwives	Really	20 February 2013
Journey to Masjid Al Aqsa	ATN Bangla	21 January 2013
Material Girl	Klear TV	17 February 2013
News at Ten	ATN Bangla	24 November 2012
Real Radio Breakfast	Real Radio North West	5 February 2013
The Alan Titchmarsh Show	ITV	14 February 2013
The Sheriffs are Coming	BBC 1	17 January 2013
Those Bedroom Eyes	True Entertainment	31 January 2013
Utopia	Channel 4	15, 22 and 29 January and 5, 12 and 19 February 2013

**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/>.