



SALLIE SPILSBURY

MEDIA LAW

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EXTRA-JUDICIAL REGULATION OF MEDIA CONTENT

In addition to the legal causes of action considered in the previous chapters, the content of media publications is regulated by a number of industry Codes of Practice, some of which are part of an industry self-regulatory system and others are provided for by statute. In this chapter, we look at the work of the following regulatory bodies in relation to publication content:

- (a) the Press Complaints Commission (PCC);
- (b) the Independent Television Commission (ITC);
- (c) the Radio Authority;
- (d) the BBC Producers' Guidelines;
- (e) the Broadcasting Standards Commission (BSC);
- (f) the Advertising Standards Authority (ASA).

It is important to appreciate that the legal issues, which were considered in the first part of this book, run parallel with the Codes. Compliance with the Codes will not automatically provide a defence to a legal action. On the other hand, non-compliance will not necessarily mean that the broadcaster or the publication have acted unlawfully.¹

THE PRESS COMPLAINTS COMMISSION AND THE EDITORS' CODE OF PRACTICE

The PCC enforces a Code of Practice which was drawn up by representatives of the press. The PCC itself refers to the Code as 'the editors' Code of Practice'. It is, therefore, not strictly correct to refer to the PCC Code of Practice. The fact that the Code was drawn up by the very parties whose activities the Code seeks to regulate has given rise to the perception that the Code is a self-serving piece of regulation. In his 1993 review of press self-regulation,² Sir David Calcutt observed that the Code in its original form did not hold the balance fairly between press and public. In Chapter 8, a number of Sir David's concerns about the apparent weighting of the Code's provisions towards the press were examined in the context of the provisions on privacy. Since that

1 Although compliance with the privacy provisions of the codes is relevant under the Human Rights Act 1998, s 12 and the Data Protection Act 1998. These statutes are considered below and in Chapters 1 and 9 respectively.

2 Sir David Calcutt QC, *Review of Press Self-Regulation*, Cmnd 2135, 1993.

review, there have been a number of revisions to the Code. Revisions to the Code are made by the Code of Practice Committee, which consists of representatives from the newspaper and magazine publishing industry. But in order to displace the perception of self-interest, any changes to the Code must be ratified by the PCC.

The Code applies to all newspapers and magazines across the country, whether regional, local or national.

The Press Complaints Commission

The PCC was established on the recommendation of the Calcutt Committee in its 1990 Report on privacy and related matters.³ It is a non-statutory body. The PCC, and the Code which it enforces, are examples of *voluntary self-regulation*. The term 'voluntary' is used in the sense that there are no direct legal sanctions which may be imposed for a breach of the provisions of the Code. The PCC's literature explains that 'the main role of the Press Complaints Commission is to serve members of the public who have complaints about newspapers or magazines'.⁴

The Commission currently has 16 members, a minority of whom are connected to the press.

The PCC's remit

The PCC adjudicates upon complaints alleging that the Code of Practice has been breached. The PCC does not 'clear' material for publication in advance of publication.

Complaints

The PCC is a reactive body rather than a proactive one. It can only act on complaints. It cannot consider alleged breaches of the Code of its own initiative. This means that the way in which the Commission and the Code of Practice are perceived becomes very important. If the self-regulatory system is perceived to be weak, then the victims of conduct which breaches the Code will be deterred or discouraged from complaining. This then gives rise to something of a self-fulfilling prophecy in that, if no complaints are made, the PCC is unable to take action to restrain or criticise the offensive conduct. The credibility of the Code is further damaged, and so on. The current perception of the PCC Code tends to be that it has few teeth. This perception might be improved if the Commission had the authority to investigate and impose

3 *Report of the Committee on Privacy and Related Matters*, Cmnd 1102, 1990.

4 PCC document entitled 'Key benefits of the system of self-regulation'.

sanctions of its own initiative, thereby assuming the mantle of a proactive standard bearer for the industry. No such developments appear to be imminent at the time of writing.

Complaints may be made by individuals or organisations which are *directly affected* by the matters about which they are complaining. The PCC guidelines indicate that occasionally, complaints may be considered by people who are not directly affected by the alleged breach, but only where the complaint raises a significant issue which has not already been resolved.

When making a complaint on behalf of a person who has been directly affected (for example, as a solicitor acting on behalf of a client), the complaint should include a signed statement from the person or organisation affected stating that they wish the third party to make the complaint on their behalf. Where it is not possible to obtain a statement, the reason should be explained to the PCC. The relationship between the person/organisation affected and the party acting on its behalf should also be explained.

The PCC generally only accepts complaints which are made within one month of publication or the cessation of correspondence between the complainant and the editor of the publication in question. It may extend this deadline in exceptional circumstances.

The PCC does *not* adjudicate on the following types of complaint:

- (a) legal or contractual matters or matters which are the subject of legal proceedings. Therefore, if legal action has been commenced in respect of a publication, the PCC will not entertain a complaint involving the same subject matter and issues. A complainant may take legal action or complain to the PCC, but it cannot do both;
- (b) matters of taste, decency and the choice of what has been published in a newspaper or magazine;
- (c) advertisements, promotions and competitions appearing in newspapers or competitions (these are subject to the Committee of Advertising Practice Codes of Practice, which is enforced by the ASA (see below));
- (d) other material which does not form part of the editorial content of the magazine or newspaper in question;
- (e) broadcast material – this is regulated by the ITC or Radio Authority Codes of Practice and the Broadcasting Standards Commission Codes, considered below.

How to make a complaint to the PCC

Before complaint is made to the PCC, the complainant should contact the editor of the newspaper or magazine in question. The editor should be given between seven days to one month to deal with the complaint in a satisfactory manner.

If the editor's response is unsatisfactory, then a letter of complaint may be written to the PCC together with:

- (a) a cutting of the article or a clear dated photocopy of the article;
- (b) a summary of the complaint giving details of why the complainant believes that the item is in breach of the Codes of Practice, where possible indicating which provisions(s) of the Code are alleged to have been breached;
- (c) copies of any relevant correspondence which the complainant believes may help the PCC to understand and assess the complaint.

A copy of the letter of complaint will usually be sent by the PCC to the editor of the relevant publication.

The PCC operates a helpline to assist complainants to formulate their complaint. It can be contacted on 020 7353 3732.

The complaint should be sent to:

PCC
1 Salisbury Square
London
EC4Y 8JB
<www.pcc.org.uk>

The complaints procedure

On receipt of the complaint, the PCC will decide if it falls within its powers and that it does not fall within the excluded matters set out above. If the complaint falls outside the remit of the PCC, the complainant will be notified promptly.

If the complaint falls within the authority of the PCC, the PCC will examine the complaint to check that it raises a possible breach of the Code. If the PCC are of the view that the complaint raises a possible breach of the Code, it will send the editor of the publication a copy of the complaint and will try to mediate an amicable resolution of the complaint. The emphasis at this stage is on conflict resolution. Lord Wakeham, the chairman of the PCC, has described the primary role of the PCC as conciliation.⁵ This might be by means of the publication of an apology or a letter from the editor to the complainant. In 1998, nine in 10 complaints to the PCC were resolved amicably, without the need for adjudication. Eighty-six complaints proceeded to adjudication, 45 of which were upheld by the PCC.⁶

5 Wynne Baxter Godfree Lecture, 15 May 1998.

6 1998 Annual PCC Report.

If it is not possible to resolve the matter amicably, the PCC will investigate the complaint further. It may ask for further information from the complainant.

The PCC will then make its decision. Oral hearings are not generally held. Copies of the adjudication will be sent to the complainant and to the offending publication. A copy of the adjudication is also published in the regular PCC adjudication reports. This exposes an offending publication to bad publicity.

Sanctions for breach

The PCC has no power to award monetary compensation to a complainant. Nor does it have power to prevent the publication of offending material. The only direct sanction is the requirement of publication of the adjudication. Where a publication breaches the provisions of the Code, it is obliged to publish the adjudication in full with due prominence.

Adjudications are published on the PCC website and in the PCC quarterly bulletins. Publications which have adverse adjudications against them may accordingly suffer adverse publicity.

Some publications impose a term in journalists' contracts of employment that employees will comply with the Code of Practice. Most editors are subject to such contractual provisions. Any employee who breaches the Codes of Practice will then also be in breach of his or her contract of employment – something which might be punishable by dismissal.⁷ However, there is no requirement that the employee must be dismissed.

A lack of credibility?

As mentioned above, there is a general perception that the PCC lacks credibility as an adjudicatory body. It is widely viewed as a self-serving industry body whose decisions carry little weight and whose sanctions lack meaningful bite.⁸

The fact that most complaints are resolved amicably means that most of the PCC's work is carried out in private. Only those cases which are dealt with by adjudication are referred to in detail in the PCC reports. This fosters the impression that much of the work of the Commission takes place behind closed doors on an *ad hoc* basis. The opportunity for a detailed corpus of guidance to emerge from PCC decisions is much reduced.

7 Subject to any claim which the employee might have for wrongful or unfair dismissal.

8 See, eg, Sir David Calcutt QC, *Review of Press Self-Regulation*, Cmnd 2135; 'Straw chains for paper tigers' (1999) *The Observer*, 30 May; 'Power and the people' (1999) *The Guardian*, 5 April; and 'Bring me your woes' (1999) *The Guardian*, 7 June.

Periodically, there are calls for the PCC to be replaced by a statutory body whose functions and powers would be codified by legislation, akin to the ITC or the Radio Authority. The statutory body would be accountable to Parliament. So far, the press have successfully beaten off such innovations. Whether this position will continue is largely in the hands of the press themselves. If their worst excesses are curbed and they are seen to be acting responsibly, self-regulation may still be a viable prospect. If not, the prospect of a statutory regulator accountable to Parliament may prove to be more than just a speculative suggestion. The Government's position at the time of writing is that effective self-regulation presents the best way of ensuring high editorial standards. It has no plans to introduce specific legislation to regulate the press. It is, however, keeping the situation under review.

The Independent Television Commission

The ITC is a statutory body established under the Broadcasting Act 1990. Broadly, it has the following functions:

- (a) issuing licences which allow commercial television companies (that is, not the BBC) to broadcast in and from the UK;
- (b) regulation of the services broadcast by its licensees, including setting standards for programme content.

Regulation by the ITC

The ITC has drawn up and enforces a programme code. The code applies to all terrestrial, cable and satellite services licensed by the ITC under the Broadcasting Acts 1990 and 1996. All licensees are required to ensure that any programmes they transmit comply with the code and to satisfy the ITC that they have adequate procedures to fulfil this requirement – including procedures for ensuring that programme makers can seek guidance on the code within the organisation at a senior level.

The ITC monitors compliance with the code and investigates complaints. Unlike the PCC, the ITC's powers are not limited to adjudicating upon complaints received. The ITC may take action on its own initiative. The code contains guidelines covering:

- taste and decency, including strong language and sexual portrayal;
- violence;
- privacy;
- impartiality;
- charitable appeals;
- religious programmes;
- undue prominence for commercial products.

The ITC does not preview or 'clear' programmes in advance of broadcast.

Sanctions

In the event of non-compliance with the programme code, the ITC has a range of sanctions at its disposal against its licensees ranging from formal warnings, an order for the publication of on-screen corrections, or the imposition of a fine. In extreme cases, the ITC may shorten a broadcasting licence or revoke it. Adjudications are published in the ITC complaints and interventions reports, which are usually brought out monthly, and on the ITC website. The reports are circulated widely, meaning that a broadcaster who has a complaint upheld against it is likely to receive bad publicity.

Complaining to the ITC

Complaints under the ITC Codes are made to the ITC using an ITC official complaint form. Before making a complaint, consideration should be given to complaining directly to the broadcaster concerned. Television companies are under an obligation to reply to complaints about their programmes.

The ITC can be contacted at:

33 Foley Street

London

W1P 7LW

Tel: 0207 255 3000

<www.itc.org.uk>

Complaints received by the ITC are generally dealt with within four to six weeks of receipt.

Complaints should be made promptly, especially in light of the facts that television companies are only obliged to keep copies of their programmes for a limited time – three months in the case of major networks and two months for other services.

The Radio Authority

The Radio Authority is the sister organisation to the ITC. It is the body which licenses and regulates the independent (that is, non-BBC) radio industry in the UK. Its authority is derived from the Broadcasting Act 1990. One of its roles is to regulate programmes and advertising on independent radio. In this regard, it has published codes on programme content and advertising. The Radio Authority adjudicates upon complaints received under the codes and enforces standards of its own initiative. It may award the same range of sanctions which we saw in relation to the ITC for non-compliance.

The Radio Authority may be contacted at:

Holbrook House

14 Great Queen Street

London

WC2B 5DG

The BBC

The BBC is not regulated by the ITC or the Radio Authority in relation to those domestic services which are funded by the television licence fee. Instead, the BBC is self-regulated by means of producers' guidelines, which are publicly available documents. They set out the BBC's editorial standards. In summary, they provide that programmes will be accurate, fair and impartial, they will avoid reinforcing prejudice and will be sensitive to the tastes and beliefs of audiences.

Complaints about breaches of the producers' guidelines may be made to the BBC's Programme Complaints Unit. The complaint must be in writing and must:

- (a) suggest a specific and serious breach of the programme standard set out in the guidelines; and
- (b) relate to the BBC's domestic licence-funded public broadcasting and online services.

An appeal from an adverse decision lies to the Governors' Programme Complaints Commission. The results of the complaints are published in the quarterly programme complaints bulletins which are produced by the BBC.

Complaints about standards, unfair treatments and violation of privacy may be made to the Broadcasting Standards Commission, which is independent of the BBC. Complaints about the BBC's commercial (that is, non-licence funded) activities may be made to the ITC or the Radio Authority as appropriate.

THE BROADCASTING STANDARDS COMMISSION

The BSC is a statutory authority established under Pt 5 of the 1996 Broadcasting Act. It is accountable to Parliament. It has the remit of drawing up codes giving guidance about the principles to be observed in connection with the avoidance of:

- (a) unjust or unfair treatment in broadcast programmes; and
- (b) unwarranted infringement of privacy in or in connection with the obtaining of material in broadcast programmes.⁹

The provisions which relate to unwarranted infringement of privacy also extend to activities carried out in connection with obtaining material included in programmes – not just to the material actually transmitted.

9 Broadcasting Act 1996, s 107.

The BSC have produced Codes of Guidance on the following topics:

- (a) Code on Fairness and Privacy;
- (b) Code on Standards. This Code contains provisions on scheduling, taste and decency, portrayal of violence and portrayal of sexual conduct.

The Codes apply to all UK broadcasters, including the BBC. They apply to television and to radio, including text, cable and digital services and to broadcast advertisements. The provisions of the Codes must be reflected by the broadcasters and by their regulators in their own Codes (for example, the ITC or Radio Authority Codes) or producer guidelines (in the case of the BBC).

The BSC is also required under the terms of the 1996 Broadcasting Act to consider and adjudicate on complaints on standards and fairness. It may not intervene of its own initiative. Complaints are decided by the BSC Commissioners, who are independent people appointed by the Secretary of State for Culture, Media and Sport.

The BSC may be contacted at:

7 The Sanctuary

London

SW1P 3JS

Tel: 020 7233 0544

<www.bsc.org.uk>

The BSC Code on Standards

The Code on Standards contains provisions on scheduling, taste and decency and the portrayal of sex and violence.

The BSC Code on fairness and privacy

The fairness provisions of the Code begin as follows:

Broadcasters have a responsibility to avoid unfairness to individuals or organisations featured in programmes, in particular through the use of inaccurate information or distortion, for example, by the unfair selection or juxtaposition of material taken out of context, whether specially recorded for a programme, or taken from library or other sources. Broadcasters should avoid creating doubts on the audience's part as to what they are being shown if it could mislead the audience in a way which would be unfair to those featured in the programme.

The Code goes on to contain more detailed provisions about dealing fairly with contributors, accuracy of programme content and the obtaining of material for factual programmes through deception or misrepresentation.

It provides that, where a broadcaster recognises that a programme has been unfair, the inaccuracy should be corrected promptly with due prominence if the person affected so wishes unless there are compelling legal reasons for not doing so. An apology should also be broadcast whenever appropriate.

The provisions relating to privacy were considered in Chapter 8.

Complaints about broadcasting standards

Any viewer or listener can complain about a broadcast programme or advertisement. Typical complaints may concern the portrayal of sex or violence or the use of bad language. Complaints must be in writing and must be made within two months of a television broadcast and within three weeks of a radio broadcast.

Complaints about fairness and privacy

The category of persons who may complain about unfair treatment and violation of privacy is narrower than it is in relation to standards. Only those people with a direct interest in a broadcast can complain of unfair treatment or unwarranted infringement of privacy. The complaint may be made by an individual, an association or a corporate body. Complaints may be made on behalf of someone with a direct interest, but it must be made clear that the agent has been authorised to make the complaint. If the affected person has died within five years preceding the broadcast a personal representative, family member or someone closely connected to the deceased may bring a complaint, although the BSC reserves the right to decide that the connection between the deceased and the complainant is not sufficiently strong.

Complaints under the unfairness and privacy Code must be made with a reasonable time which, according to BSC guidance, is normally within three months of broadcast or six weeks in the case of radio programmes. If a complaint is made after this period, the application should explain the reason for the delay. The BSC will then consider whether, in the particular circumstances, the application was made within a reasonable period.

Whatever BSC Code the complaint is brought under, the procedure is as follows:

- (a) there is a complaints form which must be used for the complaint. It may be contained from BSC;
- (b) on receipt of the form, the BSC will decide whether the complaint is one it can consider. It will not consider a complaint in the following circumstances:
 - the complainant is not eligible to complain (see above);
 - the complaint is not made within the above time limits;

- the complainant has started legal proceedings in respect of the subject of the complaint. In these circumstances the BSC will not hear the complaint. Where legal proceedings have not been commenced, but the complaint relates to an issue on which the complainant could take legal action if it chose to do so (for example, defamation), then the BSC may not be able to consider the complaint. Where a complaint is made and litigation is then started, the BSC will discontinue consideration of the complaint.

If the BSC cannot entertain the complaint, the complainant is notified by letter of this fact.

If the complaint is one which the BSC is able to pursue, the procedure is as follows:

- (a) the complaint is copied to the broadcaster for a written response;
- (b) the broadcaster's response is sent to the complainant and the complainant is given an opportunity to respond in writing;
- (c) the broadcaster is sent a copy of that response and is given a final opportunity to respond in writing if it wishes to.

The complaint will then be considered at a hearing, or at its discretion it may decide that a hearing is not appropriate. If a hearing is held, it will be in private at the BSC's offices. Reasonable travelling expenses may be claimed for the costs of attending the hearing.

The adjudication

The adjudication and a summary of it are sent by the BSC to the complainant and to the broadcaster. Where the complaint is upheld against a commercial broadcaster, a copy is also sent to the ITC. If the complaint is upheld or partially upheld, the BSC may direct the broadcaster to publish on television or radio and in the press a summary of the complaint and the BSC's findings or a summary of them.

There are no other sanctions open to the BSC. It has no power to award monetary compensation or to order an apology.

Advertising

The British Codes of Advertising and Sales Promotion

The British Codes of Advertising and Sales Promotion (the Codes) are drawn up and administered by the Committee of Advertising Practice (CAP). The Advertising Standards Authority (ASA) considers complaints which are made under the Codes.

The CAP is made up of representatives from the advertising, direct marketing, sales promotion and media industries. The Codes are therefore drawn up by members of the industries to which they apply.

Copy advice service

The CAP offers a free copy advice service to advertisers and agencies to help them comply with the Codes. The fact that advice has been taken from the CAP will not prevent complaints being upheld by the ASA.

The ASA

The ASA is independent of the CAP. It is charged with ensuring that the Codes work in the public interest. It is most associated with its role in considering, and adjudicating on, complaints made under the Codes. The ASA is the final arbiter on the interpretation of the Codes.

Complaints under the Codes

The ASA Council considers complaints made under the Codes. It can also consider advertisements or promotions on its own initiative.

Complaints can be made by any entity. They are often made by trade competitors. It is often cheaper and quicker for a competitor to complain about an advertisement through the ASA, rather than to litigate through the courts. There is a requirement that industry complainants should, wherever possible, endeavour to resolve their differences between themselves or through any relevant trade or professional organisations before complaining to the ASA. Trading Standards Departments or other interested organisations often make complaints to the ASA. Many complaints are made by members of the public and the ASA promotes the complaints system to members of the public to encourage them to make use of it.

Sanctions for breach of the Codes

The following sanctions apply to advertisers who are in breach of the Codes:

- (a) advertisers are requested by the ASA to withdraw any advertisement or promotion which breaches the Codes or to amend it to ensure that it does comply. Copy advice is available from the CAP to advise advertisers how to make adequate amendments;
- (b) an adverse finding by the ASA will generate publicity. Adjudications are published monthly. The monthly reports give details of the advertisers or promoters and their agencies. The reports are widely available and are circulated as a matter of course to the media, the advertising industry, consumer bodies and government agencies. Adverse adjudications often receive extensive media coverage. Details of ASA adjudications are also published on the ASA's website;

(c) if advertisers refuse to amend or withdraw offending advertisements, then there are a number of measures which can be taken against them including:

- *the enforcement of contractual requirements for compliance with the Codes.* The ASA will ask CAP to inform its members about the advertiser's non-compliance with its decision. Most media organisations have a term in their standard conditions of business that advertisers or promoters must comply with the Codes. If advertisements have been found not to comply, advertisers may find that they are in breach of this provision and that their advertisements are denied advertising space. The Royal Mail may also withdraw mail sort contracts where advertisers or promoters are in breach;
- *removal of trade incentives.* For example, membership of trade or professional associations may be jeopardised;
- *legal proceedings.* The ASA can refer a *misleading* advertisement (but not a promotion) to the Office of Fair Trading (OFT) under the Control of Misleading Advertisements Regulations 1988.¹⁰ It regularly does so in relation to persistent or deliberate offenders. The OFT can obtain an injunction under the regulations to prevent the advertiser using the offending advertisement in the future.

There is no provision for a direct financial penalty for non-compliance with the Codes, although the sanctions may cause an indirect financial loss.

The application of the Codes

The Codes apply to advertisements and promotions appearing in the following media in the UK:

- newspapers, periodicals and magazines including specialist and trade publications (subject to certain exceptions relating to the advertisement of medicines to the medical professions);
- inserts in printed publications;
- posters;
- cinema;
- video;
- the internet;
- mail shots;
- direct marketing;

¹⁰ The Control of Misleading Advertisements Regulations 1988 (SI 1988/915), as amended by the Control of Misleading Advertisements (amendment) Regulations 2000 (SI 2000/914).

- brochures, leaflets and circulars;
- aerial announcements;
- catalogues including individual entries in catalogues;
- viewdata services;
- all other types of printed publications including printed directories;
- literature sent out as a follow up to an advertisement.

The Codes *do not* apply to the following:

- commercials on television or the radio;
- the contents of premium rate telephone services;
- advertisements in foreign media;
- private classified advertisements – this does not include advertisements placed by commercial dating agencies, which *are* covered by the Codes;
- flyposting;
- press releases and public relations material;
- packaging, *unless* it advertises a sales promotion or is visible as an advertisement;
- point of sale displays, *unless* it is otherwise covered by the sales promotion Code or the cigarette Code (see below);
- oral communications, for example, telemarketing;
- private correspondence;
- official notices;
- health related claims in advertisements and promotions addressed only to the medical or allied professions;
- the editorial content of books and newspapers.

The Codes' basic principles

The Codes set out a number of basic principles as follows:

- advertisements/promotions must be legal, decent, honest and truthful;
- they must be prepared with a sense of responsibility to consumers and to society;
- they should respect the principles of fair competition generally accepted in business;
- they should not bring advertising or sales promotion into disrepute;
- they must conform to the Codes.

Primary responsibility for ensuring compliance with the Advertising Code rests with the advertiser. Responsibility for compliance with the Code cannot

be abrogated by the engagement of outside professionals, for example, advertising agencies or even outside legal advisers.

Advertisers must be able to demonstrate to the ASA that they have complied with the Code. If the ASA requires evidence of compliance, it should be furnished without delay:

- conformity with the Codes is assessed by looking at the advertisement or promotion as a whole;
- conformity is assessed by looking at advertisements and promotions in the context in which they appear;
- the Codes are designed to be interpreted flexibly. It follows that the *spirit* of the Codes must be complied with, as well as the letter;
- the intention of the advertiser is irrelevant. Breaches can be committed accidentally.

The ASA may be contacted at:

2 Torrington Place

London

WC1E 7HW

<www.asa.org.uk>

THE INDEPENDENT TELEVISION COMMISSION CODES OF ADVERTISING STANDARDS AND PRACTICE AND PROGRAMME SPONSORSHIP

One of the duties imposed on the ITC by ss 8 and 9 of the Broadcasting Act 1990 is the drawing up and enforcement of Codes governing standards and practice in television advertising and programme sponsorship. The ITC has promulgated two Codes, respectively:

- the Code of Advertising Standards and Practice, which sets the standards for the content of television advertising; and
- the Code of Programme Sponsorship.

In addition, there is a Code of Practice on the Amount and Scheduling of Advertising, setting out the rules which the ITC requires its licensees to observe on the amount, distribution, separation and scheduling of advertising.

The above Codes apply to all the television companies that are licensed by the ITC.

Complaints about advertisements are considered by the ITC, which publishes regular television advertising complaints reports setting out details of all complaints of substance which have been considered. Unfavourable decisions are likely to attract adverse publicity for the advertiser.

The authority of the ITC

The ITC has authority over its licensees rather than over the advertisers themselves. All holders of ITC licences are required to ensure that the advertising which they broadcast complies with the Codes. Broadcasters are directly responsible for the advertisements which they transmit and the ITC can require broadcasters to withdraw advertising which does not comply with the Codes. Such a requirement will have immediate effect. The end result is harmful to the advertiser, who will find that its advertising is denied a broadcast outlet.

As we have seen in relation to programme content, television companies can be subject to heavy sanctions for non-compliance with ITC decisions, including large fines and ultimately, revocation of their licences.

The way that the advertising Codes work in practice

In practice, the advertisers liaise with broadcasters about the content of advertisements which it wishes to have broadcast. The broadcasters are required by the ITC to have procedures in place to ensure compliance with the Codes. The ITC provides advice to broadcasters about the Codes. Advertisers who require advice about the Codes in relation to specific advertisements should contact the broadcasters or their representatives rather than the ITC.

Most television companies require the advertising which they carry on a national basis to be cleared by the Broadcast Advertising Clearance Centre (BACC). This is an organisation set up and funded by the participating broadcasters. It provides pre-transmission clearance services for ITV, GMTV, Channel 4, Channel 5, BSkyB and UK Gold amongst others. Not all television companies use the BACC for advertising clearance. Some will clear advertisements themselves.

Pre-clearance by or behalf of television companies is, in practice, a mandatory requirement.

Clearance procedures

The clearance requirements and procedures of individual television companies will differ. The BACC's procedure is described below. Whatever the procedure, it is advisable to submit material for clearance at an early stage, ideally at pre-production script stage before filming begins. This will avoid unnecessary expense on filming if the basic concept of the advertisement is flawed. The BACC ask for submission of scripts for proposed advertisements prior to filming.

The BACC clearance practices

Agencies should ideally send pre-production scripts for advertisements to the BACC for its initial examination. Where amendments are required by the BACC to ensure compliance with the Codes, the BACC will discuss them with the agency so that a revised script can be agreed. Where appropriate, the BACC will offer guidance about the visual content of the advertisements at this preliminary stage. Where matters of taste are involved, advertisers may find that it is cost effective to submit a storyboard or other visual device to the BACC at an early stage.

The BACC will view video tapes of the filmed commercial to check that it is in line with the approved script (where there is an approved script) and the Codes.

Where an advertisement contains factual claims, advertisers *must* submit supporting evidence with the script or videotape of the advertisement. Technical or scientific claims will be sent to BACC appointed experts for evaluation.

Sometimes, the BACC will recommend scheduling restrictions for advertisements, for example, that they should not be broadcast in breaks in or around children's programming.

All material submitted to the BACC is submitted in the strictest confidence.

The BACC has produced guidance notes on the precise requirements for material submitted to it for clearance. They are available from the BACC.

Limitations of BACC clearance

The BACC advises under the Codes. Its staff are not legal advisers. Advertisers or television companies seeking advice on the law should seek legal advice. Clearance by the BACC will not mean that the advertisement is not an infringement of a third party's rights. Nor will clearance by the BACC guarantee that the advertisement complies with the Codes. That decision is for the ITC alone.

The above points also apply to television companies who elect to clear advertisements themselves without the BACC.

THE ITC CODE OF ADVERTISING STANDARDS AND PRACTICE

General principles

The Code sets out four general principles which should be read in conjunction with the Code's more detailed provisions. They are as follows:

- television advertising should be legal, decent, honest and truthful;
- advertisements must comply in every respect with the law, common or statute, and licensees must make it a condition of acceptance that advertisements do so comply;
- the detailed rules set out in the Code are intended to apply in their spirit, as well as their letter;
- the standards in the Code apply to any item of publicity inserted in breaks or between programmes, whether in return for payment or not, including publicity by licensees themselves.

Products/services which cannot be advertised on television

Advertisements for the following products/services or for other products or services which would indirectly publicise the following products/services are currently unacceptable:

- all tobacco products;
- pornography;
- breath testing devices and products that purport to mask the effect of alcohol;
- the occult;
- betting tips;
- betting and gaming (except football pools and certain lotteries);
- private investigation services;
- guns and gun clubs;
- commercial services offering advice on personal or consumer problems.

Rules for particular situations

In addition to the general rules discussed above, the Code contains detailed rules applicable to the following:

- advertising and children;
- alcoholic drink;
- lotteries and pools;

- financial advertising;
- medicines, treatments, health claims, nutrition and dietary supplements;
- the use of animals in advertisements;
- homework schemes;
- matrimonial and introduction agencies;
- charity advertising;
- religious advertising.

The above rules are outside the remit of this book.

THE RADIO AUTHORITY ADVERTISING AND SPONSORSHIP CODE

The Radio Authority Code is in many respects similar to the ITC Codes. Readers should therefore cross-refer to the section of this chapter about the ITC.

Licensees (that is, commercial radio stations) are charged with complying with the Code. This means that they must ensure that the advertising and sponsorship which they broadcast meets the requirements of the Code. The Radio Authority will give advice to its licensees about the Code's provisions. Advertisers should liaise with the radio stations about specific advertisements rather than approach the Radio Authority direct. The Radio Authority investigates complaints made under the Codes and publishes details of its decisions in regular reports. An adverse decision is likely to generate adverse publicity for the advertiser. It will also mean that the advertisement must be withdrawn unless it is amended to ensure compliance with the Code. The advertiser will, therefore, find that its advertising will be denied an outlet on independent radio.

The Radio Authority can impose sanctions against those radio stations which breach the Code including fines and, in severe cases, the withdrawal of the station's licence.

The Codes and the courts

Challenging adjudications

Each of the above regulatory authorities with the exception of the PCC is subject to judicial review of their actions. The PCC is probably also subject to judicial review, although the point has not been authoritatively determined by the courts at the time of writing.

Essentially, this has meant that their decisions under the above Codes are open to challenge by way of judicial review where they can be shown to be irrational or beyond the scope of the regulator's authority. The topic of judicial review was considered further in Chapter 2. It should be remembered that the court will not substitute its own judgment for that of the regulatory body on a judicial review application. If the court agrees that an adjudication is irrational or there are otherwise grounds for review, it will remit the decision back to the regulatory body for further review. The end result may be that the body makes the same decision that led to the review application, but that it applies different grounds or reasoning in reaching that decision.

The regulatory bodies and the Human Rights Act 1998

When the Human Rights Act comes into force in October 2000, each regulatory authority is almost certainly a public authority for the purposes of the Act,¹¹ (although the decision will ultimately be for the courts). As such, any decision made by the bodies or any procedure which they follow must be compatible with the Convention rights.¹² Where a decision is incompatible with the Convention rights, it will be open to challenge under the provisions of the Act. The likely effect of the Human Rights Act on the various Codes was analysed in Chapter 1 (and Chapter 8 in relation to privacy).

The approach of the courts to the Codes

Essentially, it would appear on the very limited authorities available at the time of writing that the courts will maintain the distinction between the law and the Codes when an application is made under s 7 of the Human Rights Act 1998.¹³ They will not try to blur the Codes into the law (or vice versa). The indications are that the courts recognise that the Codes do not have the force of law and are not concerned with establishing legal rights. As such, they may be interpreted more flexibly than legal rules and obligations. In the *R v BSC ex p BBC* case,¹⁴ the court upheld a finding of violation of privacy against the BBC whilst recognising that under black letter law, such a claim would be unlikely to succeed.

More prominence for the Codes?

In two respects, the Codes have been elevated into a more prominent position than they have had previously. First, under the Data Protection Act 1998

11 Refer to Chapter 1 for further detail.

12 HRA 1998, s 6.

13 *R v BSC ex p BBC* (2000) unreported, CA.

14 *Ibid.*

material is exempt from certain of the Act's provisions where it is created for the purposes of journalism, literature or art in order to qualify for the exemption.¹⁵ The publisher must, however, reasonably believe that publication of the material is in the public interest. In deciding whether this requirement is met, the court may have regard to 'any relevant Code of Practice' which will include the PCC Code, the ITC Code, the Radio Authority Code and the BSC Code. The importance of complying with the Codes then assumes an importance that it does not otherwise have. There is at least a possibility that the court's interpretation of the Codes will begin to build up a body of guidance on the Codes which may supplement the decisions of the regulatory authority.

A similar position exists in relation to s 12 of the Human Rights Act 1998. The section was considered in detail in Chapter 1. Essentially, it requires the court to have regard to any relevant privacy Code when considering whether to grant relief which may affect the exercise of the right to freedom of expression in relation to journalistic, literary or artistic material. As with the Data Protection Act, the relevant provisions of the Codes will assume an importance which they did not otherwise have and the media will have a greater incentive to comply with the provisions of the Code.

Benefits of the regulatory system

The regulatory systems which are considered in this chapter have the following beneficial effects:

- the complaints systems examined above are more accessible to the majority of the general public than legal proceedings would be. They involve no cost to the public and involve little in the way of technicalities. The writing of a letter or completion of a complaint form is all that is required in order to start a complaint. Legal proceedings, on the other hand, generally involve substantial costs and, even after the introduction of the new Civil Procedure Rules in April 1999, they involve technical procedural rules which have to be followed. Complainants under the above Codes have no need to instruct a lawyer if they do not wish to or cannot afford to. The complaints bodies themselves offer free assistance to those complainants who require it;
- the systems put in place by the Codes offer the opportunity for redress to be obtained more quickly than it could under the litigation process;
- the Codes are more flexible than the law considered in the first part of this book. Accordingly, it is often easier for the provisions to be interpreted in line with contemporary standards than it is in relation to the law. They can

15 Data Protection Act 1998, s 32.

also be amended relatively easily to deal with new issues as and when they arise. On the whole, the law is a slower moving animal;

- the spirit of the Codes is to be interpreted as well as the letter. They generally cannot be circumvented because of a mere technicality;
- many of the regulatory bodies such as the ASA and the BSC carry out research activities to assess public views on various matters, for example, the use of swear words in advertisements or on television. The results of such surveys are taken into account when adjudicating on complaints. It might, therefore, be said that the regulatory bodies are more in touch with public opinion than the judiciary;
- many of the provisions of the various Codes are fundamentally unsuited for legal regulation. For example, take the topic of bad taste. This is an inherently subjective issue. What appears to you or I to be in bad taste might well be admired or accepted by others, and vice versa. It is inappropriate that the application of the law should be focused on individual sensibilities which might be arbitrarily determined. There is a risk that such an arbitrary legal regulation would not be sufficiently precise to be 'prescribed by law' and therefore that it would be incompatible with the Convention on Human Rights. Many of these considerations were discussed in Chapter 12 in relation to indecency offences. The defects identified in the indecency laws would be amplified in relation to a law which seeks to regulate taste.

The ITC Programme Code makes the following provision in relation to language in the section of the Code dealing with offence to good taste:

- 1.4 There is no absolute ban on the use of bad language. But many people are offended, some of them deeply, by the use of bad language, including expletives with a religious (and not only Christian) association. If, therefore, the freedom of expression of writers, producers and performers is not to be jeopardised, gratuitous use of bad language must be avoided. It must be defensible in terms of context and authenticity and should not be a frequent feature of the schedule.

If the Codes had the force of law, the court would have to grapple with what amounts to 'gratuitous', what uses might be defensible and what is authentic. These concepts defy analysis other than by reference to the individual susceptibilities of the viewer or listener and the particular circumstances of the case.

The various Codes, on the other hand, do not seek to set out legal rights and obligations. The industry bodies do not adjudicate in such terms. Indeed, the BSC literature expressly states that where a legal remedy is available to a complainant, it may be inappropriate for the BSC to consider the matter. The Codes are concerned with setting standards of best practice for the appropriate industry to follow. It is right that such standards may vary according to public sensibilities in order that the media reflect the society in

which we live. But it does not necessarily follow that a failure to meet the standards should be rendered unlawful.

It is to be hoped that the courts maintain this distinction when issues involving the Codes come before them.

PART 3

