

**CHRISTIAN CONCERN FOR OUR
NATION & THE CHRISTIAN LEGAL
CENTRE RESPONSE TO THE OFCOM
BROADCASTING CODE REVIEW
CONSULTATION
SEPTEMBER 2009**



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The Consultation can be found here:

<http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf>.

For comparison purposes, Section One of the current Code can be found here:

<http://www.ofcom.org.uk/tv/ifi/codes/bcode>

The current guidance notes can be found here:

<http://www.ofcom.org.uk/tv/ifi/guidance/bguidance>

Responding to this consultation

How to respond

A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made by **5pm on 4 September 2009**.

A1.2 Ofcom strongly prefers to receive responses using the online web form at <http://www.ofcom.org.uk/consult/condocs/bcode09/howtorespond/form>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.

A1.3 For larger consultation responses please email broadcastingcodereview@ofcom.org.uk attaching your response in Microsoft Word format, together with a consultation response coversheet.

A1.4 Responses may alternatively be posted to the address below, marked with the title of the consultation.

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Ofcom
Content and Standards
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A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted by e-mail or by using the online web form but not otherwise.

A1.6 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 4. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

Further information

A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact 020 7981 3924.

Confidentiality

A1.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on

our website, www.ofcom.org.uk, ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.

About Us

Christian Concern for Our Nation (CCFON) is a policy and legal resource centre that identifies changes in policy and law that may affect the Judeo-Christian heritage of this nation. The team of lawyers and advisers at CCFON conduct research into, and campaign on, legislation and policy changes that may affect Christian Freedoms or the moral values of the UK. CCFON reaches a mailing list of 25,000 supporters. <http://www.ccfon.org>

CCFON is linked to a sister and separate organisation, the Christian Legal Centre, which takes up cases affecting Christian freedoms. <http://www.christianlegalcentre.com>

Executive Summary

1. Whilst as Christians we do not believe that “strong” sexual material or “adult-sex” material should be broadcast at all, as a minimum protection they should be reserved for adult channels which have mandatory access restrictions such as encryption or pin codes.
2. We welcome the opportunity to respond to this Ofcom Broadcasting Code Review consultation. Our response answers questions 1 to 6 and 44 of this consultation on proposed changes to Section One of the Code in relation to the Sexual Material Rules.
3. In reviewing this Code, Ofcom is said to have taken account firstly, of “high profile compliance failings” (including sexual material); secondly, “pre-consultation discussions” with stakeholders (including broadcasters and representatives of consumer groups); thirdly, “consumer research” (in relation to commercial radio and in relation to sexual material); and fourthly, “legislative change”, in particular the European Commission Audio Visual Media Services (AVMS) Directive which must be implemented into UK legislation by 19th December 2009.¹
4. The changes to the Code regarding sexual material that distinguish between “strong” sexual material requiring strong contextual justification and “adult-sex” material are said to be suggested for clarification purposes. However, in our opinion they actually weaken the Code and provide less protection for children and those under 18 years of age (hereafter referred to as “minors”).
5. The response to breaches of the Code and high-profile compliance failings should not be to weaken the Code by “clarifying” it and relaxing the rules for strong sexual material, as this accommodates the industry, but does not assist the consumer. Instead, the appropriate response by Ofcom should be to clarify and strengthen the Code to prevent further breaches and to impose sanctions so that the industry is in no doubt that sanctions will be taken where necessary.
6. The primary aim of regulating the broadcasting of sexual material should be to protect children and minors. In order to provide adequate protection for children and minors, both strong sexual material and adult-sex material should not be broadcast and should be reserved for adult channels that have mandatory access restrictions such as encryption and pin codes. It would appear that the legislation both here and in the AVMS Directive provide support for this approach.
7. It appears illogical for Ofcom to be suggesting additional rules that would allow the broadcasting of “strong” sexual material after the watershed, whilst retaining the current rules (rule 1.22)² that disallow such material in BBFC 15³ films in order to

¹ See point 1.2 of this Consultation at: <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf>

² See rule 1.22 in the under 18's code at: <http://www.ofcom.org.uk/tv/ifi/codes/bcode/protectingu18/>

1.22 Premium subscription film services may broadcast up to BBFC 15-rated films or their equivalent, at any time of day provided:

- *there is a protection system (a mandatory PIN or other equivalent protection) pre-2000 and post-0530, that seeks satisfactorily to restrict access solely to those authorised to view when material other than BBFC U-rated or PG-rated or their equivalents is shown; and*
- *those security systems which are in place to protect children are clearly explained to all subscribers.*

³ For BBFC 15 ratings, see:

<http://www.bbfc.co.uk/downloads/pub/Guidelines/BBFC%20Classification%20Guidelines%202009.pdf>:

Sex

Sexual activity may be portrayed without strong detail.

protect children. Strong sexual material should always require restricted access rules. The guidance on BBFC 15 ratings indicates that strong sexual material would not be included in such films as “strong detail” is not allowed, so it should not be allowed after the watershed either, as children are not prevented from watching television after that time unless their parents are aware of the dangers and are conscientious.

8. We do not agree with Ofcom’s proposed changes to the sexual material code and believe that they should be weighted in favour of the important objective of protecting minors rather than facilitating the commercial aims of those who wish to broadcast potentially harmful material.
9. Ofcom have stated that one of the matters that particularly required consideration in reviewing the Code, was the degree of harm or offence likely to be caused by the inclusion of any particular sort of material.⁴ In our opinion, Ofcom have failed to have “particular regard” to the aforementioned objective in the proposed revision of this Code, to the detriment of the need to protect minors.
10. The Code should be strengthened, both in the “sexual material” and in the “harm and offence” sections. A much more precautionary approach should be taken, with the emphasis being upon proving that harm is not likely to result from material shown, rather than allowing for excuses such as “editorial justification”.
11. The harmful influence upon minors of watching television programmes that feature sex scenes cannot be underestimated. The vulnerable and impressionable young mind requires the protection of the Code. For example, a study found that teens who watch Sex in the City are more likely to get pregnant.⁵
12. Efforts to combat the rising levels of teenage pregnancies⁶, abortions⁷ and sexually transmitted diseases⁸ may do well to concentrate upon the removal of programmes that feature sex scenes and thus glamorise sexual activity in the perception of impressionable and vulnerable teenagers. Code revisions regarding sexual material in programmes and programme content could prevent this from happening.
13. Ofcom proposes in this Consultation to introduce new Code rules on Public Information Programming, which is described in the Consultation as “programming which has as its purpose a public interest benefit”. It may be funded **only** by a non-commercial, not-for-profit entity. The consultation gives as examples of matters in the public interest in this context: public health or safety, crime detection/prevention and education. We have answered the recent BCAP Code Review Consultation by saying that we would strongly oppose the advertising of abortion on television (please see link).⁹ For the same reasons as specified there, we would strongly oppose any Public Information Programming for either radio or television

There may be strong verbal references to sexual behaviour, but the strongest references are unlikely to be acceptable unless justified by context. Works whose primary purpose is sexual arousal or stimulation are unlikely to be acceptable.

⁴ See point 1.14 of this Consultation.

⁵ See *The Times* article: http://www.timesonline.co.uk/tol/news/world/us_and_americas/article5073047.ece.

⁶ See *The Times* article: <http://www.timesonline.co.uk/tol/news/politics/article5811813.ece>, *The Daily Telegraph*: <http://www.telegraph.co.uk/health/healthnews/4839713/Teenage-abortions-hit-record-as-under-16-pregnancy-rate-soars.html> and *The Daily Mail*: <http://www.dailymail.co.uk/news/article-1155824/Labours-300m-policy-disaster-teen-pregnancies-rocket-highest-level-decade.html>.

⁷ See the BBC News report: <http://news.bbc.co.uk/1/hi/wales/7980078.stm> and *The Daily Telegraph* article: <http://www.telegraph.co.uk/health/healthnews/4839713/Teenage-abortions-hit-record-as-under-16-pregnancy-rate-soars.html>.

⁸ See the NHS website: <http://www.nhs.uk/Conditions/Sexually-transmitted-infections/Pages/Introduction.aspx> and the AVERT website: <http://www.avert.org/stdstatisticuk.htm>.

⁹ See our Review Response at: http://www.ccfon.org/docs/BCAP_Code_Review_Response.pdf.

regarding abortion, which abortion sponsors could use to promote such clinics contrary to the strongly-held religious beliefs of so many people in this country. In addition, we consider programming regarding abortion to be a highly controversial and political area that should be banned in the same way that there are rules to prevent political advertising. The Code and guidance notes should make this absolutely clear. This type of coverage should not be brought in “through the back door” by exploiting new Public Information Programming rules.

Response to the Consultation

Sexual Material Rules (Section One of the Code)

Question 1

a) Do you consider that the rule in relation to ‘adult-sex’ material needs to be clarified?

Yes, clarification is needed, but the clarification should prohibit both material of a “strong” sexual nature and “adult-sex” material regardless of its purpose.

The clarification suggested here would weaken the rules by drawing the distinction between “strong sexual material” and “adult-sex material” according to its primary purpose, the distinction being that sexual arousal is the primary purpose for adult-sex material. This is a distinction without a difference, because sexual arousal may occur as a result of strong sexual material and the borderline between the two is very subjective. The suggested changes would not therefore achieve their purpose. Clarification is achieved by having clear-cut rules that prohibit both “strong sexual material” and “adult-sex material” from being broadcast.

It is stated in point 4.5 of this Consultation that in relation to strong sexual material:

Ofcom has previously investigated and adjudicated on much of this material under Section Two of the Code, most notably Rule 2.3 which states that “In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context”. Rule 2.3 can be, and has been, applied to material of a sexual nature that is considered to be strong (but not broadcast for the primary purpose of sexual arousal).

The effect of point 4.35 and 4.36 of this Consultation is simply to add the proviso that strong sexual material after the watershed requires “strong contextual justification” even though it states that rule 2.3 still applies. This will actually allow such broadcasting where it may have been disallowed previously, by stating in point 4.36 that the new rule is created “to clarify the circumstances in which sexual material of this kind *can be* transmitted” (our emphasis). This will effectively weaken rule 2.3 and give the industry permission to broadcast material many would find offensive and that is likely to harm any children that view it. The significant number of breaches of the rules to date demonstrates the need for improved protection for minors.

This case study illustrates how the proposed changes will make it easier for the industry to escape sanctions. Such liberalism is not in the best interests of protecting minors, whom Ofcom are under a statutory duty to protect, as stated in the Communications Act 2003¹⁰.

b) Do you agree with our proposed amendments to the rule on ‘adult-sex’ material (Proposed Rule 1.18 to replace Rule 1.24)?

No, we do not agree.¹¹

¹⁰ See section 319 containing the standards objectives, which include: “that persons under the age of eighteen are protected”. http://www.opsi.gov.uk/ACTS/acts2003/ukpga_20030021_en_1.

¹¹ Proposed Rule 1.18 states:

c) If you do not agree with our proposed amendments, please explain why and suggest alternative wording where appropriate

We do not agree, as we believe that the answer to the problem of clarity is to describe both “adult-sex material” and “strong sexual material” and to state clearly that both are prohibited for general broadcasting and can only be made available on mandatorily restricted access channels, as both may cause harm to children, whatever their supposed purpose.

Our suggested new Rule 1.18 reads (with our changes underlined):

1.18(a) ‘Adult-sex’ material—programmes that contain images and/or language of a strong sexual nature which are broadcast for the primary purpose of sexual arousal or stimulation—must not be broadcast at any time other than on premium subscription services and pay per view/night services between 2200 and 0530. In addition mandatory restricted access must be in place. Mandatory restricted access means:

- *there is a PIN protected system, or other equivalent protection, that restricts access solely to those authorised to view; and*
- *there are measures in place that ensure that the subscriber is an adult.*

1.18(b) The same access restrictions as specified in 1.18(a) apply to programmes or trailers that contain images and/or language of a strong sexual nature, even if they are not broadcast for the primary purpose of sexual arousal or stimulation. The only exception to the broadcasting of material of a strong sexual nature without mandatory restricted access, is if the primary purpose is educational and not for entertainment or sexual arousal or stimulation. The educational perspective must justify the inclusion of material of a strong sexual nature with a strong contextual requirement. Such material may only be broadcast after the new watershed of 22:00.

See Rules 1.6 and 1.18 and Rule 2.3 in “Section Two: Harm and Offence”, which include the meaning of “context”.

This proposed rule would replace proposed Rules 1.18 and 1.19, to make it clear that as a general rule, both material of a strong sexual nature and “adult-sex” material should not be broadcast without restrictive access safeguards.

1.18 ‘Adult-sex’ material—programmes that contain images and/or language of a strong sexual nature which are broadcast for the primary purpose of sexual arousal or stimulation—must not be broadcast at any time other than on premium subscription services and pay per view/night services between 2200 and 0530. In addition mandatory restricted access must be in place. Mandatory restricted access means:

- *there is a PIN protected system, or other equivalent protection, that restricts access solely to those authorised to view; and*
- *there are measures in place that ensure that the subscriber is an adult.*

See page 26 at: <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf>.

Current Rule 1.24, which is to be replaced:

“Premium subscription services and pay per view/night services may broadcast ‘adult-sex’ material between 2200 and 0530 provided that in addition to other protections mentioned above:

- *there is a mandatory PIN protected encryption system, or other equivalent protection, that seeks satisfactorily to restrict access solely to those authorised to view; and*
- *there are measures in place that ensure that the subscriber is an adult.”*

See page 27 at: <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf>.

The current Guidance Notes¹² for the current Ofcom Code relating to Rule 1.4 on the watershed, point out that: “Depending on the channel and audience it attracts, viewers can be concerned at strong, adult material immediately after the watershed when a significant number of children could still be watching television” (our emphasis).

In the current Guidance Notes, the distinction in rule 1.24 between “adult-sex material” and other types of sexual material seems to relate to sexual material rated “18” by the BBFC, as if that were acceptable.

The current guidance therefore does not distinguish clearly between “strong sexual material” and “adult–sex material”, nor is it self-evident that such a distinction is socially useful. In our opinion, whilst both could be better described, neither of these types of material should be broadcast, even after the watershed. Ofcom have indicated in point 4.4 of this consultation that the “proposed revisions are necessary following a significant number of compliance failures in this area.” If there are a significant number of breaches, the answer is not to make the rules weaker so that the industry can comply, but to make it clear that breaches will not be tolerated, if necessary by clarifying the rules. This is an area that requires the balance to be weighted in favour of consumer protection and primarily the protection of minors; it should not be industry-driven.

Point 4.30 of this Consultation suggests that the proposed revised rule on “adult-sex material” aims to “to avoid future compliance failures and ensure that under-eighteens are therefore effectively protected from material that is in breach of the Code.” We do not believe that the changes will have the intended effect; instead they will simply reduce standards by allowing more explicit material to comply with the code and create more problems in distinguishing between “strong” sexual material and “adult-sex” material and thus minors will not be protected by the weakening of the rules.

It remains unclear what “strong sexual material” means. Reading proposed Rule 1.19 does not assist, as it remains too vague. Section 319(4) of the Communications Act 2003 regulates “contents” of programming without making allowances for “context”. Therefore, the justification that strong sexual material requires “strong contextual justification” would not prevent inappropriate content from being broadcast if the context was judged to be acceptable. Content that has “strong sexual material” in it can be offensive or harmful, regardless of context, although of course gratuitous sexual content can add to offensiveness of the material.

In addition, there are concerns about the lowering of classification standards by the BBFC, so a rating of “18” should not be taken as any form of reassurance. For example, *Dark Knight* was given a 12A certificate when other countries rated it 15 or 16.¹³

Question 2

a) Do you consider that the introduction of a new rule in relation to material of a strong sexual nature is appropriate?

Yes, but not in the way suggested here.

¹² See: <http://www.ofcom.org.uk/tv/ifi/guidance/bguidance/guidance1.pdf>.

¹³ See: <http://www.dailymail.co.uk/news/article-1041817/British-film-censors-pressure-countries-violent-Batman-15-certificate.html>.

Please see our answer to question 1c) above, which recommends a new rule that would make it clear that both “strong sexual material” and “adult-sex material” should only be shown on channels with mandatory access restrictions.

b) Do you agree with our proposed rule on material of a strong sexual nature (proposed Rule 1.19)?

No; see our suggested addition to rule 1.18 in answer to question 1c).¹⁴

c) If you do not agree with our proposed new rule, please explain why and suggest alternative wording where appropriate.

Please see our answer to question 1c).

Question 3

a) Do you consider that the rule in relation to material equivalent to the BBFC R-18 rating needs to be separated from the rule in relation to R-18 rated works?

No.

b) Do you agree with our proposed rule on material equivalent to the BBFC R-18 rating (proposed Rule 1.17)?

No.¹⁵

c) If you do not agree with our proposed new rule, please explain why and suggest alternative wording where appropriate.

¹⁴ Ofcom’s proposed Rule 1.19 reads:

1.19 Programmes or trailers which contain images and/or language of a strong sexual nature, which are not broadcast for the primary purpose of sexual arousal or stimulation, can be broadcast after the watershed provided there is strong contextual justification. When considering the strength of the material, and therefore the contextual justification, broadcasters should take account of factors which might include (but are not limited to):

- *the amount of sexual material;*
- *the explicitness of the material, i.e. the nature of the sexual activity and sexual language used, for example how graphic, prolonged or prominent it is;*
- *the purpose of the sex scenes within the programme, i.e. whether this is to support an editorial purpose. If the purpose is sexual arousal or stimulation of the viewer Rule 1.18 applies;*
- *whether any plot or narrative provides sufficient editorial context for its inclusion; and,*
- *whether there is an educational or other perspective to justify the inclusion of material of a strong sexual nature.*

See Rules 1.6 and 1.18 and Rule 2.3 in “Section Two: Harm and Offence”, which includes the meaning of “context”.

Consider also: “4.33 There is no current rule in relation to material of a strong sexual nature” on page 28 of the present consultation: <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf>.

¹⁵ Ofcom’s proposed Rule 1.17, which is to replace existing rule 1.25, states:

1.17 Material equivalent to the British Board of Film Classification (“BBFC”) R-18 rating must not be broadcast at any time.

Existing Rule 1.25 reads as follows: “BBFC R18-rated films or their equivalent must not be broadcast.” See page 30 of this consultation: <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf>.

We suggest the following wording to replace Rule 1.25 and the proposed Rule 1.17:

BBFC R-18-rated films and material equivalent to the British Board of Film Classification (“BBFC”) R-18 rating, whether or not in films, must not be broadcast at any time.

Point 4.45 of this Consultation explains that: “The British Board of Film Classification (“BBFC”) R-18-rating is a special and legally restricted classification for works which show explicit images of consenting sex between adults. R-18 films may only be shown to adults in specially licensed cinemas, and R-18 DVDs (and other ‘video recordings’) may be supplied to adults only in licensed sex shops (not by mail order).”

The alternative wording is recommended because the suggested wording “material equivalent” in the Ofcom-proposed Rule 1.17 is totally unclear. It should apply to all R-18 material whether or not it is presented in a film, to make it clear the rating applies not only to films but also to any R-18 material, whether or not in films.

R-18 can only be supplied in a licensed sex shop where access to minors is restricted without reasonable excuse and breach of this law can result in criminal penalties being imposed. The law on this matter can be found in the Video Recordings Act 1984¹⁶ and in the Local Government (Miscellaneous Provisions) Act 1982 Schedule 3¹⁷ on the licensing of sex shops¹⁸.

The word “material” needs to be added to make sure that the rule covers not just films, but all broadcasts including trailers and advertising. The guidance to the Code should make it clear that “material” applies to every type of broadcast including trailers, programmes and advertising. We strongly disagree with the recent BCAP Code Consultation suggestion that R-18 material could be advertised within material that is 18-rated and encrypted; it should not be broadcast or advertised at any time.¹⁹

The need to protect children under the age of 18 is both a moral obligation and a statutory obligation in the standard objectives of the Communications Act 2003.

The Byron review,²⁰ which examined the BBFC ratings, suggested that there is a greater need for the protection of the young in relation to 12+ categories and suggested that they should be rated on a statutory basis. The Government agreed with the Byron review recommendations here. The proposal that such categories should be put on a statutory basis is in direct conflict with the proposed Ofcom changes on “strong” sexual material.

Question 4

¹⁶ See Section 12 of the Video Recordings Act 1984:

<http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=1810866>. This Act is not enforceable at the time of writing due to an error in failing to notify the European Commission in accordance with a European Directive, but the Government is seeking to rectify this error. For more information, see the article in *The Times*: <http://www.timesonline.co.uk/tol/news/uk/crime/article6808592.ece>.

¹⁷ See Section 2 and Schedule 3, paragraph 23 at:

http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1982/cukpga_19820030_en_1.

¹⁸ See <http://www.oxford.gov.uk/business/licensing-sex-shops.cfm> and <http://www.southampton.gov.uk/licensing/sex-establishments/default.asp>.

¹⁹ See our answers to question 54 on pages 23 and 24 of the BCAP Code Review at: http://www.ccfon.org/docs/BCAP_Code_Review_Response.pdf.

²⁰ See http://www.dcsf.gov.uk/byronreview/pdfs/byron_action_plan.pdf and <http://www.dcsf.gov.uk/byronreview>.

a) Do you consider that the rule in relation to pre-watershed material needs to be clarified?

Yes, but not in the way suggested here.

b) Do you agree with our proposed amendments to the rule on pre-watershed material (proposed Rule 1.20 to replace Rule 1.17)?

No.²¹

c) If you do not agree with our proposed amendments, please explain why and suggest alternative wording where appropriate.

We recommend the following wording:

*Representations of sexual intercourse must not occur before the **new watershed of 22:00** or when children are particularly likely to be listening **for both television and radio**, unless there is a serious educational purpose. Any discussion on, or portrayal of, sexual behaviour must be **strongly** editorially justified **with strong contextual justification** if included before the watershed, or when children are particularly likely to be listening, and must be appropriately limited and inexplicit.*

The reason for these changes, which are inspired by both rules, is to ensure that a new watershed is adopted for both television and radio. 21:00 is now outdated and needs to be revised upwards. We oppose any change to the suggested wording that would weaken its effect. For example, the change from “appropriately limited and inexplicit” to “appropriately limited”²² as suggested in this Consultation.

The research by Opinion Leader found that “many participants suggested that stronger sexual material should be shown much later at night (e.g. from 22:30 to 23:00) and wanted to see greater care applied by broadcasters in relation to sexual content shown before this time”.²³ We disagree that stronger sexual material should be shown at all on mainstream broadcasting and should be reserved for mandatorily restricted access channels that are available only to adults because of pin codes and encryption. However, we do agree that the current watershed time is still too early. Research should be undertaken on when the watershed should be, as nine p.m. is out of date, because many teenagers go to bed at a

²¹ Ofcom’s proposed Rule 1.20 reads:

1.20 Representations of sexual intercourse must not occur before the watershed (in the case of television), or when children are particularly likely to be listening (in the case of radio), unless there is a serious educational purpose. Any discussion on, or portrayal of, sexual behaviour must be editorially justified if included before the watershed, or when children are particularly likely to be listening, and must be appropriately limited.

This replaces Current Rule 1.17, which reads:

Representations of sexual intercourse must not occur before the watershed, or when children are particularly likely to be listening, unless there is a serious educational purpose. Any discussion on, or portrayal of, sexual behaviour must be editorially justified if included before the watershed, or when children are particularly likely to be listening, and must be appropriately limited and inexplicit.

See page 32 of this Consultation: <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf>.

²² See point 4.56 of this Consultation at: <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf>.

²³ See page 165, Annex 11 of this Consultation, which details key findings of the Opinion Leader research at: <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf>.

later time and are allowed to watch television until they go to sleep, sometimes unsupervised in their bedrooms. Particular scheduling care needs to be taken during school holidays, when bedtimes may be revised upwards and the Code and its revised guidance notes should reflect that fact.

We have included the need for “strong editorial justification” as well as “strong contextual justification” because we think that the term “editorial justification” is particularly weak due to its vagueness, the primary purpose always being to protect those under the age of 18.

Question 5

a) Do you consider that the associated revisions are appropriate following the other rule revisions outlined above?

No.

b) Do you agree with our proposed associated revisions in Section One?

No.

c) If you do not agree with our proposed revisions, please explain why and suggest alternative wording where appropriate

The proposed changes will not protect minors and will serve to weaken the current rules.

The clarification that is needed, is to show that both “strong” sexual material and “adult-sex” material are regarded as adult material, and that they should only be broadcast where there is mandatory restricted access provisions, so that children cannot view them.

We do not agree with the changes to the current rules 1.6, 1.10, 1.11, 1.12, 1.13, 1.14, 1.16, 1.17 and 1.19,²⁴ as they are to be changed in a similar way to Ofcom’s proposed rule 1.20.²⁵

The reason for the clarification is stated at Point 4.67 of this Consultation to be “the distinction between ‘*the watershed*’, in relation to television, and ‘*when children are particularly likely to be listening*’ in relation to radio, by inserting references to television and radio in each of the relevant rules in Section One (as ...in new Rule 1.20).”

We disagree with the above proposal, because we believe that both the watershed rules and the concept of “when children are particularly likely to be listening” should apply to both radio and television in order to protect minors, as suggested in our wording in answer to question 4c.

The suggested changes would weaken the current rules in relation to radio broadcasting, as they would allow unsuitable material to be broadcast before the watershed.

²⁴ See current code at <http://www.ofcom.org.uk/tv/ifi/codes/bcode/protectingu18/>

²⁵ See Ofcom’s proposed Rule 1.20:

1.20 Representations of sexual intercourse must not occur before the watershed (in the case of television), or when children are particularly likely to be listening (in the case of radio), unless there is a serious educational purpose. Any discussion on, or portrayal of, sexual behaviour must be editorially justified if included before the watershed, or when children are particularly likely to be listening, and must be appropriately limited.

We strongly object to the proposed changes in rules 1.6, 1.10, 1.11, 1.12, 1.13, 1.14, 1.16, 1.17, 1.19 and 1.20, which have serious implications for material from which minors need full protection. This covers matters such as violence, drugs, smoking and alcohol, dangerous behaviour, offensive language, sex and exorcism.

This change would mean that all of these adult matters could be aired during breakfast time television, to the serious detriment of the protection of children. We are very surprised that the implications of such proposed changes have not been considered. Superficially, this may appear to be a clarification. It is not. It is a serious weakening of the rules. The current Code's definition of "when children are particularly likely to be listening" is already too weak.

The current definition of "when children are particularly likely to be listening" states that: "This phrase particularly refers to the school run and breakfast time, but might include other times".²⁶

This definition already appears to be far too restrictive and should instead be defined as "before the revised higher watershed time 22:00 and other times when children are particularly likely to be listening" for **both** TV and radio.

The current code needs to be strengthened, not weakened, in view of its vague wording. For example, terms such as "editorial justification" are very weak and do not prevent inadequate justifications and excuses being provided.

Question 6

a) Do you wish to suggest an alternative approach to the proposed set of rules in relation to sexual material? If so, please outline your proposals, which should comply with relevant legislation (including the Communications Act 2003 and the European Convention on Human Rights).

Please see our previous answers to questions for our suggested approach to the proposed rules in relation to sexual material and our Executive Summary. There is a need to clarify the rules by strengthening them to protect minors. The fact that Ofcom has noted the existence of **high profile compliance failings** (notably in relation to competitions, voting and **sexual material**)²⁷ (our emphasis) is not a ground for relaxing the rules so as to make it easier to broadcast "strong" sexual material, but should instead be grounds for tightening up on the rules in order to protect consumers.

During 2007 and 2008 Ofcom received a number of complaints about stronger sexual material broadcast on a range of digital channels. These complaints resulted in six sanction decisions against broadcasters licensed by Ofcom, and 22 published findings regarding the broadcasting of strong sexual material.²⁸

In a serious complaint earlier this year about Playboy TV:²⁹ "Ofcom received five complaints between September 2007 and January 2008 that material broadcast free-to-air and un-encrypted on Playboy One featured explicit sexual content that was inappropriate on a free-

²⁶ See heading above, point 1.6, in the current Code for the under 18s: <http://www.ofcom.org.uk/tv/ifi/codes/bcode/protecting18>.

²⁷ See point 1.2 of this Consultation: <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf>.

²⁸ See page 162 of this Consultation at: <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf>.

²⁹ See: http://www.ofcom.org.uk/tv/obb/ocsc_adjud/playboytv.pdf.

to-air service.” This was said to include “sequences depicting masturbation, oral sex (both between women and between men and women), clear labial detail, sexual intercourse, and full nudity. Some also included strong language, such as “fuck” and its derivatives and “cunt”, in an overtly sexual context.” In considering these complaints “...the Committee was concerned about the harm and offence which such graphic sexual material could cause to viewers, and in particular children, when shown unencrypted. Viewers could have come across this content unawares.” A fine of £22,500 was imposed.

The fact that such an incident occurred on television provides ample evidence of the need for Ofcom to tighten the Code and increase sanctions when broadcasters feel able so blatantly to ignore such rules.

Infringements were found on Radio as well. The BBC was fined £150,000 in the Russell Brand complaint regarding the BBC Radio 2 programme that featured the piece.³⁰ “Ofcom received 1,939 complaints about the programmes and the BBC 42,851.”

Our suggested approach, namely that both “strong” sexual material and “adult-sex” material should be available on adult mandatory restricted access broadcasts only, complies with the relevant legislation. There are a number of legal requirements to protect minors in broadcasting in both domestic and European legislation that would support our argument that there is a need to improve rather than weaken the current Code as far as the protection of minors is concerned.

These domestic duties are outlined in the Communications Act 2003 at various points in this consultation and are extracted in italics as follows (note reference to the “Act” means the “Communications Act 2003”):

3.1 As part of its duties in relation to broadcasting, Ofcom is responsible for setting broadcast standards for the content of programmes. The objectives to be secured by these standards under section 319(2) of the Act are:

- ***that persons under the age of eighteen are protected;***

3.2. In setting, or revising, these standards Ofcom must have regard to the following matters under section 319(4) of the Act:

- ***the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes generally, or in programmes of a particular description; (our emphasis).***

The Consultation states that:

3.14 Section 3(3) and section 3(4) say that in performing the duties set out in section 3(1), Ofcom must have regard to a variety of other factors, including:

...

the vulnerability of children and of others whose circumstances appear to Ofcom to put them in need of special protection

Regulatory objectives in this consultation

3.24 The regulatory objectives of this consultation are as follows:

...

³⁰ See: http://www.ofcom.org.uk/tv/obb/ocsc_adjud/BBCRadio2TheRussellBrandShow.pdf.

ii) To review and revise standards for the content of television and radio services to secure the following objectives:

- **that persons under the age of eighteen are protected;**
- that generally accepted standards are applied to the contents of television and radio services to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material;...(our emphasis).

One of the reasons given for the need for a Code Review was because of:

...legislative change in particular the European Commission Audio Visual Media Services (AVMS) Directive which must be implemented into UK legislation by 19 December 2009 and includes a number of mandatory changes³¹ (our emphasis).

However, an examination of the Audio Visual Media Services (AVMS) Directive,³² which amends the “Television Without Frontiers” Directive, supports the need to strengthen the protection of minors in relation to sexual material.

Article 3h of the AVMS Directive has added the requirement that minors should not normally be able to hear or see on-demand audiovisual media services. This means that the protection for minors extends to these adult paid-for encrypted services.

The AVMS Directive states as follows:

PROVISIONS APPLICABLE ONLY TO ON-DEMAND AUDIOVISUAL MEDIA SERVICES

Article 3h

Member States shall take appropriate measures to ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction which might seriously impair the physical, mental or moral development of minors are only made available in such a way that ensures that minors will not normally hear or see such on-demand audiovisual media services.

It is important to note that this refers to material which might “seriously impair the physical, mental or moral development of minors”. This is a wide definition, which in our opinion covers all types of material, including “strong” sexual material and certainly “adult-sex” material.

In addition, Article 22 of the original Directive,³³ which has been retained, provides as follows:

Article 22

1. Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include any programmes which might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence.

³¹ See point 1.2 of this Consultation at: <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf>.

³² See the original Directive at: http://ec.europa.eu/avpolicy/reg/avms/index_en.htm, which was updated in 1997 as follows: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0036:EN:NOT>. It is now named the AVMS Directive and can be found at this link: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32007L0065:EN:NOT>. Please note that the current Directive comprises of a jig-saw of the text from the original Directive, updated and amended in 1997 and updated and amended in the AVMS Directive.

³³ Article 22 can be found in the 1997 version of the Directive, and Article 3h in the AVMS Directive.

2. The measures provided for in paragraph 1 shall also extend to other programmes which are likely to impair the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts.

3. Furthermore, when such programmes are broadcast in un-encoded form Member States shall ensure that they are preceded by an acoustic warning or are identified by the presence of a visual symbol throughout their duration.

It should be noted that Article 22(2) applies to other unsuitable programmes and only requires that the material is likely to “impair”, (it does not need to “seriously” impair) the physical, mental or moral development of minors. It allows Member States the choice of timing **or** any technical measures to ensure that minors will not normally hear or see such broadcasts. This means that our suggested proposal that “strong” sexual material, as well as “adult-sex” material, should be encrypted and supplied subject to mandatory restricted access provisions, is likely to comply with such “technical measures”.

Proposed Public Information Programming on TV

Questions 12

a) Would you consider that it is appropriate for Ofcom to introduce rules that would allow Public Information Programming (as described above)? If so please explain why. If not, please explain why not.

No, please see our answer to 12 b). In addition, airtime on such an issue could be used as a subtle propaganda exercise and we do not think that such programmes should exist. Not only could this lead to undesirable programmes, but it may well breach the current rules and laws in relation to political advertising and programme impartiality that apply to political matters. They also strike a note of “cheap television” whereby the Government could indoctrinate the public, particularly as such measures are motivated by falling advertising revenue.

There is also a significant danger that commercial interests may indirectly support charities or not-for-profit organisations in the hidden sponsorship of such programmes, where interests coincide.

This kind of programming is not a good idea, and may even divert revenues from advertising. There needs to be a clear dividing line between advertising and programmes to protect consumers and this would produce a hybrid version that would extinguish that important distinction, which is also a safeguard. This change would lead to subtle influencing of the public in relation to particular causes, which may or may not be worthy of it.

Public Information Programming may well fall within the definition of “advertising” in Article I of the AVMS Directive³⁴ and could easily be a surreptitious way of misleading the public.

³⁴ See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32007L0065:EN:NOT>, which reads:

b) "programme" means a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and whose form and content is comparable to the form and content of television broadcasting. Examples of programmes include feature-length films, sports events, situation comedies, documentaries, children's programmes and original drama;

(i) "television advertising" means any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking or natural

Likewise, it does not seem to fit comfortably within the examples of what a “programme” is defined to be in the Directive.

The real motivation behind the introduction of such programmes is to satisfy the appetite of commercial interests (broadcasters and potential funders)³⁵ and to raise falling advertising revenues.³⁶ It is not for the protection of the consumer. There is even a comparison made between this type of programming and revenue from spot advertising.³⁷ It would result in a subtle form of highly influential surreptitious advertising which lacks transparency³⁸ under the guise of a “public interest” purpose. It should not be proceeded with, as it may well be used wrongly to circumvent both the principles of the AVMS Directive and the rules on surreptitious advertising. This is an illogical approach, because elsewhere in this Consultation Ofcom proposes to introduce a new rule to prevent surreptitious advertising for the purposes of transparency.³⁹

The scheduling of such programmes could easily be used wrongly to coincide with important political debates. In normal programming, the BBC has already been accused of trying to influence Parliamentary debate on assisted suicide with the Julia Walters drama.⁴⁰

b) If Ofcom were to introduce rules in relation to Public Information Programming:

i. Are there any potential programmes that you believe could comply with the potential rules but that you consider would be undesirable or arguably not in the public interest? If so, please give details.

We would not support the introduction of such programmes as there would be an increased capacity to allow for propaganda to be broadcast. There is a large difference of opinion on what is or is not in the public interest.

As stated in our Executive Summary, it would be highly undesirable, and we would be strongly opposed to not-for-profit organisations that support abortion sponsoring programmes and featuring abortion clinics. Issues such as the morning after pill, abortion, euthanasia, or doctor-assisted suicide are all highly political and controversial, yet all may come within these rules under the guise of a public interest programme “on health matters”. The Code and guidance should make it perfectly clear that such issues should not be covered in Public Information Programming, albeit that in our opinion such programming should never be allowed in the first place.

person in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment;
(j) "surreptitious audiovisual commercial communication" means the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the media service provider to serve as advertising and might mislead the public as to its nature. Such representation shall, in particular, be considered as intentional if it is done in return for payment or for similar consideration.

³⁵ See point 6.39 of this Consultation.

³⁶ See point 6.40 of this Consultation.

³⁷ See point 6.40 of this Consultation.

³⁸ See points 6.32 of this Consultation.

³⁹ See proposed Rule 9.41 on page 50 of this Consultation.

⁴⁰ See: <http://www.telegraph.co.uk/news/uknews/4326438/BBC-accused-of-trying-to-influence-assisted-suicide-debate-with-Julie-Walters-film.html>.

ii. What impact (e.g. social, economic, equality) do you think the potential rules would have on viewers, the television industry and any other parties?

There are an enormous number of charities and not-for-profit organisations. Such a measure would create an uneven playing field, whereby only well-resourced charities or not-for-profit organisations could have a platform. Such charities may even be supported by Government funding. This means that a volunteer-run pro-life organisation would not have the resources to sponsor a public information programme, but an abortion charity may well have.

Programmes could be produced that would greatly offend strongly-held religious beliefs. It may also allow the promotion of undesirable organisations being given a platform for their views.

iii. Do you consider that the potential rules would maintain the editorial independence of the broadcaster and provide adequate consumer protection? If not, please explain why.

No, they should be abandoned.

iv. Do you consider that additional or alternative safeguards to those included in the draft potential rules are necessary? If so, please provide details.

No, safeguards will protect viewers from being exploited and from producing inferior propaganda television.

v. Specifically, should there be any restriction on the type of non-commercial, not-for-profit entities permitted to fund Public Information Programming, and if so, what restrictions?

Yes, as described above, however we do not believe such programmes should be allowed in the first place.

vi. Do you consider it would be appropriate for Ofcom to review these rules two years after their introduction? If not, please explain why.

If the rules are introduced, they would need to be reviewed every six months, but we do not think they should be introduced in the first place.

Proposed Public Information Programming in Radio

Question 30

a) Would you consider that it is appropriate for Ofcom to introduce rules that would allow Public Information Programming (as described above)? If so, please explain why. If not, please explain why not.

We wish to answer the question of the rules being introduced for radio broadcasting in the same way as we have answered the question of them being introduced for television. Please replace the reference to “television” with “radio” in the appropriate places.

Please see our answer to 12 a).

b) If Ofcom were to introduce rules in relation to Public Information Programming:

i. Are there any potential programmes that you believe could comply with the potential rules but that you consider would be undesirable or arguably not in the public interest? If so, please give details.

Please see our answer to 12 b) i).

ii. What impact (e.g. social, economic, equality) do you think the potential rules would have on listeners, the radio industry and any other parties? Please provide any evidence or data to support your answer.

Please see our answer to 12 b) ii).

iii. Do you consider that the potential rules would maintain the editorial independence of the broadcaster and provide adequate consumer protection? If not, please explain why.

Please see our answer to 12 b) iii).

iv. Do you consider that additional or alternative safeguards to those included in the draft proposed rules are necessary? If so, please provide details.

Please see our answer to 12 b) iv).

v. Specifically, should there be any restriction on the type of non-commercial, not-for-profit entities permitted to fund Public Information Programming, and if so, what restrictions?

Please see our answer to 12 b) v).

Question 44

a) Do you agree with the proposed approach which only proposes changes to Section One of the Code in relation to material of a sexual nature; only proposes changes to Section Two in relation to Competitions and Voting; and proposes no changes to Sections Three to Eight.

No.

b) If you do not agree with our approach, please explain which other sections of the Code you consider should be reviewed and why.

We consider that the sections on protecting under 18's need to be improved to provide better protection with less vague wording, but the clarification should be to improve standards not to weaken them. The same applies to the "harm or offence" section.

In addition, we believe that a single research study by Opinion Leader is not sufficient. The sample was only 169 people and even the writers admit that any opinion is merely

“indicative” only and not representative of the population as a whole.⁴¹ In our view, no conclusions can be drawn from such limited samples. We are concerned that when participants are placed in a group situation, the need to comply with group conformity is likely to stifle true opinions in order not to appear “prudish”. Attitudes given in relation to such exercises are often determined by how the scene is set or how questions are asked.

The “harm or offence” section of the Code⁴² needs to be reviewed to improve standards. For example it states that:

Methods of suicide and self-harm must not be included in programmes except where they are editorially justified and are also justified by the context. (See Rule 1.13 in Section One: Protecting the Under-Eighteens.)

In order to protect the vulnerable, this should instead read:

Methods of suicide and self-harm must not be included in programmes. (See Rule 1.13 in Section One: Protecting the Under-Eighteens.)

The current Code states that:

2.6 Demonstrations of exorcism, the occult, the paranormal, divination, or practices related to any of these that purport to be real (as opposed to entertainment) must be treated with due objectivity. (See Rule 1.19 in Section One: Protecting the Under-Eighteens, concerning scheduling restrictions.)

To protect the vulnerable this should instead read:

2.6 Demonstrations of exorcism, the occult, the paranormal, divination, or practices related to any of these that purport to be real (as opposed to entertainment) must not be included in programmes.

Section 319(2) of the Communications Act 2003⁴³ requires:

...that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material.

The “harm and offence” section of the Current Code appears to weaken the protection of that Statute by suggesting that the infringement of “generally acceptable standards” can be justified by context. The statute refers to “contents”, which means what the programming contains, not what context the material is shown in.

c) Do you agree with Ofcom’s approach which will be to provide, and update, guidance to all sections on an on-going basis? If so, are there particular areas where you consider an updating of guidance would be helpful?

⁴¹ See the end of page 162 of this Consultation which describes the findings:
<http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf>.

⁴² See: <http://www.ofcom.org.uk/tv/ifi/codes/bcode/harmoffence>.

⁴³ See: http://www.opsi.gov.uk/ACTS/acts2003/ukpga_20030021_en_29#pt3-ch4-pb16-1lg319.

It would be better to ensure that the Code itself is amended with the objective of achieving higher standards to protect consumers in general and minors in particular. We are concerned that regular reviews may result in a lowering of standards rather than in their improvement. As demonstrated in the proposed changes here on sexual material, it is important for Ofcom not to be industry-led, but to maintain its own high standards for the protection of adult consumers and minors.