

*Championing
excellence and diversity
in broadcasting*

Founded in 1983 by Jocelyn Hay CBE



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RESPONSE BY THE VOICE OF THE LISTENER & VIEWER (VLV)

IN RESPONSE TO OFCOM'S BROADCASTING CODE REVIEW

February 2017

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INFORMATION ABOUT THE VLV

1. Voice of the Listener & Viewer Limited (VLV) represents the citizen and consumer interests in broadcasting and speaks for listeners and viewers on the full range of broadcasting issues. It uses its independent expertise to champion quality and diversity in public service broadcasting, to respond to consultations, to produce policy briefings and to conduct research. VLV has no political, commercial or sectarian affiliations and is concerned with the issues, structures, institutions and regulations that underpin the British broadcasting system. VLV supports the principles of public service in broadcasting. It is a charitable company limited by guarantee (registered in England No 4407712 - Charity No 1152136).

EXECUTIVE SUMMARY

2. VLV is concerned by the proposals to regulate the BBC according to the Broadcasting Code, as highlighted in our recent submission to the consultation on applying Section 5 of the Broadcasting Code to the BBC, because these changes will lead to a significant reduction in independent regulation of BBC content standards. The standards set out in Section 319 of the Communications Act are far more limited than the existing Editorial Guidelines of the BBC which the BBC Trust has used to regulate the BBC and they will not apply to all content.
3. VLV believes that all BBC content should be potentially subject to independent scrutiny, as has been the case under the regulatory oversight of the BBC Trust. VLV's primary concern in making this proposal is that the accountability of the BBC to licence fee payers should be maintained.
4. While we understand the rationale in the proposal of devising a simpler approach to content regulation which applies equally across the broadcasting industry, we believe that public accountability regulation of the BBC should be distinct from regulation of other PSBs, because the public has different expectations of the BBC because they pay for it through the licence fee.
5. While VLV understands that under the new Charter the BBC will follow the 'broadcaster first' system of regulation whereby all complaints are first handled by the BBC and ultimately will be a matter for the Non-Executive Directors of the BBC Unitary Board, it is difficult to judge how effective this method of regulation will prove to be because, as yet, we have no indication of how the Unitary Board will handle complaints. The proposed new system will place a huge responsibility on the new board and this underlines how important it will be for the non-executive directors to have the necessary skills and resources to be able to fulfil their role.
6. VLV would like to know whether Ofcom plans to implement further measures, specifically in the Operating Framework which it is currently developing, to monitor and assess the delivery of the BBC's mission.
7. If the proposals under consideration in this consultation are instituted without additional measures by Ofcom to assess BBC content standards, VLV holds this could run contrary with

the Government's ambition for the *BBC to be held to account more robustly for its content standards...*¹

INTRODUCTION

8. VLV made a submission to the recent Ofcom consultation on proposals to apply Sections 5 and 6 of the Broadcasting Code to the BBC. Many of the views we expressed in that submission equally apply to this consultation.²
9. We understand that Sections 1-4 and 7 and 8 of the Broadcasting code currently apply to the BBC broadcasting services and that the current proposals will make no change to the application of these Sections to BBC UK broadcasting services. Sections 9 and 10 (commercial references and commercial communications) do not currently apply to the BBC, but the new Agreement requires them to do so because Clause 49 in the Agreement makes provision for such services to be partially funded by alternative means of finance in some circumstances. We understand that as a result of these proposals all Sections of the Broadcasting Code will apply to BBC ODPS.
10. VLV does not, in principle, oppose any of these proposals, however we believe that regulating the BBC solely according to the Broadcasting Code is not adequate. We are concerned that these proposals will lead to a significant reduction in the independent oversight of BBC content standards.
11. The standards set out in Section 319 of the Communications Act are far more limited than existing Editorial Guidelines of the BBC which the BBC Trust has used to regulate the BBC. As well as being less rigorous than the existing guidelines, they will not, for example, cover online and social media content or World Service output.³
12. VLV holds that all BBC content should be potentially subject to independent scrutiny, if it proves to be necessary, as it has been the case under BBC regulation by the BBC Trust. VLV's primary concern in making this proposal is that the accountability of the BBC to licence fee payers should be maintained.
13. VLV has a number of concerns about the proposals in this consultation which largely arise as a result in the changes which need to take place to move governance and regulation from the BBC Trust to a combination of the BBC Unitary Board and Ofcom.
14. While we understand the rationale in the proposal of devising a simpler approach to content regulation which applies equally across the broadcasting industry, we believe that public accountability regulation of the BBC should be distinct from regulation of other PSBs, because the public has different expectations of the BBC because they pay for it through the licence fee.
15. VLV does not want to suggest through its response to this consultation that we advocate more regulation per se. What we want is for future regulation to be maintained at existing levels to ensure that the public are able to hold the BBC to account in delivering the Mission and Public Purposes to the standards which are set out in the Charter and Agreement.

¹ *Ofcom's Preparations for Regulating the BBC* Para 2.2 <https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2016/ofcom-sets-out-preparations-for-regulating-the-bbc>

² <http://www.vlv.org.uk/broadcasting-assets/vlvjan2017submissionofcomdueimpartialityandaccuracyconsultationfinaljanuary2017.pdf>

³ *BBC Trust Response to the DCMS Charter Review Consultation, Technical Annex F*, November 2015

16. While VLV understands that under the new Charter the BBC will follow the ‘broadcaster first’ system of regulation whereby all complaints are first handled by the BBC and ultimately will be a matter for the Non-Executive Directors of the BBC Unitary Board, it is difficult to judge how effective this method of regulation will prove to be because, as yet, we have no indication of how the Unitary Board will handle complaints. The proposed new system will place a huge responsibility on the new board and this underlines how important it will be for the non-executive directors to have the necessary skills and resources to be able to fulfil their role.
17. Separating the roles of governance and regulation of the BBC is a complex task. These are important issues for VLV because the audience needs to know that there is a body looking after their interests. It needs to be very clear where regulatory responsibilities lie – whether they lie with Ofcom or the BBC. We understand that Ofcom is required under the new Charter to devise an Operating Framework⁴ which will set out a process and methodology to assess the delivery of the BBC mission, explaining clearly the roles and responsibilities of the BBC board and the relationship between the BBC and Ofcom. This Framework has not yet been prepared and without such a Framework, it is difficult to assess the current proposals fully.
18. We believe regulation is about ensuring compliance with existing editorial standards, standing up for complainants when those standards have been breached, and setting the wider public and commercial framework within which the BBC operates, with due regard to the interests of other organisations in the media market.
19. Additionally there is another area of concern which is public accountability and the representation of the interests of licence fee payers. VLV holds that public accountability regulation of the BBC should be distinct from regulation of other PSBs, because the public has different expectations of the BBC because they pay for it through the licence fee.
20. The reasons for the need for independent regulatory oversight are that:
 - Expectations have moved on since the BBC Trust took over regulation of the BBC, with the focus now very much on external regulation. Senior management within the BBC will need to adapt to not having an external regulator and this could necessitate a change in culture to successfully institute, especially in the early days of the new regulatory model.
 - VLV is concerned whether the Non-Executive members of the BBC Unitary Board will be in a position to operate effectively as an appeals body when they sit alongside the Director-General on the Board. Any appeal about editorial standards will effectively be against the Director-General, who is the final arbiter of editorial decisions. This situation could potentially undermine the authority of the Director-General on the Board.
 - In light of this, the Non-Executive members of the Board will need to be held to account, but the proposals in this consultation alone will not achieve this ambition.

⁴ BBC Agreement, Clause 5 (2), November 2016

Question 1. Do you agree with the proposed changes to the Ofcom Broadcasting Code in relation to our application of the Code to regulate the content standards on BBC broadcasting services? If not, please explain why.

21. VLV notes that the current proposals which are being consulted on have been drafted in response to direction in the BBC Agreement (2016) that *the BBC must observe the standards set under section 319 of the Communications Act 2003 (Ofcom’s “Standards Code”).*⁵
22. We are concerned that these proposals will lead to a significant reduction in the independent oversight of BBC content standards. The standards set out in Section 319 of the Communications Act are far more limited than existing Editorial Guidelines of the BBC which the BBC Trust has used to regulate the BBC. As well as being less rigorous than the existing guidelines which the BBC Trust has used to regulate the BBC, they will not, for example, cover regulation of BBC online and social media content or World Service output.⁶
23. If these proposals are instituted without additional measures by Ofcom to assess and monitor the BBC for impartiality and accuracy, VLV holds this could run contrary with the Government’s ambition as noted in Ofcom’s document *Ofcom’s preparations for regulation of the BBC*, namely:

*... the Government has signalled its intention for the BBC to be held to account more robustly for its content standards... and, in resetting the BBC’s Mission and Public Purposes, the Government has made clear that it expects the BBC to do much more in certain key areas, in order to justify its unique funding and privileged status.*⁷

Comparison between the Ofcom proposals and current BBC Regulation

24. VLV considers that as a result both of its more detailed editorial guidelines and the fact that its rules apply to all content, the BBC Trust has regulated to a higher, more rigorous standard than Ofcom has the other UK broadcasters which is in accordance with Section 319 and 320 of the Communications Act (2003). While we understand that it is the intention that the new BBC Unitary Board will take on much of the responsibility of the BBC Trust in ensuring that the BBC maintains its content standards in line with the BBC Editorial Guidelines, we are concerned that there are a number of areas which will not be the focus of any independent oversight.
25. Key areas which will not be covered by the new arrangements as set out in this proposal but have been regulated by the BBC Trust since 2006 are as follows:
- Editorial standards in all non-factual broadcast content
 - Editorial standards of online content
 - Editorial standards of social media content
 - Editorial standards of the output of the World Service
 - Appeals about fair trading, television licensing and any other appeal (described in the complaints procedure as general appeals)

⁵ BBC Agreement, Clause 3 (1), November 2016

⁶ BBC Trust Response to the DCMS Charter Review Consultation, Technical Annex F, November 2015

⁷ Ofcom’s preparations for regulating the BBC Para 2.2

26. Other issues included in the Editorial Guidelines set by the BBC Trust which are regulated by the Trust but are not included in the Agreement (2016) or in the Communications Act 2003 are editorial integrity and independence from external interests, conflicts of interest, and external relationships and funding. The Trust has taken and upheld significant complaints from industry in this area.⁸

27. In its response to the DCMS Charter Review consultation in November 2015, the BBC Trust said,

*The Trust sets, and considers appeals against, higher editorial standards with more detailed requirements than Ofcom is required to do as a minimum standards regulator established under the Communications Act and in particular the Trust specialises in detailed accuracy and impartiality complaints.*⁹

28. Another concern of VLV's relating to Section 391 of the Communications Act being used as a code for the regulation of BBC content is that, with reference to complaints, it is stated in the Agreement¹⁰ that complaints to the BBC will be judged according to BBC editorial guidelines (paragraph 2 of Schedule 3) whereas if complaints are then sent onto Ofcom because they have not been satisfied by the BBC, Ofcom will judge them according to Section 319 of the Communications Act (paragraph 3 of Schedule 3). This could not only lead to great confusion, but it is likely to lead to less rigorous regulation of the BBC which could be detrimental to licence fee payers.

29. VLV considers the maintenance of high standards of content quality to be basic rights of licence fee payers. It has been seen that trust in the BBC in the past has been severely undermined when content standards have been seen to drop and that audience trust is not merely based on news and factual output. This is the rationale for regulating all BBC content for impartiality and accuracy.

Too often impartiality is regarded as a shibboleth for News and Current Affairs. It does of course apply there. It extends to other factual areas: Science, Religion, Arts, History, Documentaries and Natural History. But it also applies in Drama, Children's Programmes, Comedy, Light Entertainment, Sport, Live Events, Education and Music.

Impartiality is required not only in network television and radio, but equally in the nations and regions, local and community radio, and the BBC's online services and interactive sites. It also applies to publications, publicity, marketing and programme trails.

*The audience assesses a programme by its content, not its departmental provenance. It makes no allowance for it being produced by Religion rather than Documentaries, by Light Entertainment rather than Live Events, or by Education rather than Current Affairs. Nor does YouTube or Google. Topical, cultural or factual issues arise in all forms of output. Two recent programmes which provoked the fiercest audience reaction, Jerry Springer – the Opera and Celebrity Big Brother show how explosive entertainment can be when it rubs shoulders with real life.*¹¹

⁸ BBC Trust Response to the DCMS Charter Review Consultation, Technical Annex F, November 2015, para 19

⁹ BBC Trust Response to the DCMS Charter Review Consultation, Technical Annex F, November 2015, para 46

¹⁰ BBC Agreement, Clause 56 (2), November 2016

¹¹ From Seesaw To Wagon Wheel, Safeguarding impartiality in the 21st century BBC Trust 2007, Pg 47

Recommendations

30. VLV would like to know whether Ofcom plans to implement further measures, in addition to those set out in the Broadcasting Code, to oversee content standards not covered by the Code. This includes information about the standards of non-factual content, online content, social media content, and the World Service.

All BBC Content should be regulated for standards

31. VLV recommends that all BBC content should be independently assessed and monitored to ensure that content standards are maintained. We support the BBC Trust's suggestion that Ofcom must be able to consider complaints about editorial standards which result from breaches of the BBC's Editorial Guidelines across the entirety of the BBC's output in the UK and abroad. We understand that the Charter rules that this responsibility should fall on the BBC Board¹² but we consider that Ofcom should be able to act as a backstop if the BBC fails to satisfy complainants.
32. In making this recommendation we also consider that Ofcom should judge appeals on the basis of BBC Editorial Guidelines and not Section 319 of the Communications Act which is far less detailed and rigorous.¹³
33. VLV expects Ofcom to propose rigorous methods within the Operating Framework to assess and measure whether content standards are maintained across all BBC output. If such measures are not instituted this will represent a significant loss of accountability towards audiences. If Ofcom is to deliver the level of regulation the public currently expect for the BBC then it will need to work to a higher degree of intervention than it currently applies to other UK broadcasters. This may require additional time and resources.

Regulation of the World Service

34. While we understand that the Charter requires the BBC to be wholly responsible for assessing the performance of the World Service¹⁴ this removes all external regulation of the World Service, as exists under the current model. Under the new system of regulation Ofcom will only be responsible for assessing the World Service's contribution to the fulfilment of the Mission and Public Purposes of the BBC in its periodic reviews.¹⁵ Even though there is no statutory basis for Ofcom regulating the World Service, VLV would like Ofcom to have regulatory oversight of the World Service. This is necessary in order to ensure that standards and trust are maintained.

Online Content

35. In what is being called the 'post-truth era', where online content is unregulated, the reliability of BBC content, both broadcast and online is crucial. In the atomized, multi-faceted age of social media, the BBC provides a recognised source of information to which people instinctively turn in crisis or celebration, when great events happen and there are major occasions to be broadcast and recorded. The BBC remains, in the digital age, a glue electronically bonding the nation. In order to retain its universal appeal the BBC needs to remain trustworthy. Appropriate, transparent and accessible regulation is one of the key ways in which trust will be maintained in BBC output, including online and social media content.

¹² BBC Charter, Clause 20 (3) (f) (g), November 2016

¹³ BBC Trust Response to the DCMS Charter Review Consultation, Technical Annex F, November 2015, para 55, 56

¹⁴ BBC Agreement, Clause 33 (4), November 2016

¹⁵ BBC Agreement, Clause 35 (7), November 2016

Other regulatory matters

36. We also support the BBC Trust's suggestion that Ofcom must be able to consider general matters which would include fair trading appeals, TV licensing, and out of remit complaints about operational matters or editorial and creative decisions if they raise significant issues of general importance.¹⁶

Question 2. Do you agree with the proposed changes to the Ofcom Broadcasting Code in relation to our application of the Code to regulate content standards on BBC ODPS? If not, please explain why.

37. Allowing for comments made above in response to Question 1, VLV agrees with the broad principle that any regulation of BBC UK Public On Demand Programme services (BBC ODPS) should mirror that of the regulation of BBC live broadcast services. We support the proposal that where interpretation of a rule is particularly affected by the on demand nature of BBC ODPS, that specific provisions should be made to ensure that the Protection of under-18s and Harm and Offence rules are met.

Question 3. Do you agree with the proposal to include the rules for on demand programming services? Do you think the other changes are helpful and make clear the full range of Ofcom's regulatory responsibilities. If not, please explain why.

38. We agree with the proposals in Section 4 of the consultation document, namely to broaden the main title of the Broadcasting code to include On Demand Programme Services, the restructuring of the document and the clarification of the definition of 'sponsorship'.
39. We understand that the Cross-promotion Code does not apply to the BBC and that there are separate provisions in the new Agreement for how the BBC must deal with promotion of any of its output on the UK Public Services.
40. We note that Part 3 of the new Broadcasting Code will include the existing statutory rules which apply to ODPS.
41. We also note and agree with the minor amendments to the Code in compliance with Ofcom's equality duties.

¹⁶ BBC Trust Response to the DCMS Charter Review Consultation, Technical Annex F, November 2015, para 60