

Ofcom Content Sanctions Committee

Consideration of sanctions against:

The British Broadcasting Corporation ("the BBC") in respect of its service Radio 2.

For:

Breaches of the Ofcom Broadcasting Code ("the Code") in respect of:

Rule 2.1: *"Generally accepted standards must be applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive material";*

Rule 2.3: *"In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context. Such material may include, but is not limited to, offensive language...sex, sexual violence, humiliation, distress, violation of human dignity...Appropriate information should also be broadcast where it would assist in avoiding or minimising offence";* and

Rule 8.1: *"Any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted."*

The breaches related two editions of *The Russell Brand Show* which contained offensive material relating to the actor Andrew Sachs and his granddaughter, and content which unwarrantably infringed their privacy.

On:

18 October 2008 and 25 October 2008.

Decision:

To impose a financial penalty (payable to HM Paymaster General) of **£80,000** for the breaches of Rule 8.1 of the Code (privacy) and **£70,000** for the breaches of Rules 2.1 and 2.3 of the Code (harm and offence); and, in addition, to require the BBC to **broadcast a statement of Ofcom's findings** on its service Radio 2, on a specified occasion, at a time, and in a form to be determined by Ofcom.

1. Summary

- 1.1 For the reasons set out in full in Section 10 of this adjudication, under powers delegated from the Ofcom Board to Ofcom's Content Sanctions Committee ("the Committee"), the Committee decided to impose statutory sanctions on the BBC in light of the serious and repeated nature of its breaches of the Code. This adjudication under the Code relates to the broadcast of *The Russell Brand Show* ("*Russell Brand*") on BBC Radio 2 on 18 October 2008 and 25 October 2008.
- 1.2 *Russell Brand* was a weekly Saturday night Radio 2 programme broadcast from 21:00 to 23:00 which had been running for two years prior to October 2008. The programme was at times pre-recorded. The programme format was Russell Brand and a co-host in conversation. Much of the content was comedic in tone and it often contained adult humour (including sexual references and innuendo). Jonathan Ross was Russell Brand's co-host in the programme of 18 October 2008.
- 1.3 During the two editions of *Russell Brand* broadcast on 18 and 25 October 2008 offensive references were made to the actor Andrew Sachs and to his granddaughter, Georgina Baillie, which resulted in their privacy being unwarrantably infringed.
- 1.4 *Russell Brand* of 18 October 2008 had been pre-recorded on 15 October 2008 and was scheduled to contain a telephone interview with Andrew Sachs. Andrew Sachs was unavailable when contacted during the recording because he was making another programme. This led to a number of telephone calls being made to Mr Sachs during the programme and a series of lewd messages being left on his answerphone by Russell Brand and Jonathan Ross. During these calls both Russell Brand and Jonathan Ross referred to Georgina Baillie and said that Russell Brand had had a sexual relationship with her. In the first phone call, while Russell Brand was leaving a message on Andrew Sachs' answerphone, Jonathan Ross shouted out:

"He fucked your granddaughter"
- 1.5 Jonathan Ross and Russell Brand continued to make further references to the sexual relationship between Georgina Baillie and Russell Brand within the programme. This ended with Russell Brand singing an improvised song - allegedly intended by him to be an apology - to Andrew Sachs.
- 1.6 Further references to Andrew Sachs and Georgina Baillie were made in the next edition of *Russell Brand*, broadcast live on 25 October 2008. During that programme the sung 'apology' to Andrew Sachs, originally broadcast in the programme of 18 October 2008 (see preceding paragraph), was played again.
- 1.7 On 23 October 2008, an official complaint about the content of the 18 October 2008 programme was made on behalf of Andrew Sachs by his agent who emailed it direct to the Controller of BBC Radio 2 and also sent it by letter on 24 October. However, the BBC stated that the Controller was not aware that any complaint had been received until 26 October 2008. Andrew Sachs' agent copied this complaint to Ofcom on 5 November 2008 in connection with Ofcom's own investigation into the events surrounding the programme.

- 1.8 Ofcom received 1,939 complaints about the programmes and the BBC 42,851. The number of complaints rose significantly after extensive media reporting of the content. Those who contacted Ofcom were concerned in particular about the explicit content of the phone calls to Andrew Sachs and the fact that the calls referred in some detail to Georgina Baillie, apparently without their knowledge. Complainants were also concerned that Russell Brand and Jonathan Ross revealed extremely private information about Ms Baillie apparently without her consent.
- 1.9 The BBC stated to Ofcom that the broadcasts of 18 and 25 October 2008 should never have happened. They were unacceptable and demonstrably failed to meet the BBC's editorial standards. In relation to Rules 2.1 and 2.3 of the Code, the BBC admitted the breaches and said that it did not consider that generally accepted standards were applied in the case of the programmes. The BBC also accepted that there were unwarranted infringements of the privacy of Andrew Sachs and Georgina Baillie in the programmes. It also outlined the key issues that it said had arisen from the incidents. These were:
- that there was a failure of editorial judgment in relation to both the recording and broadcasting of offensive and intrusive material;
 - a conflict of interest had arisen because a BBC producer was loaned out to the independent production company to make *Russell Brand*;
 - failures of compliance systems; and
 - the initial error to broadcast some elements of the programme on 18 October 2008 was compounded on 25 October 2008 when the 'apology' song was replayed.
- 1.10 Having investigated the case, Ofcom found that the editions of *Russell Brand* broadcast on 18 and 25 October 2008 were in breach of Rules 2.1 and 2.3 of the Code relating to offence. A considerable amount of material in *Russell Brand* of 18 October 2008 consisted of various and prolonged discussions between Russell Brand and Jonathan Ross about a sexual relationship between Russell Brand and Georgina Baillie. Some material, notably the sung 'apology,' was repeated in *Russell Brand* of 25 October 2008. Ofcom decided that the BBC repeatedly failed to apply generally accepted standards to this content so as to provide adequate protection for members of the public from this offensive material.
- 1.11 In light of Ofcom's statutory duty to ensure 'standards' relating to privacy Ofcom also recorded breaches of Rule 8.1 (infringement of privacy) as regards *Russell Brand* of 18 and 25 October 2008.¹ Russell Brand and his guest Jonathan Ross made repeated references throughout the 18 October 2008 programme to Andrew Sachs and to Georgina Baillie, including frequent sexual allusions and other intimate details. Some of these described sexual acts that had allegedly taken place between Russell Brand and Georgina Baillie. On 25 October 2008 Russell Brand's 'apology' song containing

¹ Under the Communications Act 2003, Ofcom has a general duty relating to breaches of 'standards' in respect of unwarranted infringement of privacy. This duty is independent of its obligation to adjudicate on privacy complaints made by individuals who are directly affected by potential breaches of their privacy.

intimate references to Ms Baillie's personal life was repeated. Ofcom considered that Mr Sachs and Ms Baillie had a legitimate expectation of privacy in relation to the material broadcast in these programmes which was of a highly personal, intimate and sensitive nature and their privacy was infringed because informed consent was not obtained from Mr Sachs or Ms Baillie before the broadcast. Moreover, there was no justification for broadcasting such intimate and sensitive information and so the infringement was not warranted.

- 1.12 Ofcom considered the breaches to be serious and repeated and therefore referred the case to the Committee for consideration of the imposition of a statutory sanction.
- 1.13 Ofcom also received a complaint about an interview with Russell Brand on *The Chris Moyles Show* on Radio 1 on 21 October 2008. During this interview Russell Brand referred to the incident on his own programme described above in paragraph 1.4. He also alluded to his association with Georgina Baillie. Ofcom found the interview was a breach of the BBC's obligation to apply the 'standards' set out by Ofcom to avoid unwarranted infringements of privacy, but did not believe the contravention in that particular programme was sufficiently serious to warrant consideration of a statutory sanction. A breach finding relating to this edition of *The Chris Moyles Show* is annexed to this adjudication.

Summary of the Committee's Findings

- 1.14 In deciding this case, Ofcom recognises the paramount importance that is attached to freedom of expression in the broadcasting environment. In particular, broadcasters must be permitted to enjoy the creative freedom to explore issues and ideas without undue interference. Comedy in particular has a tradition of challenging and even deliberately flouting boundaries of taste. Whilst such programming must have room for innovation and creativity, it does not have unlimited licence. Individual performers and presenters may sometimes overstep the line. However, it is the responsibility of broadcasters operating in creative environments to have robust systems in place and apply them so as to ensure compliance with the Code, and specifically in this case so that individuals and members of the public are provided adequate protection from offensive and harmful material and unwarranted infringements of privacy.
- 1.15 Creative risk is therefore part of the BBC's public service role but so is risk management. However, when the BBC decided to turn the series into an independent production made by a company which Russell Brand partly owns (see further paragraphs 10.26-10.27 below) three significant decisions were made which impacted on the careful balance that needs to be struck between creative risk and risk management. One was that the Executive Producer was a senior figure at the agency that represents Russell Brand. The second was that the BBC would not appoint its own Executive Producer or similar senior editorial figure to oversee the series. The third was that the Producer who actually oversaw the programme on a day-to-day basis would be loaned by the BBC to work for the independent production company partly owned by Russell Brand. Therefore, although the greatest compliance risk in the series lay in what Russell Brand would say on the air, part of the risk management had effectively been ceded to those working for him. It would appear that the

interests of the presenter had been given greater priority than the BBC's risk management systems.

- 1.16 Having considered all the evidence and the BBC's representations, Ofcom found that the breaches of the Code in this case were serious.
- 1.17 Firstly, the Committee considered the breaches of Rules 2.1 and 2.3 were particularly serious because the references to Andrew Sachs and Georgina Baillie in the broadcast of 18 October 2008 became increasingly explicit, offensive and gratuitous as the programme progressed. This resulted in the material having a cumulative effect which resulted in it overall being exceptionally offensive, humiliating and demeaning. The seriousness of these breaches was compounded because this programme was pre-recorded. This gave the BBC ample time to comply the programme thoroughly. In addition the 'apology' song played in this programme was repeated in its entirety on 25 October 2008. In Ofcom's view this trivialised and compounded the severe offence already caused by the presenters' remarks in the programme of 18 October 2008.
- 1.18 The Committee also found that the breaches of Rule 8.1 (privacy) in the programmes were especially serious. In reaching this decision the Committee took account of: the BBC's own admission in its statement to Ofcom that it had unwarrantably infringed the privacy of both Andrew Sachs and Georgina Baillie in both broadcasts; and of the BBC Trust's assessment that the broadcast of the remarks about Mr Sachs and his granddaughter were "an unacceptable and deplorable intrusion into their private lives"². There was no justification whatsoever for these gross breaches of privacy. The repetition of the 'apology' in the broadcast of 25 October 2008 in turn meant that the intimate information revealed on 18 October 2008 was revisited, so that the seriousness of the earlier breaches of privacy was further exacerbated. The seriousness was also increased by the fact that the BBC had already been sent a complaint from Mr Sachs on 23 October 2008 (see paragraph 1.7 above), and so had had an opportunity to take corrective action before 25 October.
- 1.19 At the oral hearing before the Committee, the BBC admitted what it called "three very clear failures in this whole sorry incident". These were: failures of editorial control; failures of editorial judgment; and failures of compliance systems. The detailed evidence before the Committee suggested there were no fewer than six flaws within the Radio 2 compliance systems for *Russell Brand*. These were:
- a lack of clarity about the exact role of someone who was a senior figure at the agency that represents Russell Brand acting as the Executive Producer of the programmes of 18 and 25 October 2008 on behalf of the independent production company;
 - the failure of the Executive Producer to attend a BBC Safeguarding Trust compliance course, despite this being a condition of the production contract;
 - in respect of the compliance forms for 18 and 25 October 2008 the Executive Producer did not fulfil another condition of the production

² See BBC Trust Editorial Standards Findings Report 21 November 2008 at <http://www.bbc.co.uk/bbctrust/>

contract, which was that he would sign off compliance forms for *Russell Brand*, and it was not known whether he signed off previous forms.

- no proactive testing and insufficient monitoring of the compliance systems in the Audio and Music Group in general, and in particular relating to *Russell Brand* after the series became an independent production from May 2008;
- an unacceptable conflict of interest for the Producer in day-to-day charge of the series when he was seconded from the BBC on a part-time basis to the independent production company making *Russell Brand*; and
- a lack of clarity about who at the BBC had "hands-on" editorial oversight of the series.

1.20 This list of weaknesses is all the more extraordinary considering that the senior management of BBC Radio always regarded *Russell Brand* as a 'high risk' series, and considering the assurances given to Ofcom that the compliance systems of BBC Radio would be improved after an earlier and very serious breach of the Code by *The Russell Brand Show* on BBC 6 Music in the summer of 2008. At that time the BBC gave Ofcom clear assurances about improvements made, or to be made, in the quality of its compliance generally and in BBC Radio in particular. The evidence in this case clearly showed that the necessary improvements were not implemented quickly or effectively. The risk for the BBC of breaching the Code was increased by the highly unsatisfactory compliance arrangements approved by the management of Radio 2 in May 2008 whereby *Russell Brand* should no longer be made in house but by an independent production company partly owned by Russell Brand. The Committee was deeply concerned by the failure or ineffectiveness of the BBC's compliance, risk management and management procedures described above in relation to Radio 2 and the impact this had had in this case.

1.21 These overall weaknesses in the BBC's compliance arrangements set the scene for the particular failures of compliance in this case, which were very serious. They included:

- the failure to obtain the informed consent of Andrew Sachs or Georgina Baillie before either the broadcast of 18 or 25 October 2008 as required by the BBC's Editorial Guidelines and the Code;
- the failure of the BBC to recognise that, by formally 'loaning' the Producer of *Russell Brand* to the independent production company that made the programme, the Producer would be exposed to an acute conflict of interest;
- the failure of any senior manager at Radio 2 to listen to the programme of 18 October 2008 in its entirety before broadcast; and
- the failure to complete and submit the compliance forms for *Russell Brand* before broadcast on 18 October 2008 as required by the compliance procedures.

The effect of these failures was compounded by the Controller of Radio 2 not picking up the e-mailed complaint of Andrew Sachs dated Thursday, 23 October 2008 until 26 October was broadcast, so action was not taken sooner.

- 1.22 In mitigation, the Committee noted in particular that senior management at the BBC acted swiftly to mitigate the offence and damage caused by the breaches of the Code: Russell Brand resigned from his programme and *Russell Brand* is no longer broadcast; the Controller of Radio 2 and the Radio 2 Head of Compliance resigned; the BBC at an early stage apologized publicly and on air for the broadcasts; and the BBC suspended Jonathan Ross from all of its broadcasts for a period of three months. Also the BBC has outlined a series of additional actions it has taken, or is taking, in the wake of these broadcasts to improve compliance. The Committee further noted that the BBC Trust on 30 October 2008 issued a full statement which condemned the "deplorable" intrusion into the privacy of Mr Sachs and his granddaughter and directed the BBC to broadcast apologies on Radio 2 in relation to this case. Whilst welcoming these assurances given by the BBC about improving compliance, Ofcom expects BBC management to ensure they are fulfilled more effectively and quickly than certain previous assurances about compliance made to the Committee in the summer of 2008 (see paragraphs 10.22-10.25 below).
- 1.23 The Committee carefully considered the relevant facts as outlined above, all the representations made by the BBC, and relevant aggravating and mitigating points in this case. Having regard to all these factors and Ofcom's Penalty Guidelines, the Committee decided to impose a financial penalty on the BBC of **£80,000** for the breach of Rule 8.1 through its failure to observe the 'standard' relating to unwarranted infringements of privacy; and **£70,000** for the breaches of Rules 2.1 and 2.3 (harm and offence). Both are payable to HM Paymaster General. The Committee considered this to be a proportionate and appropriate penalty in all the circumstances. In addition, the Committee directed the BBC to **broadcast a statement of Ofcom's findings** in relation to this case on Radio 2, on a specified occasion, at a time, and in a form to be determined by Ofcom.

2. Background

- 2.1 *Russell Brand* was a weekly Saturday night Radio 2 programme broadcast from 21:00 to 23:00 which had been running for about two years prior to October 2008³. The programme format was Russell Brand and a co-host in conversation. It also featured contributions from celebrity guests and musical performances. Much of the content was comedic in tone and it often contained adult humour (including sexual references and innuendo).
- 2.2 Prior to the programmes broadcast on 18 and 25 October 2008, during an edition of *Russell Brand* broadcast on 11 October 2008, Russell Brand's guest co-host, David Baddiel, described meeting the granddaughter of the actor, Andrew Sachs. The granddaughter was not named but the presenters

³ *The Russell Brand Show* was previously broadcast on BBC 6 Music from April 2006 until November 2006

discussed meeting her at Russell Brand's house and it was implied that she and Russell Brand may have had a sexual relationship. After investigation, Ofcom did not find this programme to have breached the Code. It is therefore included here for background only.

2.3 As a result of the events outlined in this adjudication, Russell Brand resigned as a BBC presenter and *Russell Brand* of 25 October 2008 was the final edition of the programme.

3. Legal Framework

The Communications Act 2003

3.1 In discharging its functions, Ofcom's principal duties are to further the interests of citizens in relation to communications matters and the interests of consumers (section 3(1) of the Act) and to secure a number of other matters including:

- the application in the case of all television and radio services of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services (section 3(2)(e)); and
- the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other persons from unwarranted infringements of privacy resulting from activities carried on for the purposes of such services (section 3(2)(f)).

3.2 Ofcom therefore has a general duty to apply, in the case of all television and radio services, 'standards' to provide adequate protection to members of the public from offensive and harmful material under section 3(2)(e) of the Act and unwarranted infringements of privacy under section 3(2)(f) of the Act.

3.3 In performing these duties, Ofcom is also required to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principles representing best regulatory practice (section 3(3) of the Act); and where relevant, a number of other considerations including:

- The need to secure that the application in the case of television and radio services of standards relating to harm and offence and unwarranted infringements of privacy is in the manner that best guarantees an appropriate level of freedom of expression (section 3(4)(g) of the Act).

3.4 Ofcom has a duty under section 319 of the Communications Act 2003 ("the Act") to set standards for the content of programmes in television and radio services as appears to it best calculated to secure the standards objectives. The standards set by Ofcom must be contained in one or more codes.

3.5 The standards objectives are set out in section 319(2) of the Act. They include:

- 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 (section 319(2)(f) of the Act).
- 3.6 Section 107(1) of the Broadcasting Act 1996 ("the 1996 Act") sets out Ofcom's duty to draw up a code giving guidance in connection with the avoidance of unwarranted infringements of privacy ('the Fairness Code').
- 3.7 Ofcom's general duty to apply 'standards' relating to unwarranted infringements of privacy sits separately from its duty under section 110 of the 1996 Act (as amended by section 327 of the Act) to consider and adjudicate on complaints relating to unwarranted infringements of privacy and is not dependent upon the receipt of a complaint from an individual or organisation.
- 3.8 Standards set by Ofcom in accordance with section 319 of the Act and section 107 of the 1996 Act are set out in Ofcom's Broadcasting Code which came into force on 25 July 2005 ("the Code")⁴.

Regulation of the BBC

- 3.9 Under section 198 of the Act, Ofcom is required to regulate the BBC's services as well as other activities connected to the provision of the BBC service. Ofcom's duties and powers in relation to the BBC are conferred on it under statute and the BBC Charter and Agreement.
- 3.10 Clause 46 of the BBC Agreement which accompanies the BBC Charter states that the BBC must observe certain standards set by Ofcom under section 319 of the Act, including those relating to the application of generally accepted standards so as to provide adequate protection for the public from harmful or offensive material (section 319(2)(f) of the Act).
- 3.11 Clause 45 of the BBC Agreement states that the BBC must comply with the Fairness Code in relation to the programmes included in the UK Public Broadcasting Services, including provisions relating to the avoidance of unwarranted infringements of privacy (section 107 of the 1996 Act).
- 3.12 Clauses 93 and 94 of the BBC Agreement set out the possible sanctions that Ofcom can impose against the BBC in relation to a breach of the Code. These are:
- a direction to broadcast a correction or statement of Ofcom's findings or both (Clause 93(1));
 - a direction not to repeat a programme (Clause 93(5)); and
 - the imposition of a financial penalty up to a maximum of £250,000 on any occasion (Clause 94).
- 3.13 Section 198(3) of the Act requires the BBC to pay penalties to Ofcom in respect of any contraventions of the conditions contained in these provisions. The BBC is in a unique position in comparison to other Public Service Broadcasters ("PSBs") with respect to the maximum fine that can be imposed

⁴ The Code can be found at <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>

on it. Commercial PSBs can be fined up to a maximum of 5% of their qualifying revenue. The BBC's maximum limit of £250,000 is due to the BBC being funded by the licence fee. Section 198(5) states that:

- "the maximum penalty that may be imposed on the BBC on any occasion by Ofcom in exercise of a power conferred by virtue of the BBC Charter and Agreement is £250,000".

The Ofcom Broadcasting Code

- 3.14 As noted above, standards set by Ofcom in accordance with section 3(2) of the Act, section 319 of the Act and section 107 of the 1996 Act are set out in the Code which came into force on 25 July 2005.
- 3.15 Guidance Notes accompanying each section of the Code are published, and from time to time updated, on the Ofcom website.⁵ The Guidance Notes are non-binding but assist broadcasters to interpret and apply the Code.
- 3.16 By virtue of section 198 of the Act and sections 45 and 46 of the BBC Agreement, the BBC must observe relevant programme Code standards which include, but are not limited to, those relating to harm and offence (Section 2 of the Code) and privacy (Section 8 of the Code).
- 3.17 The relevant provisions of the Code are (so far as relevant):
- Rule 2.1: "Generally accepted standards must be applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive material";
 - Rule 2.3: "In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context. Such material may include, but is not limited to, offensive language, violence, sex, sexual violence, humiliation, distress, violation of human dignity, discriminatory treatment or language...Appropriate information should also be broadcast where it would assist in avoiding or minimising offence"; and
 - Rule 8.1: "Any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted."

The Human Rights Act 1998

- 3.18 Under section 6 of the Human Rights Act 1998, there is a duty on Ofcom (as a public authority) to ensure that it does not act in a way which is incompatible with the European Convention of Human Rights ("the Convention").
- 3.19 Article 10 of the Convention provides for the right to freedom of expression. It encompasses the broadcaster's right to "impart information and ideas" and also the audience's "right to receive information and ideas without interference by public authority". Such rights may only be restricted if the restrictions are "prescribed in law and necessary in a democratic society, in

⁵ Guidance Notes can be found at <http://www.ofcom.org.uk/tv/ifi/guidance/bguidance/>

the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary" (Article 10(2) of the Convention).

- 3.20 Ofcom must exercise its duty in light of these rights and not interfere with the exercise of these rights in broadcast services unless it is satisfied that the restrictions it seeks to apply are required by law and necessary to achieve a legitimate aim.

4. Ofcom's investigation

- 4.1 During the two editions of *Russell Brand* broadcast on Saturday, 18 October 2008 and Saturday, 25 October 2008 references were made to the actor Andrew Sachs and to his granddaughter, Georgina Baillie. These references in particular included ones about Russell Brand and Ms Baillie having sexual relations. Ofcom did not receive any complaints immediately following the broadcast of 18 October 2008. After the programme of 18 October 2008, the BBC had received 2 complaints from listeners. However, on the Monday (27 October) after the programme of 25 October 2008 and following articles in the national press, the BBC received a further 546 complaints. The total number of complaints finally received by the BBC about *Russell Brand* was 42,851.
- 4.2 After the transmission of the 25 October 2008, Ofcom had received a total of 1,939 complaints about a number of aspects of the programmes, including concerns about explicit phone calls made to Andrew Sachs' answerphone, during which the presenters revealed extremely private information about Andrew Sachs and his granddaughter, apparently without their consent and that the calls appeared to humiliate Andrew Sachs and his granddaughter or could have caused them distress.
- 4.3 Following these complaints, Ofcom began an investigation.

Russell Brand of 18 and 25 October 2008

- 4.4 Jonathan Ross was Russell Brand's co-host in the programme of 18 October 2008, which was pre-recorded on 15 October. The actor Andrew Sachs was due to be a guest on this programme. Russell Brand tried to call Andrew Sachs on his mobile phone but the actor was not available because he was taking part in another programme being made in London. This led to a number of telephone calls being made to Andrew Sachs' mobile phone during the programme and a series of lewd messages being left on his answerphone by Russell Brand and his co-presenter Jonathan Ross. During these calls both Russell Brand and Jonathan Ross referred to Andrew Sachs' granddaughter, Georgina Baillie, and said that Russell Brand had had a sexual relationship with her⁶. In the first phone call, while Russell Brand was leaving a message on Andrew Sachs' answerphone, Jonathan Ross shouted out:

"He [i.e. Russell Brand] *fucked your granddaughter*".

⁶ Georgina Baillie had first been referred to in *Russell Brand* a week earlier on 11 October 2008; see paragraph 2.2 above.

- 4.5 Jonathan Ross and Russell Brand continued to make further and explicit references to the sexual relationship between Georgina Baillie and Russell Brand within the programme. This ended with Russell Brand singing an improvised song – apparently intended to be of apology - to Andrew Sachs. This ‘apology’ described sexual acts that had purportedly taken place between Russell Brand and Georgina Baillie.
- 4.6 During *Russell Brand* broadcast on 25 October 2008 (which was transmitted live), Ofcom noted that, in an interview with the musician, Dizzee Rascal, Russell Brand referred to the previous week’s show. Russell Brand indicated that he had left a message on Andrew Sachs’ answerphone and referred to the ‘apology’ that he had sung on that programme (see paragraph 4.5 above). Later, in the same programme, the sung ‘apology’ was replayed in its entirety.
- 4.7 During its investigation, Ofcom noted the responses of the BBC and the BBC Trust to the broadcasts of *Russell Brand* on 18 and 25 October 2008. On 27 October 2008 for example the BBC issued a statement apologising to Mr Sachs and to listeners for any offence caused by the broadcasts. The statement recognised that some of the content broadcast was unacceptable and offensive. Russell Brand and Jonathan Ross also issued public apologies. On 29 October 2008 the BBC’s Director-General issued a further statement in which he announced that Russell Brand and Jonathan Ross would be suspended from BBC broadcasts until the Director-General had seen a report on the events. On the same day Russell Brand resigned from his BBC Radio 2 programme.
- 4.8 A full statement was issued by the BBC Trust’s Editorial Standards Committee on 30 October 2008. It stated that the offensive comments broadcast on *Russell Brand* on 18 October 2008 fell far short of audiences’ legitimate expectations, and that there had been a “deplorable” intrusion into the privacy of Mr Sachs and his granddaughter. It apologised to Mr Sachs, Georgina Baillie, the rest of Mr Sachs’ family and to licence fee payers as a whole. A further statement of apology by BBC Management was published on the same day. The Controller of BBC Radio 2 Leslie Douglas resigned from the BBC on 30 October 2008 and also on the same day Jonathan Ross was formally suspended by the BBC from all its broadcasting activity for a twelve-week period ending on 23 January 2009.
- 4.9 On Saturday, 8 November 2008 the BBC broadcast an apology on BBC Radio 2. The BBC Trust’s Editorial Standards Committee published critical findings on the broadcasts on 21 November 2008.
- 4.10 By way of background, on 5 November 2008, Andrew Sachs’ agent sent a letter to Ofcom. This letter copied to Ofcom Mr Sachs’ complaint, regarding *Russell Brand* of 18 October 2008, made earlier to the BBC by email on 23 October 2008 and by letter on 24 October 2008. The complaint was copied to Ofcom “[i]n light of Ofcom’s decision to investigate the events surrounding” the programme of 18 October 2008. The copied complaint from Mr Sachs:
- objected to Mr Sachs’ treatment by Russell Brand and Jonathan Ross, specifically alluding to Russell Brand telling Jonathan Ross (and listeners) that he had slept with Mr Sachs’ granddaughter; and to the presenters leaving messages of “increasing crudity” on his mobile;

- stated that Mr Sachs had been “upset” by this but was told that the material would be edited; and
 - said Mr Sachs’ believed that both his family and himself had been treated by Russell Brand, Jonathan Ross and the producer “with complete contempt”.
- 4.11 In response to Andrew Sachs’ agent, Ofcom acknowledged receipt of the copy of the complaint and noted that Ofcom had “not received any Fairness or Privacy complaint from Andrew Sachs or his granddaughter.” Andrew Sachs’ agent then informed Ofcom that Mr Sachs “has no further complaint he wants to make.”

Harm and Offence

- 4.12 Ofcom first wrote to the BBC about *Russell Brand* of 18 and 25 October 2008 on 6 November 2008 and asked whether the BBC wished to make any representations in addition to those it had already published about these broadcasts. Ofcom referred the BBC to Rules 2.1 and 2.3. of the Code (harm and offence) and asked the BBC to provide full details of the background and sequence of events in respect of the broadcasts, and of the compliance arrangements in place with regard to *Russell Brand*.
- 4.13 The BBC responded to Ofcom on 21 November 2008, the same day that a BBC Trust report into Russell Brand and related matters was published.
- 4.14 At the outset the BBC wished to highlight that the broadcasts should never have happened. They were unacceptable and demonstrably failed to meet the BBC’s editorial standards. In relation to Rules 2.1 and 2.3 of the Code, the BBC said that it did not consider that generally accepted standards were applied in the case of the programmes. The BBC then outlined the key issues that it said had arisen from the Russell Brand incident. These were:
- failure of editorial judgment in relation to both the recording and broadcasting of offensive and intrusive material;
 - the conflict of interest that had arisen because a BBC producer was loaned out to the independent production company for the purposes of the production of *Russell Brand*;
 - failures of compliance systems; and
 - the initial error made to broadcast some elements of the programme on 18 October 2008 was compounded on 25 October 2008 when the song ‘apology’ song was replayed.
- 4.15 The BBC described in detail events surrounding the broadcast of the complained of material. The principal points to note were:
- the Radio 2 Head of Compliance listened only to extracts of the programme of 18 October 2008 before broadcast;

- the Controller of Radio 2 was away from the office and did not listen to the material but did email her agreement to it being used before broadcast;
- as a result, the programme of 18 October 2008 was not listened to in full by anyone in Radio 2's compliance team before transmission; and
- contrary to the BBC compliance rules in force at the time, no compliance form was completed and submitted in respect of the programme of 18 October 2008 until after the broadcast.

4.16 In relation to efforts to contact either Mr Sachs or Ms Baillie about the references to them in the broadcasts, the BBC clarified that the producer had telephoned Mr Sachs about broadcasting private material about him and his family before the programme was broadcast on 18 October 2008. The BBC accepted however that no proper informed consent was obtained from Mr Sachs. The BBC also confirmed that no effort was made to contact Ms Baillie.

Privacy

4.17 Under the Communications Act 2003, Ofcom has a general duty requiring it to secure that 'standards' are applied to television and radio which provide adequate protection to members of the public and all other persons from unwarranted infringements of privacy. As a result of this duty, the BBC's responses on Rules 2.1 and 2.3, and the unprecedented overall nature of this case and the serious issues raised, Ofcom also decided to investigate whether the programmes had breached the privacy 'standard' in the Code. On 23 January 2009, it therefore asked the BBC to comment in relation to Rule 8.1 of the Code (Privacy). It asked how *Russell Brand* of 18 and 25 October 2008 complied with the 'standard' set out in Rule 8.1 of the Code dealing with the avoidance of unwarranted infringements of privacy in programmes, or in connection with obtaining material included in programmes.

4.18 In its response, the BBC questioned whether Ofcom's remit extended to an investigation of a potential failure to observe the privacy 'standard' reflected in Rule 8.1 of the Code in the absence of a complaint from either of the individuals whose privacy had potentially been infringed. Nevertheless it accepted that the principles expressed in Rule 8.1 of the Code were neither properly considered nor properly applied in respect of both broadcasts. It also accepted that the infringement of privacy that resulted from the programmes was unwarranted.

4.19 The BBC concluded by saying that if Ofcom did proceed to investigate breaches of Rule 8.1, it must do so consistently with the Communications Act's provision that regulatory powers must be exercised in a way that is "proportionate" and "targeted only at cases where action is needed".

5. Ofcom's decisions that the BBC was in breach of the Code

Russell Brand, 18 October 2008

5.1 Details of this pre-recorded programme are set out in paragraphs 4.4-4.5 above.

Harm and Offence

5.2 A considerable amount of material in *Russell Brand* of 18 October 2008 consisted of various and prolonged discussions between Russell Brand and Jonathan Ross about the relationship between Russell Brand and Georgina Baillie. Ofcom decided because of the output and for the reasons outlined below, that the BBC failed to apply generally accepted standards so as to provide adequate protection for members of the public from harmful and/or offensive material. Further, Ofcom found any offensive material that was transmitted was not justified by the context, as required by the Code.

5.3 In reaching these conclusions, Ofcom took account of the following:

- Jonathan Ross said that "*He [Russell Brand] fucked your [Andrew Sachs'] granddaughter*". The programme clearly presented to the audience that Jonathan Ross had shouted this unexpectedly onto Andrew Sachs' answerphone. This was a comment - about private information of a particularly sensitive nature - that appeared to be made without the knowledge of those affected. As noted in the Code, offence can be caused by humiliating or distressing material. In Ofcom's view, these remarks were offensive both to some listeners, some of whom complained immediately after the broadcast, and the very large number of listeners to radio in general and members of the public who complained later to Ofcom and the BBC. This was because the remarks were being broadcast, as far as complainants were aware, without the consent of the individuals to whom they related and those individuals were not party to the recording. Ofcom also considered that, on this occasion, the context in which the language was used was also offensive;
- Ofcom noted the continued and repeated nature of the references to Russell Brand's encounters with Georgina Baillie. Ofcom found that the prolonged nature of the discussion about Georgina Baillie, and the manner in which Russell Brand and Jonathan Ross repeatedly returned to it throughout the two hour programme, was tantamount to a form of humiliation or distress;
- Ofcom also found that as the programme progressed, the sexual allusions involving Georgina Baillie became more extreme and explicit;
- Ofcom also noted that these comments and remarks concerned not only Georgina Baillie but also her grandfather, Andrew Sachs. There were extremely offensive references for example to Andrew Sachs' possibly committing suicide, and at the very end of the programme Russell Brand suggested he might perform a sex act on Andrew Sachs; and
- towards the end of the programme, Russell Brand sang a spontaneous 'apology' for the messages left on Andrew Sachs' answerphone. Jonathan Ross joined in this song. The song was light hearted in tone but its content was at times explicit. It made further demeaning and distressing references to Andrew Sachs and Georgina Baillie. This 'apology' described sexual acts that had purportedly taken place between Russell Brand and Georgina Baillie.

5.4 Most of these breaches of generally accepted standards resulted to a very great extent from the BBC's failure to meet the required standards to ensure members of the public are given adequate protection from unwarranted breaches of privacy. This in turn led to offence being caused in the form for example of humiliation and distress. For all these reasons Ofcom therefore recorded breaches of Rules 2.1 and 2.3 of the Code.

Privacy

5.5 In *Russell Brand* of 18 October 2008, Russell Brand and his guest Jonathan Ross made a number of unsuccessful attempts to get through to Andrew Sachs, who had been scheduled to appear as a guest, and left messages on his answerphone. The contents of these messages and other comments made in the programme are discussed above in relation to the harm and offence provisions of the Code. The harm and offence Code breaches were caused to a great extent by the BBC's failure to meet the 'standards' set to ensure adequate protection of members of the public from unwarranted infringements of privacy. When considering the material under Rule 8.1, Ofcom noted in particular that, before the first call was made to Andrew Sachs, Russell Brand said to listeners:

"...the elephant in the room is what Andrew doesn't know is [sic] that I've slept with his granddaughter..."

During the first call, as Russell Brand was leaving a message, Jonathan Ross was heard to exclaim:

"...he fucked your granddaughter..."

As the call continued, Russell Brand said:

"...Andrew Sachs, I did not do nothing with Georgina..."

5.6 In addition Ofcom noted the repeated references throughout the remainder of the programme of 18 October 2008 to Andrew Sachs and to Georgina Baillie, which contained frequent sexual allusions and other intimate details. Towards the end of the programme, for example, Russell Brand sang an impromptu 'apology' for leaving the messages on Andrew Sachs' answerphone. This described sexual acts that had allegedly taken place between Russell Brand and Georgina Baillie.

5.7 Ofcom first considered whether Mr Sachs and Ms Baillie had a legitimate expectation of privacy in relation to the comments broadcast in this programme. Ofcom considered that all of these remarks were likely to be regarded as relating to matters of a highly personal, intimate and sensitive nature, including details of Ms Baillie's sex life. The comments were unambiguous and were disclosed in the context of a programme in which Ms Baillie and Mr Sachs were named and therefore clearly identifiable. In these circumstances Ofcom considered that Mr Sachs and Ms Baillie did have a legitimate expectation of privacy in relation to the broadcast of the remarks in this programme.

5.8 In light of the above, Ofcom then considered whether Mr Sachs and Ms Baillie's privacy was infringed in the broadcast. Ofcom took account of the requirement in Practice 8.6 of the Code that, where the broadcast of a

programme would result in an infringement of privacy, consent should be obtained before the broadcast (unless the infringement is otherwise warranted). Ofcom also noted the guidelines in Practice 7.3 of the Code regarding the obtaining of consent⁷, for example whether Mr Sachs and Ms Baillie had been told the nature and purpose of the programme, whether Mr Sachs was made aware of any significant changes to the programme as it developed and whether he was given any clear information about whether he would have been able to effect any changes to the programme.

- 5.9 Ofcom noted from the BBCs representations that the BBC had admitted that the necessary informed consent was not obtained from either Mr Sachs or Ms Baillie.
- 5.10 It was Ofcom's view that the broadcast of this material which was of such a personal, intimate and sensitive nature, in which both Mr Sachs and Ms Baillie were named and in the absence of informed consent, did result in an infringement of their privacy in the programme as broadcast.
- 5.11 Ofcom then considered whether the infringement of privacy was warranted. Ofcom was not satisfied that there was any public interest in the broadcast of such personal, intimate and sensitive information and for this reason the infringement of privacy was therefore unwarranted. Ofcom noted from the BBC's representations that it accepted that this infringement of privacy was unwarranted. Further, the BBC admitted that the principles expressed in Section 8 of the Code were neither properly considered nor properly applied as regards this broadcast.
- 5.12 Accordingly Ofcom found that the broadcast of the material referring to Andrew Sachs and Georgina Baillie resulted in a failure by the BBC to observe the 'standard' relating to privacy reflected in Rule 8.1 of the Code and was therefore in breach of Rule 8.1 of the Code.

Russell Brand 25 October 2008

Harm and Offence

- 5.13 During *Russell Brand* of 25 October 2008, in an interview with the musician, Dizzee Rascal, Russell Brand referred to the previous week's show. He indicated that he had left a message on Andrew Sachs' answer phone and referred to the 'apology' that he had sung on that programme. Russell Brand asked for the recording of the 'apology' and later in the programme the sung 'apology' song was replayed in its entirety.
- 5.14 As described above under the discussion of the programme of 18 October 2008, this 'apology' described sexual acts that had purportedly taken place between Russell Brand and Georgina Baillie. It also purported to reveal highly personal and sensitive information about Georgina Baillie. In Ofcom's view, these remarks were offensive because they were being broadcast, as far as listeners were aware, without the consent of the individuals to whom they related and those individuals were not party to the recording. By replaying them on this occasion - in full knowledge of their content - the events to which

⁷ The Code explains in the Foreword to Section Eight (at page 36, October 2008 edition) that where consent is referred to it refers to "informed consent". Practice 7.3 of the Code outlines the steps required to ensure that any consent gained is "informed consent".

the apology related were trivialised resulting in unjustified offence being caused by humiliation and distress.

5.15 For these reasons Ofcom found this programme in breach of Rules 2.1 and 2.3:

Privacy

5.16 At the beginning of *Russell Brand* of 25 October 2008 Russell Brand referred to the previous week's programme (18 October 2008) and said:

"I'd like to take this opportunity to issue a personal, Russell Brand apology to Andrew Sachs the great comic actor who played Manuel for a message that Jonathan and I left on his answerphone but it was quite funny..."

5.17 Later, the 'apology' song that had been broadcast on the programme of 18 October 2008 was repeated in its entirety. This occurred during an interview with the musician, Dizze Rascal. As described above under the discussion of the programme of 18 October 2008, this 'apology' described sexual acts that had allegedly taken place between Russell Brand and Georgina Baillie.

5.18 Ofcom first considered whether Mr Sachs and Ms Baillie had a legitimate expectation of privacy in relation to the comments broadcast in this programme. It considered that all of these remarks were likely to be regarded as relating to matters of a highly personal, intimate and sensitive nature, including details of Ms Baillie's sex life. The comments were unambiguous and were disclosed in the context of a programme in which Ms Baillie and Mr Sachs were named and therefore clearly identifiable. In these circumstances Ofcom considered that Mr Sachs and Ms Baillie did have a legitimate expectation of privacy in relation to the broadcast of the remarks in this programme.

5.19 In light of the above, Ofcom then considered whether Mr Sachs and Ms Baillie's privacy was infringed in the broadcast. Ofcom took account of the requirement in Practice 8.6 that, where the broadcast of a programme would result in an infringement of privacy, consent should be obtained before the broadcast (unless otherwise warranted). Ofcom also noted the guidelines in Practice 7.3 of the Code regarding the obtaining of consent⁸.

5.20 Ofcom noted that the BBC admitted that the necessary informed consent was not obtained from either Mr Sachs or Ms Baillie.

5.21 In Ofcom's view the broadcast of this material which was of such a personal, intimate and sensitive nature, in which both Mr Sachs and Ms Baillie were named and in the absence of informed consent, did result in an infringement of privacy in this programme as broadcast.

5.22 Next Ofcom considered whether the infringement of privacy was warranted. Ofcom was not satisfied that there was any justification for the broadcast of such personal, intimate and sensitive information and the infringement of privacy was therefore unwarranted. Ofcom noted that in its representations the BBC accepted that this infringement of privacy was unwarranted. Further, the BBC had admitted that the principles expressed in Section 8 of the Code

⁸ See footnote 6 above

were neither properly considered nor properly applied as regards this broadcast.

- 5.23 Accordingly Ofcom found that the broadcast of the material referring to Andrew Sachs and Georgina Baillie in this programme also breached Rule 8.1 of the Code in that there was a failure to observe the 'standard' relating to unwarranted breaches of privacy.

6. Referral to the Content Sanctions Committee

- 6.1 Ofcom considered that, taking all the circumstances into account and, in particular, the serious and repeated nature of the breaches of Rules 2.1, 2.3 and 8.1 of the Code, the breaches should be considered for the imposition of a statutory sanction. This was mainly because of: the nature and number of offensive remarks made in *Russell Brand* on 18 and 25 October 2008 concerning Andrew Sachs and Georgina Baillie, the severity of the offence which resulted and of the BBC's failure to comply with the 'standard' concerning unwarranted infringements of privacy in this case, the BBC's own admissions with regard to the breaches, the multiple contraventions of the Code, and evidence that the BBC's compliance arrangements in this case had failed significantly in a number of respects.

- 6.2 Therefore, in accordance with Ofcom's outline procedures for consideration of statutory sanctions in content and content-related cases, the case was referred to the Committee. The BBC asked that this case be considered under the 'fast track' route provided for under these procedures.

7. The BBC's written representations on the possible imposition of a sanction

- 7.1 The BBC did not dispute that the Code breaches should be referred to the Committee. It did however raise certain issues which it said Ofcom should take into account when reaching a decision on an appropriate sanction. It said that when reaching its decision on the recommended penalty for the Code breaches, Ofcom should have attached more weight to two factors in particular.
- 7.2 First, in relation to assessing the offence to listeners, given the number of complaints was extremely low during the period immediately after the broadcast of 18 October 2008, the BBC stated that this amounted to evidence that the offence caused to listeners was very limited. This suggested the material in question did not go significantly beyond audience expectations for *Russell Brand*.
- 7.3 Second, noting the absence of a complaint to Ofcom by either Andrew Sachs or Georgina Baillie about an infringement of their privacy, the BBC said it was not aware of any precedent for Ofcom investigating a breach of standards regarding unwarranted infringement of privacy in the absence of a first party complaint. If such complaints had been made by Mr Sachs or Ms Baillie, they would have provided evidence of the gravity of the breaches in the eyes of the complainants (for example how serious they personally believed disclosure of sexual matters was). The BBC therefore argued that the level of

penalty should reflect the degree of uncertainty because of the absence of a first party complaint.

8. Decision to refer to the Committee

8.1 The Committee, having reviewed all the material relevant to the decision of the Ofcom Executive to refer the current breaches to the Committee, accepted that the breaches of the Code were sufficiently serious and repeated that they should be considered for sanction. Accordingly, the BBC was invited to attend a hearing before the Committee.

9. Sanctions Hearing

9.1 The Committee held a hearing to consider this case on 25 March 2009. At this meeting the BBC made oral representations before the Committee decided whether the breaches warranted the imposition of a statutory sanction, and if so, at what level. The BBC was represented by Mark Byford (Deputy Director General), Tim Davie (Director of Audio and Music), David Jordan (Director of Editorial Policy and Standards), Fraser Steel (Head of Editorial Complaints) and Nadia Banno (Lawyer, BBC Legal Department).

9.2 The BBC began by reiterating many of the points already made in correspondence to Ofcom. It said that what had occurred with these broadcasts was totally unacceptable. The programmes had revealed very serious failures on the part of senior managers at Radio 2 and demonstrated a very serious failure to adhere to compliance procedures. This had damaged the BBC and had let down its audience. These failures were all the more serious in light of previous assurances (given previously at hearings of the Committee) about the robust nature of compliance procedures in place provided to Ofcom by the BBC. At the same time, the BBC pointed out that it makes thousands of hours of programmes a year and whilst what had occurred in *Russell Brand* was unacceptable, it did not represent complacency in the organisation as a whole. It pointed to new procedures that had been implemented as a direct result of this case. These included independent spot audit checks on programmes to ensure compliance procedures were in place and being observed and new rules relating to the use of independent production companies by the BBC. It said that if it were broadcast now, *Russell Brand* would be on the High Risk Register within Audio and Music, which is monitored weekly by the Controller and the Director of Audio and Music.

9.3 The BBC was also questioned in detail about the content of the compliance form for *Russell Brand* of 18 October 2008 completed by the Producer. It acknowledged that there were numerous issues raised by it. For example the form confirmed there was "blasphemous" content in the programme that may offend, that there was sexual content that may offend and surreptitious recording, and that there was other potentially "dangerous" behaviour. Nonetheless the form stated that no prior approval of the Controller was required. The BBC said the fact that this programme had not been referred to a senior figure at the BBC was a fundamental failure.

9.4 The BBC also acknowledged, in response to questions, that the compliance form supplied lacked any reference to the most contentious material that had been broadcast. It said that this was more a reflection on the Producer's

judgment than on the compliance structure in place at the time. The producer believed he had obtained consent from Andrew Sachs for references to be made to Georgina Baillie in the context of this programme. The BBC also said that the Producer appeared to have been more concerned with the use of strong language in the programme and this had been reflected in the compliance form.

- 9.5 The BBC went on to describe the status of the Producer of *Russell Brand* on 18 and 25 October 2008. It explained that he was a BBC employee, seconded to Vanity Projects for two days a week to work on *Russell Brand*. On the remaining days he worked on other BBC programmes. In the case of *Russell Brand* it was the practice that the producer would refer some matters to a BBC Executive Producer and refer other matters to the Executive Producer at Vanity Projects. The BBC recognised that this led to an unacceptable conflict of interest and this was demonstrated by the fact that while the Producer had concerns about the programme, he felt he also had to put forward what Russell Brand and Jonathan Ross were keen to keep in the programme, so long as consent procedures were in place. But he had a conflict of interest in believing that he had to represent their views on this. The BBC pointed out that this conflict could not occur now as a result of recently introduced measures.
- 9.6 Discussion also took place about the Producer's apparent concerns, before recording the 18 October 2008 programme, about possible references to Georgina Baillie. Information supplied to Ofcom by the BBC for the purposes of this investigation revealed that the Producer had advised Russell Brand before the recording that it would not be a good idea to mention his association with Georgina Baillie. The Committee asked the BBC why this was not reflected in the paperwork. The BBC acknowledged that this was not reflected in the compliance form. The BBC acknowledged that this risk was not picked up after the recording of the programme of 18 October 2008 when it should have been. It said this demonstrated a critical failure in the existing compliance process. The BBC did point out however that the Producer's concern was mentioned in separate emails between the Producer and Radio 2.
- 9.7 The BBC also explained that the fact that in this case the Producer completed and submitted the compliance form to the BBC after transmission of the programme of 18 October 2008, demonstrated a complete misunderstanding of the purpose of the compliance form which was not merely "form-filling". The BBC said that its investigation had revealed that, while there were other instances of post transmission submission of compliance forms occurring, these were rare.
- 9.8 The BBC was also questioned about the divergence in opinion between the Controller of Radio 2 and the Radio 2 Head of Compliance about who was responsible at the network for listening to independently produced programmes before they were broadcast. It acknowledged that the confusion was clearly unacceptable. It said it had investigated other BBC networks, and other Radio 2 programmes. In all other cases the Executive responsible for listening to programmes was made clear. It said this situation had been rectified and there is now a clear protocol in place at Radio 2.
- 9.9 The BBC went on to describe the role of the Executive Producer at Vanity Projects. During the recording of the programme that was broadcast on 18

October 2008 the Executive Producer was not present in the studio gallery - although this was not always the case for *Russell Brand*. When asked whether the Executive Producer ever had a significant function in the production of the programme the BBC stated that the editorial support provided for *Russell Brand* was not sufficient. It said that for all programmes there should be a strong Executive Producer in place and also a senior BBC editorial figure. On this occasion the Executive Producer was not as fully engaged as would normally be expected and the senior BBC figure was the Head of Compliance at Radio 2 who did not listen to the programme. Therefore, while there was a theoretical model for compliance in place, it was not followed. The BBC concluded that the programmes should have been listened to by the Executive Producer and the BBC.

9.10 There followed a discussion on how *Russell Brand*, originally an in-house BBC production, had been outsourced in May 2008 to the independent production company, Vanity Projects. The BBC explained that the decision to outsource the programme was made by the then Controller of Radio 2 at a time when the Ofcom investigation into competitions and voting on BBC Radio was continuing and in the knowledge that *Russell Brand* was considered a high risk programme within the Radio 2 network (although this high risk nature was not documented in any formal sense). Under the terms of the BBC's agreement with Vanity Projects, the Executive Producer was required to sign the compliance form for the programme and was required to complete the BBC's Safeguarding Trust programme. In this case, the BBC was unsure whether the Executive Producer had ever signed the compliance form but to the best of its knowledge he had attended the Safeguarding Trust programme. When questioned as to whether the lapses revealed a systematic failure in the process, the BBC said its investigation did not show any evidence that similar compliance process lapses had occurred before.

9.11 The BBC also referred to assurances given at previous Committee hearings for example that no pre-recorded programmes would get on air without a compliance form. It said these assurances were given in good faith but were mistaken.

9.12 The BBC in closing said it would not present arguments on the level of sanction the Committee wished to impose. It stressed that it recognised this incident was unacceptable, had caused reputational damage and was significant. It also stated that it had since taken steps to ensure that such a breaches of the Code would not recur.

9.13 The BBC agreed to respond after the hearing to further questions from the Committee about the role of the Vanity Projects' Executive Producer. The Committee wished to be assured of the accuracy of the BBC's statement during the oral hearing that to the best of its knowledge the Executive Producer from Vanity Projects had attended its Safeguarding Trust programme as required by the production contract. The Committee asked the BBC to check this statement after the hearing. Two days later the BBC wrote to the Committee to say that: the Executive Producer at Vanity Projects did not complete the BBC Safeguarding Trust course; and had also received no specific training on the BBC's Editorial Guidelines (which incorporates and gives effect to the requirements of the Code). This was despite the terms of the production contract which made it clear that the programme needed to comply with the Guidelines.

10. Sanctions Decision

- 10.1 The Committee considered carefully the seriousness of the BBC's breaches of the Code and their repeated nature, and all the written and oral submissions provided by the broadcaster. The Committee decided, for the reasons set out below, to impose statutory sanctions on the BBC. In deciding on an appropriate and proportionate level of financial penalty in this case, the Committee had regard to Ofcom's Penalty Guidelines⁹.
- 10.2 In deciding this case, Ofcom recognises the paramount importance that is attached to freedom of expression in the broadcasting environment. In particular, broadcasters must be permitted to enjoy the creative freedom to explore issues and ideas without undue interference. Comedy in particular has a tradition of challenging and even deliberately flouting boundaries of taste. Whilst such programming must have room for innovation and creativity, it does not have unlimited licence. In these circumstances, it may be expected that individual performers and presenters may sometimes overstep the line. However, it is the responsibility of broadcasters operating in creative environments to have robust systems in place to ensure compliance with the Code and to apply them, and specifically in this case so that individuals and members of the public are provided adequate protection from offensive and harmful material and unwarranted infringements of privacy.

The seriousness of the breaches

- 10.3 Having considered all the evidence and the BBC's representations, the Committee found that the breaches of the Code in this case were serious. This was for the following reasons. The Committee considered the harm and offence breaches and the privacy breaches in turn.

Harm and Offence

Russell Brand, 18 and 25 October 2008

- 10.4 The Committee considered the breaches of Rules 2.1 and 2.3 were particularly serious because the references to Andrew Sachs and Georgina Baillie in the broadcast of 18 October 2008 became increasingly explicit, offensive and gratuitous as the programme progressed. This resulted in the material having a cumulative effect which resulted in it overall being exceptionally offensive, humiliating and demeaning. In the Committee's opinion, these remarks would be particularly offensive to listeners because they were being broadcast, as far as listeners were aware, apparently without the consent of the individuals to whom they related and those individuals were not party to the recording. All of this served to increase the degree and intensity of the offence.

⁹ Ofcom's Penalty Guidelines are available at: <http://www.ofcom.org.uk/about/account/pg/>. Section 392 of the Act requires Ofcom to prepare and publish a statement containing guidelines it proposes to follow in determining the amount of any penalties imposed by Ofcom, which Ofcom must have regard to in setting any penalty.

- 10.5 The programme contained sexual allusions to Georgina Baillie of a lewd and explicit nature, including references for example to "a swing", "condoms" and being "bent over a couch". Given the context of the discussion - a sexual relationship that Russell Brand had with Ms. Baillie - this would have increased the offence to listeners and the impression of the presenters humiliating the affected parties. This was especially the case as these remarks were made in a mocking fashion.
- 10.6 Further, Jonathan Ross's intervention in the first answerphone message on 18 October 2008 used the verb "fucked" in its most raw and unadulterated form in a particularly gratuitous manner. The seriousness of these breaches was compounded by the prolonged nature of the discussion about Georgina Baillie, and the manner in which Russell Brand and Jonathan Ross repeatedly returned to it throughout the two hour programme.
- 10.7 Russell Brand's 'apology' song on 18 October for the messages left on Andrew Sachs' answerphone also contributed to the seriousness of the contraventions. Its content was at times explicit and made further references to Andrew Sachs and Georgina Baillie's private life.
- 10.8 The seriousness of the breaches of 18 October 2008 was compounded by the broadcast of the programme on 25 October 2008, when Russell Brand referred to his earlier show. He alluded to the answerphone messages left for Andrew Sachs a week earlier, and to the 'apology' that he had sung on that previous programme, and later replayed the 'apology' song in its entirety. Through these remarks, and above all by replaying the 'apology', the broadcast of 25 October 2008 trivialised the 'apology', caused further serious offence to listeners and complainants, and compounded the humiliation and distress caused to Andrew Sachs and Ms Baillie.
- 10.9 The Committee also considered that the seriousness of these breaches was increased because *Russell Brand* of 18 October 2008 was pre-recorded. The production and compliance staff therefore had time to consider all the material in this programme before broadcast and amend or edit it as appropriate. *Russell Brand* of 25 October 2008 on the other hand was broadcast live. The Committee noted however that the 'apology' song to Andrew Sachs replayed in full in that programme a week after its original broadcast was of course a pre-recorded sequence. This meant that on both occasions the material which led to the offence was pre-recorded. The BBC therefore repeated it in full knowledge of its content and the decision to replay it in full appears to have been deliberate.
- 10.10 The Committee carefully considered the BBC's argument that the evidence of offence to listeners was very limited (see paragraph 7.2 above) but noted, at the same time, that the BBC acknowledged that the incidence of complaints is not the only measure of the offensiveness of material complained of. In any event, the Committee was mindful that Ofcom's statutory duty to ensure broadcasters apply generally accepted standards to radio programmes so as to provide adequate protection for members of the public in general from harmful and/or offensive material, does not involve any obligation to calculate the precise amount of offence actually caused. Any evidence however as to the degree of harm or offence likely to be caused may be a relevant factor.
- 10.11 As the BBC acknowledged at the hearing on 25 March 2009, the Committee is not required to take account of the number of complaints in deciding on any

particular case. The Committee may however - in assessing the seriousness of contraventions of Rules 2.1 and 2.3 in this case - legitimately have some regard to the unusually large number of complaints made to the BBC and Ofcom after media reports about the programmes. This is because they are evidence of widespread public concern about potentially offensive content in the programmes and that "generally accepted standards" were not applied in this case by the BBC. The Committee noted that in its statement of 30 October 2008, the BBC Trust itself had said it was "dismayed...that the offensive comments broadcast on the Russell Brand Show on 18 October fell so far short of audiences' legitimate expectations." Taking all this into account, the Committee considered it was appropriate to take some account of the large number of complaints made to Ofcom and the BBC concerning this case.

- 10.12 Finally, the Committee took care when considering the seriousness of the breaches of Rules 2.1 and 2.3 in this case, to distinguish between protection of individual members of the public from unwarranted infringements of their privacy, and protection of the public in general from the harm and offence which may arise from the infringements of the privacy of others (e.g. through humiliation, distress and/or violation of human dignity). In other words it took care to distinguish between the seriousness of the breaches of Rules 2.1 and 2.3, and the seriousness of the contraventions of Rule 8.1.

Privacy

Russell Brand, 18 and 25 October 2008

- 10.13 The Committee found that the failures by the BBC to observe the 'standards' relating to privacy in Rule 8.1 in the programmes were especially serious. In reaching this decision the Committee took account of: the BBC's own admission in its statement to Ofcom of the unwarranted infringements of privacy of both Andrew Sachs and Georgina Baillie in both broadcasts; and of the BBC Trust's assessment that the broadcast of the remarks about Mr Sachs and his granddaughter were "an unacceptable and deplorable intrusion into their private lives" and "fell far short of the standards the licence fee payer expects of the BBC"¹⁰.
- 10.14 The Committee found that the nature of the information disclosed in the programme of 18 October 2008 was highly personal, intimate and sensitive. The comments were unambiguous and were revealed in the context of a programme in which Mr Sachs and Ms Baillie were named and so clearly identifiable. These led to infringements of privacy of the most serious nature. It was clear to the Committee that there was no justification whatsoever for these gross breaches of privacy. The Committee also found that the 'apology' song broadcast in the 18 October programme compounded the unwarranted infringements of privacy caused by leaving the messages on Mr Sachs' answerphone and other remarks. The repetition of the 'apology' in the broadcast of 25 October 2008 in turn meant that the intimate information revealed on 18 October 2008 was revisited and the 'apology' trivialised, so that the seriousness of the earlier breaches of privacy was further exacerbated.

¹⁰ See BBC Trust Editorial Standards Findings Report, 21 November 2008 at <http://www.bbc.co.uk/bbctrust/>

- 10.15 The Committee found that the fact that the material was broadcast at all revealed significant breaches of the BBC's obligation to ensure that the standards regarding unwarranted infringements of privacy in programmes are applied to ensure adequate protection of members of the public from unwarranted infringements of privacy. In particular there was a failure on the BBC's part to obtain the informed consent of either Andrew Sachs or Georgina Baillie before either programme was broadcast.
- 10.16 The breaches in relation to the programme of 25 October 2008 were made more serious also in the Committee's view by the fact that Andrew Sachs had made an official complaint to the BBC (see paragraphs 4.10) two days earlier. A complaint was made by Andrew Sachs, via his agent, by e-mail on Thursday, 23 October 2008 to the Controller of Radio 2 about the programme of 18 October 2008. When no response was received, the agent converted the e-mail into a letter and posted it the next day, 24 October, to the BBC. On the same day a reporter from *The Mail on Sunday* rang the BBC and told a Radio 2 publicist that he understood Mr Sachs had complained to the BBC. The publicist contacted the Producer and the Radio 2 Head of Compliance, and then the Controller of Radio 2. All said they were unaware of a complaint from Andrew Sachs. The Controller did not see the e-mailed complaint from Mr Sachs until the evening of Sunday, 26 October 2008. The BBC was therefore notified by Mr Sachs of his concerns about breaches of his and Ms Baillie's privacy sufficiently in advance of *Russell Brand* of 25 October 2008 to have had a reasonable opportunity to consider and change the content of that programme.
- 10.17 Overall, the seriousness of the case as regards privacy was further aggravated in the Committee's view by the fact that this was not a case where the broadcaster had to reach a fine editorial judgment, balancing a number of competing factors such as the public interest and the privacy of the individuals concerned, before deciding whether to broadcast the material in question. It was clearly content which would, if broadcast without the informed consent of the parties affected, infringe the privacy of those individuals unwarrantably, given its broadcast could not be justified in the public interest. It was broadcast as a result of the conscious and deliberate decisions of a BBC presenter (and co-presenter, in the case of the programme of the 18 October 2008), and BBC editorial staff.
- 10.18 The Committee noted the BBC's arguments in relation to the lack of a complaint to Ofcom by either Andrew Sachs or Georgina Baillie (see paragraph 7.3 above). The BBC had also highlighted the subjective element in assessing the effect of an infringement of privacy on individuals and the lack of any direct Ofcom sanctions precedent (that is, a breach of Rule 8.1 in the absence of a first-party complaint which attracted a statutory sanction).
- 10.19 The Committee, while keen to exercise great care in deciding what form of penalty is suitable in this case for the contravention of Rule 8.1, noted that it has always been the case that a decision on an appropriate penalty for an unwarranted breach of privacy involves the Committee exercising its discretion. It also noted that the complaint to the BBC on behalf of Andrew Sachs was copied to Ofcom (see paragraph 4.10 above). The agent explained that this was done "in light of Ofcom's decision to investigate events surrounding" the programme of 18 October 2008. From this copy complaint the Committee noted that Mr Sachs objected to his treatment in the programmes and that he had been "upset" by it but had understood the

producer to say that the material would be edited. As a result, while the Committee did not have the benefit of specific representations, it had a complaint directly copied to Ofcom from Mr Sachs on behalf of himself and his family, which set out his views on *Russell Brand* broadcast on 18 October 2008.

Inadequate Compliance Procedures

10.20 The Committee considered that one of the most serious aspects of this case were the systemic flaws in the BBC's compliance systems, which in turn permitted particular and flagrant compliance failures to occur in October 2008.

10.21 At the oral hearing before the Committee, the BBC admitted what it called "three very clear failures in this whole sorry incident". These were: failures of editorial control; failures of editorial judgment; and failures of compliance systems. The detailed evidence before the Committee suggested there were also no fewer than six flaws within the Radio 2 compliance systems for *Russell Brand*. These were:

- a lack of clarity about the exact role of someone who was a senior figure at the agency that represents Russell Brand, acting as the Executive Producer of the programmes of 18 and 25 October 2008 on behalf of the independent production company;
- the failure of the Executive Producer to attend a BBC Safeguarding Trust compliance course, despite this being a condition of the production contract;
- in respect of the compliance forms for 18 and 25 October 2008 the Executive Producer did not fulfil another condition of the production contract, which was that he would sign off compliance forms for *Russell Brand*, and it was not known whether he signed off previous forms.
- no proactive testing and insufficient monitoring of the compliance systems in BBC Radio in general, and in particular relating to *Russell Brand* after the series became an independent production from May 2008;
- an unacceptable conflict of interest for the Producer in day-to-day charge of the series when he was seconded from the BBC on a part-time basis to the independent production company making *Russell Brand*; and
- a lack of clarity about who at the BBC had "hands-on" editorial oversight of the series.

10.22 This list of weaknesses is all the more extraordinary considering that the senior management of BBC Radio always regarded *Russell Brand* as a 'high risk' series and because of the clear assurances given in the summer of 2008 by the BBC to Ofcom about: the improvements that had already been made to compliance in BBC Television and Radio; the resulting high level of compliance in the BBC Audio & Music division at the time; and, further improvements that were planned. These assurances were given in the context of a series of Ofcom statutory sanctions cases against the BBC for mishandling voting and competition entries.

10.23 Specifically, on 17 June 2008, the BBC appeared before the Committee at a hearing in relation to a statutory sanction to be imposed on the BBC for an unfair phone-in competition run on *Russell Brand* on BBC 6 Music. At that hearing the following assurances for example were given to the Committee:

- Lesley Douglas, then the BBC's Controller of Popular Music, stated that compliance at Radio 2 was "very, very, very high" and that systems had been put in place "that would make sure that anyone who naively or wilfully wanted to, or did break the rules, that we would capture it before it affected the audience at all"; and
- the BBC Deputy Director-General, Mark Byford, said that "the [compliance] paperwork [for BBC Radio] has always been absolutely there".

10.24 The Committee published its sanction decision in the *Russell Brand*/BBC 6 Music case¹¹, and seven others concerning competitions and voting in BBC television and radio services, on 30 July 2008.¹² Many of these decisions summarised the steps taken by the BBC to investigate, seek to address Code breaches and its assurances about preventing the recurrence of the same or similar compliance failures in future. In the Committee's view, these decisions in effect put the BBC, and BBC Radio in particular, on notice to ensure improved compliance with the Code.

10.25 The evidence in this case however suggested that the necessary improvements were not implemented quickly or effectively. The BBC admitted that *Russell Brand* was regarded by Radio 2 management as "a significant risk" before October 2008. Nonetheless, the BBC acknowledged that before October 2008 it was not proactively conducting regular audits and spot checks to ensure that compliance was working effectively at Radio 2 and on *Russell Brand* in particular following Ofcom's sanctions decisions of 30 July 2008. In this case the internal compliance mechanisms put in place were applied carelessly and were therefore ineffective, and there were no procedures in place to verify that these were being followed appropriately.

10.26 Further, the risk for the BBC of breaching the Code was increased by the compliance arrangements entered into in May 2008 when the BBC agreed that *Russell Brand* should no longer be made in house but by an independent production company, Vanity Projects, which Russell Brand partly owns. The Programme Production Agreement named as Executive Producer (who should have provided some element of editorial oversight) an individual who was a senior figure at the agency that represents Russell Brand and also part of Vanity Projects. Whilst the contract required the Executive Producer to complete the BBC's Safeguarding Trust course, he did not do so. Another term of the Agreement obliged him to complete the BBC compliance forms for *Russell Brand*. He did not do so for the programmes of 18 and 25 October 2008. The Committee noted that the Deputy Director-General of the BBC told the Committee at the oral hearing that he had been unable to speak to the Executive Producer during the time when he was drawing up the management's report to the BBC Trust on the incident, and that he had not spoken to him subsequently.

¹¹ http://www.ofcom.org.uk/tv/obb/ocsc_adjud/bbcjuly08/brand.pdf

¹² http://www.ofcom.org.uk/tv/obb/ocsc_adjud/bbcjuly08/

- 10.27 As the BBC confirmed, in practice editorial management of the programme on a week-to-week basis lay with the Producer. In October 2008 the Producer was a BBC employee provided to Vanity Projects for two days a week to make *Russell Brand* (he worked the other three days at the BBC). This producer only started work on *Russell Brand* in September 2008 and as the BBC admitted "was relatively inexperienced to take sole charge of a talented but challenging performer [Russell Brand]." These compliance arrangements therefore led to an acute conflict of interest for the Producer – his contract required him to comply with instructions from Vanity Projects but his managers at Radio 2 placed undue reliance on him to fulfil the BBC's editorial duties.
- 10.28 Creative risk is part of the BBC's public service role but so is risk management. However, as has just been explained, when the BBC decided to turn the series into an independent production made by a company which Russell Brand partly owns, three significant decisions were made which impacted on the careful balance that needs to be struck between creative risk and risk management. One was that the Executive Producer was a senior figure at the agency that represents Russell Brand. The second was that the BBC would not appoint its own Executive Producer or similar senior editorial figure to oversee the series. The third was that the Producer who actually oversaw the programme on a day-to-day basis would be loaned by the BBC to work for Vanity Projects. Therefore, although the greatest compliance risk in the series lay in what Russell Brand would say on the air, part of the risk management had effectively been ceded to those working for him. It would appear that the interests of the presenter had been given greater priority than the BBC's risk management systems.
- 10.29 These significant weaknesses in the BBC's overall compliance arrangements for *Russell Brand* set the scene for the particular failures of compliance in this case, which were numerous and serious. The most flagrant examples which struck the Committee were:
- the failure to obtain the informed consent of Andrew Sachs or Georgina Baillie before either the broadcast of 18 or 25 October 2008; the Committee noted that while some attempt was made by the BBC to contact Andrew Sachs, none was made at all by the BBC to contact Georgina Baillie;
 - the failure of the BBC to recognise that, by formally 'loaning' the producer of *Russell Brand* to the independent production company Vanity Projects that made the programme, the producer would be exposed to an acute conflict of interest;
 - the failure of any senior manager at Radio 2 to listen to the programme of 18 October 2008 in its entirety before broadcast, despite a clear expectation within the BBC that this would happen;
 - the failure to complete and submit the compliance forms for *Russell Brand* before broadcast on 18 October 2008 as required by the compliance procedures. The form was not in fact submitted until Tuesday, 21 October 2008. Moreover, the Committee noted that while the form contained numerous references to offensive language, surreptitious recording, sexual content and other indications that the programme could cause

compliance difficulties, it failed to identify the harm and offence and unwarranted breaches of privacy being discussed here. The only reference to the series of lewd messages left for Andrew Sachs was in response to the question "Does the programme contain any surreptitious recording?" and stated "Recording of messages left on Andrew Sachs' answerphone. This was cleared with Andrew Sachs with the producer [sic]."

The effect of these failures was compounded by the Controller of Radio 2 not picking up the e-mailed complaint of Andrew Sachs dated Thursday, 23 October 2008 until the day after the programme of 25 October was broadcast, so that action was not taken sooner in response.

Repeated

10.30 The Sanctions Procedures make clear that a repeated breach of the Code includes repetition of the same or similar conduct as that which earlier contravened the Code, and breaches of different Rules of the Code. In this case, the BBC breached Rules 2.1, 2.3 and 8.1 of the Code as regards *Russell Brand* on both 18 and 25 October 2008. The BBC therefore repeatedly contravened the Code.

Precedent

10.31 As regards previous sanctions cases which could be considered as precedents, the Committee noted that there were no direct equivalents. The Committee did however find of assistance the decision in *Kiss FM Radio Limited/ Kiss FM*¹³. This was published on 20 June 2006.

10.32 The *Kiss FM* case involved a very serious breach of the fairness and privacy rules and a series of contraventions of the standards rules on harm and offence. It therefore had certain parallels with the current case. The fairness and privacy breach related to a prank phone call transmitted live. An innocent member of the public had inadvertently left his phone number on the voicemail of a *Kiss FM* presenter, believing it to be that of Human Resources (HR) officer of a prospective employer. The presenter then telephoned the member of the public, posing as the HR officer, and made a series of very disparaging and distressing comments to him about his employment prospects. The financial penalty imposed for this fairness and privacy breach was £75,000 – the first and only time so far that Ofcom has levied a fine (in part) for a breach of the privacy Rules in the Code. The Committee also considered in *Kiss FM* a series of breaches of the standards rules relating to offensive language and sexual content. The penalty imposed for these breaches was £100,000. However the Committee noted that in *Kiss FM* this penalty was imposed for offensive language and sexual content at breakfast time, and therefore one reason for the level of fine was to reflect the need to protect the under eighteens – a factor not present in the current case. The Committee also noted that the level of fine was an aggregate amount for multiple breaches that occurred over a six month period. In the Committee's view, the breaches of Rules 2.1 and 2.3 in the present case were less serious than in *Kiss FM*.

¹³ http://www.ofcom.org.uk/tv/obb/ocsc_adjud/kiss100.pdf

- 10.33 Regarding privacy, the BBC argued that the extent to which the Committee could rely on *Kiss FM* was "very limited" because the fine in *Kiss FM* covered both fairness and privacy, and in *Kiss FM* the Committee was able to take account of the complainant's own representations.
- 10.34 The Committee found that the privacy breaches in this case are more serious than previous privacy breaches it has recorded (including for *Kiss FM*). It found that based on all the evidence and arguments set out in this adjudication, the breaches of the privacy 'standard' are especially serious in this case in particular because: the whole programme of 18 October 2008 was pre-recorded; the breaches did not involve fine editorial judgement; the BBC failed to apply its existing compliance procedures effectively and the contraventions were repeated despite previous assurances to Ofcom. Specifically relating to *Kiss FM*, the breaches in *Russell Brand* as the infringements of privacy involved two individuals and occurred in two programmes. Moreover the *Kiss FM* programme was live on air whereas *Russell Brand* of 18 October 2008 was pre-recorded as was the sung 'apology' that was subsequently broadcast in the 25 October programme.
- 10.35 The Committee also noted the BBC's own admissions and the findings of the BBC Trust about the unwarranted and unacceptable breaches of privacy in this case.
- 10.36 In the circumstances of this case, the Committee did not have the advantage of direct representations from a first-party complainant. It did however have significant and sufficient evidence and information to reach a considered view that a financial penalty was appropriate in the unprecedented and exceptional circumstances of this particular case, and at what level it should be set. This evidence included a complaint to the BBC from Andrew Sachs, copied to Ofcom in connection with its own investigation (see paragraph 4.10).
- 10.37 In the light of precedents, therefore the Committee found that the breaches in the current case are serious enough and repeated so as to warrant consideration of a statutory sanction. They are also sufficiently serious and repeated to merit a significant financial penalty. This applies to the breaches both of Rules 2.1 and 2.3 (harm and offence), and of Rule 8.1 (privacy).

Incentive

- 10.38 In accordance with Ofcom's Penalty Guidelines, any statutory sanction imposed – whether a financial penalty alone or coupled with another form of sanction - should be sufficient in all the circumstances to act as an effective incentive to ensure future compliance by the BBC. In this respect, the Committee noted the assurances given by the BBC to Ofcom in the summer of 2008 about improved compliance which were not effectively implemented before October 2008. The sanction in the current case must be substantial enough to ensure the BBC continues its efforts to make its compliance with the Code appropriately robust, and to act as an incentive to other broadcasters.

Other specific criteria

- 10.39 The Committee then considered whether there were any specific criteria it should take into account in deciding on a suitable level of financial penalty. It

considered the following should be taken into account equally regarding breaches of both Rules 2.1 and 2.3, and Rule 8.1 (except where indicated):

- the degree of severity of the breaches of Rule 8.1 (privacy) and the degree of offence caused by the breaches of Rules 2.1 and 2.3 were in the opinion of the Committee significant (see paragraphs 10.13-10.17 and 10.4-10.11);
- the BBC is Britain's largest Public Service Broadcaster with a large and secure income; but the maximum financial penalty Ofcom can impose is £250,000 on any one occasion;
- there has been no financial penalty imposed by any other body in this case;
- the contraventions of the Code occurred throughout, and cumulatively in, *Russell Brand* on 18 October 2008 lasting two hours and were repeated in *Russell Brand* 25 October 2008;
- the reputation of the BBC as a trusted public service broadcaster would have materially increased the audience expectation that *Russell Brand* broadcast on Radio 2 – the UK's most listened to radio station and a long-established BBC radio service - would have observed generally accepted standards as regards offensive material and the need to avoid unwarranted infringements of privacy; and
- while regular listeners to *Russell Brand* expected a high degree of sexual content, as stated by the BBC Trust itself "the offensive comments broadcast on the Russell Brand Show on 18 October fell so far short of audiences' legitimate expectations."

10.40 In conclusion, the Committee found that it would be both appropriate and proportionate to impose a significant financial penalty for the Section Two and Section Eight Code breaches that occurred in *Russell Brand* of 18 and 25 October 2008.

Factors tending to increase the level of penalty

10.41 The Committee then considered whether any of the factors set out in the Penalty Guidelines (or any other relevant factors) aggravated or tended to increase the level of any financial penalty it might impose.

10.42 The Committee took account of the following facts as aggravating factors, equally applicable to both breaches of Rules 2.1 and 2.3, and of Rule 8.1:

- the breaches of 25 October 2008 occurred after the BBC had received a complaint by Andrew Sachs on 23 October 2008;
- senior management responsible for BBC Radio 2 ought to have known that breaches of the Code were likely to occur when compliance procedures were so lax that (as in this case) staff did not seek to apply them appropriately;
- the extent of the failures to apply compliance systems in general; and

- Radio 2 had ample time to ensure robust compliance because the programme of 18 October 2008 was wholly pre-recorded 3 days in advance, which is unusual in radio on predominantly music stations. The Committee regarded the failure of the BBC to use this opportunity properly to weigh and consider the content of the programme as a significant aggravating factor.

Factors tending to decrease the level of penalty

10.43 The Committee then considered whether any of the factors set out in the Penalty Guidelines (or any other relevant factors) in its view might limit or decrease the level of any financial penalty it might impose.

10.44 The Committee took account of the following facts as mitigating factors equally applicable to the breaches of Rules 2.1 and 2.3 as to the breaches of Rule 8.1:

- once alerted to the compliance problems in this case, the most senior management at the BBC acted swiftly to mitigate the offence and damage caused: Russell Brand resigned from his programme and *Russell Brand* is no longer broadcast; the Controller of Radio 2 and the Radio 2 Head of Compliance also resigned in the wake of these broadcasts; the BBC at an early stage apologized publicly and on air for the broadcasts and admitted that the case involved a failure of editorial judgment and a failure in compliance systems; the BBC suspended Jonathan Ross from all of its broadcasts for a period of three months; and the presenter apologized to viewers upon his return to air;
- the BBC has outlined a series of additional actions it has taken in the wake of these broadcasts to improve compliance. These include new guidance on compliance for pre-recorded programmes, recruitment of a new full-time Head of Editorial Standards for Audio and Music, and new procedures to improve compliance with regard to content made by talent-owned independent productions companies; and
- the BBC has cooperated with Ofcom's investigation.

Conclusion

10.45 The Committee is of the view that these breaches of the Code constitute a significant failure by a long-established public service broadcaster to observe generally accepted standards relating to harm and offence and unwarranted infringements of privacy.

10.46 The Committee is very concerned by the failure or ineffectiveness of the BBC's compliance, risk management and management procedures and the impact this has had in this case. Its concern is heightened by the fact that these failures occurred despite previous assurances to Ofcom by the BBC that procedures had been introduced to prevent similar failures recurring.

10.47 The Committee noted that the BBC had promptly and publicly apologised for the breaches that had occurred. The Committee further noted that the BBC Trust had already directed the BBC to broadcast apologies on Radio 2 in

relation to this case. However, the Committee took into account that the BBC's significant and numerous compliance failures in this case had resulted in breaches of Rules 2.1, 2.3 and of 8.1 of the Code that were serious and repeated. It also had regard to the difference in purpose of an apology to the audience for breaches of the broadcaster's own Editorial Guidelines, and a broadcast statement informing the audience of serious breaches of Ofcom's Code, and Ofcom's resulting imposition of statutory sanctions. In the circumstances, the Committee was of the view that it was appropriate and proportionate for the Committee to direct the BBC to broadcast a statement of Ofcom's findings in relation to this case on Radio 2, in addition to the apologies already required by the BBC Trust. Such a statement would alert listeners to Ofcom's decision in this case and the BBC's repeated failure to comply with the Code.

- 10.48 While recognising that any fine would be taken from monies paid by the public (the licence fee payer), the Committee noted that Parliament had decided that it was appropriate in certain circumstances for Ofcom to impose a financial penalty on the BBC (though at a lower threshold to other public service broadcasters, i.e. set at a maximum of £250,000 on any occasion). In all the circumstances of this case and for the reasons already stated, the Committee also concluded that a financial penalty is appropriate and proportionate in this case.
- 10.49 In a manner similar to the *Kiss FM* case referred to above, in the interest of Ofcom's general duty to act transparently, the Committee determined to apportion the financial penalty between the privacy breaches and the breaches of the harm and offence rules.
- 10.50 The decision as to the level of fine is based on the Committee's belief that in this case overall the contraventions of the privacy 'standard' set out in Rule 8.1 are more serious than the contraventions of Rules 2.1 and 2.3. The core of the complainants' concerns was that intimate and confidential information about certain individuals was broadcast apparently without their consent – in other words that the privacy of Andrew Sachs and Georgina Baillie was unwarrantably and seriously infringed. There was a clear failure on the BBC's part to adhere to principles and observe standards set out in the Communications Act 2003 and the Code, designed to protect members of the public from unwarranted infringements of privacy. This was demonstrated by the BBC making no proper attempt to obtain informed consent from Mr Sachs, nor making any attempt to contact Ms Baillie for her consent, before broadcast of the programmes. It was the seriousness of these breaches in respect of privacy in what were exceptional circumstances, that led Ofcom to record breaches of Rule 8.1 in the absence of a formal complaint direct to Ofcom from the individuals affected. These infringements of privacy to a great extent contributed, and are linked, to the breaches of generally accepted standards of harm and offence.
- 10.51 Whilst welcoming the assurances given by the BBC about improving compliance (see paragraphs 9.2 and 10.44), Ofcom expects BBC management to ensure they are fulfilled more effectively and quickly than certain previous assurances about compliance made to the Committee in the summer of 2008 (see paragraphs 10.22-10.25 above).
- 10.52 Having considered the relevant facts as outlined above and all the representations made by the BBC, the Committee decided to impose a

financial penalty on the BBC of: **£80,000** (payable to HM Paymaster General) for its failure to observe the privacy 'standard' which caused breaches of Rule 8.1 of the Code; and **£70,000** (payable to HM Paymaster General) in respect of the breaches of Rules 2.1 and 2.3 of the Code (harm and offence). It considered this to be a proportionate and appropriate penalty in all the circumstances. In addition, the Committee directed the BBC to **broadcast a statement of Ofcom's findings** in relation to this case on Radio 2, on a specified occasion, at a time or times, and in a form to be determined by Ofcom.

Content Sanctions Committee

Philip Graf
Kath Worrall
Stewart Purvis

3 April 2009

The Chris Moyles Show

Radio 1; 21 October 2008, 08:00

Introduction

The Chris Moyles Show is a weekday show on Radio 1 featuring music and light hearted discussion and celebrity interviews. Ofcom received a complaint about an interview with Russell Brand on this edition of the programme. During the interview Russell Brand referred to an incident on his own programme on Radio 2, broadcast on 18 October 2008, in which he and his guest Jonathan Ross had left messages on Andrew Sachs' answerphone (see attached adjudication of the Content Sanctions Committee on *Russell Brand* on Radio 2). Russell Brand stated:

"...I phoned up Andrew Sachs to apologise for a matter live on radio and Jonathan Ross blurted out an expletive regarding Andrew Sachs' granddaughter who I'd in inverted commas, recently "met". [laughs] I "met" her brains out."

Ofcom did not receive any direct complaint from either Andrew Sachs or his granddaughter about the infringement of their privacy in this broadcast. However under its general duties and powers, and in order to satisfy itself that it was meeting its statutory obligation to secure the application of standards with respect to privacy, Ofcom asked the BBC to comment on the programme in light of the Code provisions on privacy – in particular Rule 8.1 (any infringement of privacy in programmes must be warranted).

Response

While questioning Ofcom's jurisdiction to carry out a privacy investigation into the programme in the absence of a complaint from either Andrew Sachs or his granddaughter, the BBC directed Ofcom to the finding on the material published by the BBC Trust's Editorial Standards Committee.¹ The BBC said that this report indicated that, insofar as issues in relation to section 8 of the Code fell to be considered, they were not given due consideration in this programme. However the BBC asked Ofcom to take into account the fact that Ms Baillie was not named in the programme, the reference was not explicit, and *The Chris Moyles Show* production team was unaware of the content of *The Russell Brand Show* of 18 October 2008.

Decision

Ofcom considered that the comments complained about were likely to be regarded as relating to matters of a highly personal, intimate and sensitive nature, including details of the sex life of Andrew Sachs' granddaughter, Georgina Baillie. The comments were disclosed in the context of a programme in which Mr Sachs was identified and Ms Baillie was likely to be identifiable. In these circumstances Ofcom considered that Mr Sachs and Ms Baillie did have a legitimate expectation of privacy in relation to the broadcast of the remarks in this programme. Ofcom then considered whether Mr Sachs' and Ms Baillie's privacy was infringed in the broadcast. It took account of the requirement in Practice 8.6 of the Code that, where the broadcast of a programme would result in an infringement of privacy, consent should be obtained before the broadcast (unless otherwise warranted). Ofcom also noted the guidelines

¹ The finding is available at <http://www.bbc.co.uk/bbctrust/>

in Practice 7.3 of the Code regarding the obtaining of consent and the fact that the BBC had publicly, and in correspondence with Ofcom, acknowledged that the references to Ms Baillie's private life in this broadcast were without consent.

Ofcom concluded that the broadcast of this material which was of a personal, intimate and sensitive nature, in which both Mr Sachs and Ms Baillie were identifiable and in the absence of informed consent, did result in an infringement of privacy in the programme as broadcast.

Ofcom then considered whether the infringement of privacy was warranted. It was not satisfied that there was any public interest in the broadcast of such personal, intimate and sensitive information and the infringement of privacy was therefore unwarranted.

Under the Communications Act 2003 (the "Act"), Ofcom has a general duty requiring it to secure that 'standards' are applied to television and radio which provide adequate protection to members of the public and all other persons from unwarranted infringements of privacy. Ofcom considered all the evidence in light of this duty notwithstanding that there was no complaint to Ofcom in relation to this material by the persons directly affected. Ofcom decided that Russell Brand's comments in this programme breached the privacy 'standard' in Rule 8.1 of the Code having taken into account: the BBC's responses; the overall nature of this case and the serious issues it raised; the decision of the BBC Trust that there was an unwarranted infringement of privacy in this case "without editorial justification"; and, that the BBC has admitted this infringement. In the exceptional circumstances of this case, Ofcom has therefore recorded a breach of Rule 8.1.

In view of the BBC's right to freedom of expression and the need for Ofcom to exercise its regulatory powers in a proportionate manner, however, Ofcom did not believe that this breach of Rule 8.1 of the Code was sufficiently serious to warrant consideration of a statutory sanction.

Breach of Rule 8.1