

*Championing
excellence and diversity
in broadcasting*

Founded in 1983 by Jocelyn Hay CBE



The Old Rectory Business Centre
Springhead Road, Northfleet
Kent, DA11 8HN
Tel: 01474 338716
email: info@vlv.org.uk
VLV: www.vlv.org.uk

VLV RESPONSE TO OFCOM CONSULTATION

Statements of Programme Policy and Statements of Media Content Policy guidance

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INFORMATION ABOUT THE VLV

The Voice of the Listener & Viewer (VLV) is an independent, not for profit membership-based charity, free from political and sectarian affiliations. VLV supports high quality broadcasting which maintains the democratic and cultural traditions of the UK. We support the independence and integrity of the BBC and encourage work which demonstrates commitment to the principles of Public Service Broadcasting (PSB). VLV is a charitable company limited by guarantee (registered in England and Wales No 4407712 - Charity No 1152136).

Background

1. The UK's PSBs are facing challenging competition for viewers and production resources from American streaming services that have either enormous global subscriber bases (Netflix) or parent companies with enormous financial resources available to subsidise their growth (Apple, Amazon). In both cases, the result is these streaming services have large content budgets available to invest in programming. This is driving rampant inflation in the cost of making programmes, particularly in the most popular and prestigious genres like premium scripted drama.

2. One response of the UK PSBs to this challenge, given funding constraints imposed by government (repeated licence fee freezes) and by reliance on advertising revenue (amidst the decline of linear TV viewing), is to reroute spending from other PSB content genres to the most popular genres, where cost inflation is especially rapid, in order to try and maintain some ability to compete for viewers with the streaming services. The result is cuts that erode PSB programme making even in genres where cost inflation is less rapid, ultimately eroding the quality and appeal for the viewer of programmes made in these genres. In the long term, there is a clear risk that provision in some of the classic PSB genres – genres that meet important social, cultural and civic needs – may wither away.

3. VLV was one of a number of voices during pre-legislative scrutiny of the Media Bill that objected to the Bill's further erosion and dilution of the overall PSB remit. Specifically, we objected to the replacement of the previous, detailed definition of the PSB remit set out in section 264 of the Communications Act 2003 with a new, much vaguer and less specific definition which eliminated mention of the following specific PSB genres and functions:

- that cultural activity is specifically 'supported' and 'stimulated' by PSBs' representation of drama, comedy, music, film and the treatment of other visual and performing arts – clause 264(6)(b)
- 'a wide range of different sporting and other leisure interests' – clause 264(6)(d)
- 'educational matters' – clause 264(6)(e)
- Science – clause 264(6)(f)
- Social issues – clause 264(6)(f)
- Matters of international significance – clause 264(6)(f)
- Religion and other beliefs – clause 264(6)(f)

As well as the abandonment of specific requirements for PSB programming:

- 'dealing with a wide range of subject matters' – clause 264(4)(a)
- 'properly balanced, as far as their nature and subject matters are concerned' – clause 264(4)(c)
- 'maintain high general standards' with respect to quality of programme making and professional skill and editorial integrity – clauses 264(4)(d)(ii) and (iii)¹

¹ Communications Act 2003, section 264. <https://www.legislation.gov.uk/ukpga/2003/21/section/264>

4. It should be noted that, though more detailed than the new PSB remit, the 2003 Act's move away from programming quotas for specific PSB genres enabled a major fall in production in those genres, particularly by the commercial PSBs.

5. Despite these objections, the provisions in question became law in the Media Act 2024, for the implementation of which Ofcom is now responsible. Since they are vague, much now hangs on how Ofcom chooses to interpret the provisions of the Act that define the overall PSB remit – for example, the definition of what constitutes an “appropriate range of genres” – and on how robustly it enforces the remit.

Response to consultation question 1: Do you have any comments on our approach and draft guidance?

6. Ofcom's draft guidance on Statements of Programming Policy (SoPPs) and Statements of Media Content Policy (SMCPs) acknowledges that these documents are important means of providing “transparency and accountability about the delivery of PSBs' regulatory obligations,”² providing information allowing Ofcom (a) to judge how the licensed PSBs are delivering against their individual remits and contributing towards the overall PSB remit, as well as how Channel 4 Television Corporation (C4C) is delivering on its media content duties, and (b) to enable and maintain designation of their TV apps.

7. However, there are potentially three levels at which Ofcom's regulation of the PSBs for the delivery of these obligations could run into problems:

- a. Some of the aspects of the overall PSB remit set out in the Media Act 2024 are critically vague, making it easier for the PSBs to reduce their PSB programming while remaining technically able to claim they are fulfilling their requirements. Some of these problems are inherent in the design of the overall PSB remit.
- b. Ofcom's guidance could fail to eliminate areas of vagueness and uncertainty by interpreting and defining clearly what the terms of the legislation concretely require
- c. The PSBs' reporting of their performance and plans in SoPPs and SMCPs could be too vague, unspecific and unsupported by evidence.

We now address each of these issues in turn.

Problems with the Media Act

8. The first problem is that the overall PSB remit set out in the Media Act contains some areas of critical vagueness which, in order to make the remit clear and enforceable, Ofcom must address in its guidance for the broadcasters.

9. The Media Act only requires that each PSB make an ‘adequate contribution’ to the collective fulfilment of the overall PSB remit. There are three problems with this approach:

- a. In the event that the overall PSB remit is not fulfilled, it is unclear how it is to be decided which individual PSB or PSBs are responsible for this failure, and therefore how responsibility will be attributed for plugging the gap.

VLV, “VLV response to DCMS Select Committee call for evidence: pre-legislative scrutiny of the draft Media Bill”, March 2023, p. 7-8. <https://vlv.org.uk/wp-content/uploads/VLV-Response-to-DCMS-Media-Bill-inquiry-May-2023-final-1.pdf>

² Draft guidance, p. 3, paragraph 1.2

- b. The requirement that the overall remit only needs to be fulfilled 'collectively' in effect permits individual PSBs to abandon making programmes of certain kinds necessary to the overall fulfilment of the PSB remit, so long as other PSBs continue to provide programming of this kind. The result is that, over time, rather than more than one PSB providing this type of programming, and the viewer being afforded the possibility of choosing between a range of options, the viewer's options are reduced to output from one PSB, eliminating choice and competition, and potentially producing long term stagnation and declining quality. The BBC's extensive PSB remit is likely to leave it the last provider of certain kinds of PSB programming, with the licensed PSBs in effect excused from providing those kinds of programming, and able to cut their contribution in that area, on the basis that the BBC alone will still provide enough.
- c. As Ofcom notes in its guidance, the term 'adequate contribution' is not defined in the legislation.³ In effect, Parliament has (improperly in our view) given Ofcom the job of deciding what constitutes an 'adequate contribution' to the overall PSB remit by each PSB.

10. As explained above, the Media Act replaces specific requirements for provision of programmes in a number of defined PSB genres with a general, vague requirement for programming in an "appropriate range of genres". This presents interpretive difficulties:

- a. Here too, Parliament has (again, improperly in our view) given Ofcom the job of deciding what constitutes an 'appropriate range of genres' of content to meet the main purposes for PSB set out in the legislation: civic (i.e. news and current affairs), cultural – conceived as information, education and entertainment – and the specific education of children and young people.
- b. In eliminating the previous list of PSB genres and replacing it with the requirement for an "appropriate range", Parliament has effectively indicated an intention that some of the previously listed genres be eliminated from the new 'appropriate range', but without indicating which, and in effect leaving this up to Ofcom and the broadcasters to decide between them.
- c. The danger here is that, in practice, an 'appropriate range' is defined as the range that, collectively, the broadcasters deem it practical for them to provide. But if this is the case, then there is in practice no space for Ofcom to deem the range of genres provided inadequate and no possibility of it requiring the PSBs to expand the range of genres they provide. In short, no real requirement for a range of PSB genres at all. The result would be to reduce the genre requirements made of the PSBs to a residuum of those instances – either in the overall PSB remit, individual remits, or C4C's media content duties – where specific genres continue to be mentioned.
- d. As with the problem of assigning responsibility for filling gaps in the fulfilment of the overall PSB remit, the question again arises, if there are PSB genres necessary for what Ofcom deems an 'appropriate range' that the PSBs are not collectively providing, how will responsibility for producing content in these unprovided genres be assigned? The risk is that they are automatically assigned to the BBC, as the publicly funded broadcaster. Clearly this creates a dangerous incentive for other PSBs to abandon production of content in more unprofitable PSB genres, in the expectation the BBC will be required to pick up the slack.

Ofcom's draft guidance for the PSBs

11. Despite these problems with the wording of the Media Act, Ofcom's draft guidance to the broadcasters on how to demonstrate they are contributing to the overall PSB remit could go some way to providing the kind of clarity and specificity necessary to ensure the PSBs can be properly held to account for the adequacy of their individual contributions. It is therefore crucial that Ofcom's final guidance is as clear and specific as possible.

³ Draft guidance, p. 6, paragraph 2.13 (b)

12. In respect of the definition of an ‘adequate contribution’ to the overall PSB remit, Ofcom’s draft guidance notes that the term is not defined in legislation. It goes on to say that “what might be adequate for one PSB may not be adequate for another” and that different factors may be relevant in its determination as to whether a PSB has made an adequate contribution, including: “the requirements of its own remit” and “the respective size and intended audience of the PSB”. Ofcom notes that C4C’s adequate contribution “will reflect the fact that its individual remit includes producing a broad range of content that demonstrates innovation, experiment and creativity in the form and content of programmes, a requirement which does not apply to the other licensed PSBs.”⁴

13. Given the lack of definition in the legislation, we believe the draft guidance leaves the definition of an ‘adequate contribution’ by each PSB too vague. Not least because, in the cases of Channel 3 services and Channel 5, their individual remits are also somewhat vague – only specifying “a range of high quality and diverse programmes.”⁵

14. Although we welcome much of the detail the draft guidance suggests the PSBs provide in their SoPPs and SMCPs, we note that the guidance sometimes seems to describe this detail as optional – information the PSBs ‘could’ or ‘may wish to include’, not a hard requirement. For example, the guidance suggests the PSBs “may wish to include in their SoPP plans” information that explains how they will deliver “a range of high-quality and diverse programmes, including the range of genres, across all relevant services and details of any programming themes and priorities”.⁶ But if it is only optional for each PSB to provide detail on the range of genres across which they plan to provide programmes, how will Ofcom be able to judge, based on these plans, whether the overall range of genres in which programming is planned by the PSBs collectively is ‘appropriate’?

15. Similarly, reference is made to the fact PSBs “could include details of their plans for each relevant service for the provision of factual, educational, entertainment, comedy and drama programming, and films (as applicable)”.⁷ But there is no hard requirement for the PSBs to include details of how their plans break down by genre. The danger is that Ofcom is only able to assess whether an ‘appropriate range of genres’ is covered by the PSBs collectively in retrospect, not prospectively, limiting its ability to enforce the overall PSB remit.

16. There are two areas in Ofcom’s draft guidance where it indicates that the PSBs could report the breakdown of their content by genre:

- a. Plans to fulfil the part of the overall PSB remit about providing a public service for “the dissemination of information and for the provision of education and entertainment” could include details of plans for “the provision of factual, educational entertainment, comedy and drama programming, and films (as applicable).”⁸
- b. Plans to fulfil the part about “a sufficient quantity of [programmes] reflecting the lives and concerns of different communities and cultural interests and traditions” could include details about the representation of “cultural interests in the UK, including, for example, sports, music,

⁴ Draft guidance, p. 6, paragraph 2.13 (b)

⁵ Draft guidance, p. 19, paragraph A1.4

⁶ Draft guidance, p. 6, paragraphs 2.14 and 2.14 (b)

⁷ Draft guidance, p. 8, paragraph 2.32

⁸ Draft guidance, p. 8, paragraph 2.32

arts, and religion and ethics programming and the depiction of cultural life within other genres.”⁹

17. However, there is no indication in the draft guidance about how Ofcom would use these details to inform its assessment of whether the PSBs collectively are providing an ‘appropriate range of genres’ of programming. Particular PSB genres are mentioned as examples of what PSBs might choose to include details about – but nothing is said anywhere in the guidance document about which genres are included in the ‘appropriate range’ Ofcom expects the PSBs collectively to cover.

SoPPs and SMCPs

18. Finally, even if Ofcom’s final guidance is more specific and detailed in the areas we have identified above, there remains the concern that the SoPPs and/or SMCPs produced by the PSBs could be too vague and general in both their forward-looking plans and in their retrospective reviews. There may be narrow commercial reasons why broadcasters might seek to avoid providing much detail about the programmes they plan to make or detailed quantitative data about the programmes they have made. But such vagueness may also enable them to, in practice, trim and chip away over time at their individual contribution to the overall PSB remit.

19. We therefore believe it is imperative that Ofcom impose more detailed and specific reporting requirements on the PSBs, including requiring a breakdown of their output by genre. Not least because the stakes of these reports are now higher than before: not only are they means of providing transparency and accountability over the PSBs’ fulfilment of their individual and collective remits, they are the basis on which Ofcom proposes to designate their internet programme services for the purposes of the new digital PSB prominence regime.

⁹ Draft guidance, p. 8, paragraph 2.34 (c)