

# RESPONSE FROM CHANNEL 4 TELEVISION CORPORATION ("CHANNEL 4") TO HOME OFFICE CONSULTATION ON THE POSSESSION OF EXTREME PORNOGRAPHIC MATERIAL

## Introduction

1. Channel 4 is a public service broadcaster licenced by Ofcom to broadcast, currently, the main Channel 4 core service, two free-to-air digital channels (E4, primarily an entertainment channel, and More4, primarily a documentaries and news channel) and FilmFour a premium subscription film channel available through digital satellite and cable operators to paying subscribers. All four channels are regulated, post broadcast, by Ofcom under its Broadcasting Code ("the Ofcom Code"). As a premium subscription service, a slightly more favourable regime operates for the scheduling and broadcast of films on FilmFour, which has PIN code protection available. The Channel 4 main service itself, E4 and More4 operate under broadly the same regulatory constraints. Channel 4 is obliged under its licence for all these services to ensure compliance with the Ofcom Code and severe sanctions may be imposed by Ofcom for a serious or persistent breach of the code. In the case of the three specialist channels, their licences could be shortened or revoked and in the case of Channel 4 and the other three channels fines of up to 5% of qualifying revenue (i.e. all advertising revenue and sponsorship revenue) can be imposed. All UK broadcasters, including the BBC, ITV, Five and digital channels fall under Ofcom's jurisdiction.
2. The Ofcom Code, in accordance with the Communications Act 2003, Section 319 in particular, enshrines the importance of ensuring the protection of under eighteens and the application of acceptable standards to prevent harm or offence and the Ofcom Code sets out the principles and rules for how this should be achieved. Therefore, there is adequate and effective regulation of the content of television services.
3. In addition, like other broadcasters in a multi-channel, digital environment, Channel 4 broadcasts content through a number of new media outlets including broadband, the web and mobile telephone portals. Although these platforms are not regulated by Ofcom, we apply our own code of practice which is broadly similar to the Ofcom Code so as to ensure acceptable editorial standards and compliance with the law.
4. The Channel 4 Television Corporation is a public service broadcaster and a separate statutory corporation with a special and unique statutory remit contained in Section 265(3) of the Communications Act 2003 which provides:

*"The public service remit for Channel 4 is the provision of a broad range of high quality and diverse programming which, in particular-*

*(a) demonstrates innovation, experiment and creativity in the form and content of programmes;*

*(b) appeals to the tastes and interests of a culturally diverse society;*

*(c) makes a significant contribution to meeting the need for the licensed public service channels to include programmes of an educational nature and other programmes of educative value; and*

*(d) exhibits a distinctive character."*

5. Whilst we welcome a number of assurances in the consultation document that there is no intention on the part of the Home Office to adversely affect or constrain legitimately operated television services, we nonetheless fear that the proposals appear to be so widely drawn that they would potentially render a range of legitimate documentary making, documentary programmes and feature films in breach of the criminal law. Since this is expressly not the intention of the proposed legislation it is vital that, if legislation is to be imposed in this area, it is carefully drafted to ensure that proper programme making and broadcasting activities are unaffected, either through the framing of the offences itself or through the creation of appropriate defences.

### **The Proposed Offences**

6. We have deliberately declined to answer the specific questions posed in the consultation document as we feel that it is not appropriate for a broadcaster to do so. Our role as a potentially affected party and whose programme makers may be affected, albeit although this is expressly intended not to be the case, is to set out our concerns in this regard only. As to the proposed offences themselves we do have a number of fundamental concerns as a matter of principle concerning:-
  1. Offences which are strict liability in nature based on possession and on a judgment being made about the potential impact of the material on the person in whose possession the material is.
  2. The efficacy of comparing indecent images of children with activities which, although extreme, involve adults and, may well be consensual and/or, at least in part, acted.
  3. The apparent conflict with existing laws, including the Obscene Publications Act 1959 and the apparent criminalisation of matters not currently in breach of the criminal law.
7. We should emphasise that the above concerns are based on fundamental principle and, as a responsible public service broadcaster, we naturally aim to adhere to the highest standards of best practice and to comply with the Ofcom Code in the scheduling, content and labelling of material on all our services. In its history, Channel 4 has broadcast many controversial programmes with extreme content from the live autopsy carried out by Gunther Von Hagen broadcast on 20 November 2002 to Beeban Kidron's 1993 film about extreme sexual services provided by prostitutes, "Hookers, Hustlers, Pimps and their Johns" to other documentaries and feature films of a very challenging nature dealing with the very fringes of adult sexuality and sexual behaviour, for example in our recent "Banned" season. All of these programmes were found to have complied with the relevant regulatory code in force at the time. All of the programmes were scheduled appropriately late, justified by context and preceded by clear and specific warnings as to their content. These are matters rightly enshrined as correct practice in the new Ofcom Broadcasting Code issued in July of this year.
8. We note various assurances in the consultation document including that the material it is sought to criminalise "goes well beyond what is available for sale

in licensed sex shops classified R18 by the British Board Film Classification” and that “our mainstream entertainment industry, which works within obscenity laws, would not be affected by the proposals” (Executive Summary, page 1) we also note the statements that “the offence would not generally be relevant to broadcast material since we already have controls in place to prevent such material from being available on television” (paragraph 50, page 13) and “it is not the intention to impinge on the freedom of the media in respect of news coverage, or of analysis or documentary footage of real events, including atrocities committed in other countries” (paragraph 51, page 13). In addition – “it is not our intention to penalise anyone who accidentally stumbles across the material specified in the proposal, or who has sent it to them without their consent, or has a legitimate reason (such as assisting law enforcement) for dealing with it” (page 2).

9. We have been provided, in confidence, with the proposed submissions to be made by the BBC and the British Board of Film Classification (“BBFC”) and we broadly agree with the position taken by these two public authorities and note that we share with them similar concerns about the potential impact on legitimate programme making and broadcasting.
10. We believe it would be helpful if we give examples of areas of programme making, documentary programmes and feature films which we believe could well be, despite the clear intention of the proposed legislation, create criminal liability on the part of programme makers and/or broadcasters which we do below.

### **The Making and Broadcast of Documentaries Exploring Adult Sexuality and Pornography**

11. We note the assurances we have outlined above and the statement on page 11 (paragraph 37) of the consultation document that “it is not the intention to capture medical or scientific material, educational, artistic, mainstream broadcast entertainment, or news footage”. However despite these repeated and consistent assurances, the proposals as presently drawn would effectively outlaw a significant raft of important programming which has not in the past breached the old regulatory Codes and would not breach the Ofcom Code provisions. This is unless there are to be clearly defined defences which would enable journalists and producers legitimately to investigate subjects which touch on extreme adult pornography and for broadcasters to transmit programmes, appropriately edited and scheduled in accordance with the Ofcom Code.
12. Channel 4 is a publisher broadcaster without an in-house production base, and our programmes are produced by a range of independent production companies. The independent production companies which make our programmes are obliged to comply with the law and with the Ofcom Code. However, Channel 4 cannot, and would not wish to, subrogate our responsibilities for compliance with the Ofcom Code under our licence from Ofcom and in the event that a controversial or contentious documentary is commissioned, legal and editorial staff will work closely with the producers to ensure compliance with the law and with the Ofcom Code. Prior to the vesting of Ofcom and the issue of its Broadcasting Code, Channel 4 was subject to the regulation of its licensing body the Independent Television Commission

("ITC") and the Broadcasting Standard Commission ("BSC"). These two regulators had an overlapping remit enabling the BSC to entertain complaints from viewers about standards and the ITC to intervene (whether or not complaints had been received) if it had concerns that the taste and decency provisions in the ITC Code had been breached. The current regulatory regime under the Ofcom Broadcasting Code enables greater latitude for freedom of expression in documentaries scheduled appropriately, provided difficult material can be justified by context and viewers are effectively forewarned about material they may find offensive.

13. By way of example, in the past Channel 4 has broadcast the following documentaries exploring extreme sexual behaviour none of which have been found in breach of the relevant Codes:-

- "Fetishes" – award-winning documentary maker Nick Broomfield's portrait of prostitutes and their clients who engage in extreme sexual practices include sadomasochism and bondage. Scenes included severe whipping and domination of clients in an entirely consensual context. Broadcast on 10 September 1998.
- "Hookers, Hustlers, Pimps and their Johns" – critically acclaimed documentary by established film maker Beeban Kidron which through interviews and footage of sexual encounters showed extreme sexual practices involving pain and humiliation including the use of sandpaper and a cheese grater on genitalia, urine drinking, use of nipple clamps and other forms of sexual pain, sexual domination and humiliation. Broadcast in 1993.
- "Anatomy of Desire" – an exploration of extreme sexual behaviour which included interviews with a woman who admitted (and had been convicted of) engaging in necrophilia. The producers would almost certainly have had material in their possession for research purposes which showed or depicted these activities. Last broadcast on 9 March 2000
- "Animal Passions" – a documentary which attempted to explore why people engage in bestiality. The documentary included interviews with people who talked openly about having sex with animals and with experts who attempted to analyse their desires and why they acted on them. The producers would certainly have had material in their possession for research purposes which showed or depicted sexual activity between adults and animals – for example using web sites to establish the veracity of contributors, particularly those interviewed anonymously. Broadcast May 1997.
- "The History of Pornography". This film included classical "realistic depictions" of sex between humans and sheep or goats. Broadcast on 11 February 2003
- "The Marquis de Sade: Pornographer or Prophet" – a documentary which was shown as part of a "Masters of Darkness" series and, with actors, depicted a number of very explicit scenes of extreme sadomasochism from de Sade's work. Broadcast on 6 October 2002
- "Damned in the USA" an award-winning documentary shown in Channel 4's first Banned Season explored the censorship of the arts in the USA and showed a number of controversial artistic works including Robert Mapplethorpe's photographs showing the practice of "fisting" and a bullwhip inserted into a man's rectum. Broadcast in 1990.

- “Hustler White” - . This film, made in 1996, is a satiric black sex comedy about gay hustlers and their customers in Santa Monica, California. The version broadcast on Filmfour in 1999 was edited in line with edits made by the BBFC, in particular, explicit penetration scenes involving amputation fetishists but still contains scenes of amputation, fetishism and serious sexual violence. Broadcast on FilmFour on 24 May 1999.
  - “Sick: the Life and Death of Bob Flanagan, Sadomasochist” – this documentary, critically acclaimed, explored the life of performance artist Bob Flanagan who died at the age of 43 after an agonising struggle with cystic fibrosis. He used sadomasochism to relieve his pain and the documentary is as moving as his practices were extreme and painful. The ICA showed, as they were permitted to, more extreme scenes which the BBFC had cut which showed the nailing of his penis to a piece of wood and the insertion of large objects into his rectum. Channel 4 broadcast an edited version not including those particular scenes (as obliged by the old ITC Code and the current Ofcom Code) on 8 October 1998.
  - “Hardcore” – a documentary which followed a woman called “Felicity” who was attempting to break into the US hardcore porn industry. The documentary included a disturbing scene in which a hardcore porn actor, Max Hardcore, subjects Felicity to strangulation and gagging in a sex scene. The scene is very disturbing but powerfully portrays how the sex industry exploits and affects women. Broadcast 7 April 2001.
  - “Raw Deal: A Question of Consent” – an American made documentary which examined through the use of home video footage an alleged rape of a woman who claimed that she was attacked at a fraternity house party. The documentary made extensive use of this footage which the woman subsequently claimed was a rape but the other participants claimed was consensual rough sex. The level of violence is strong if you accept that the footage was non-consensual. The documentary itself left the answer open but leant towards the victim’s claims that she was raped. After the film was made, the US Courts concluded that her claim was false. Broadcast 29 January 2002.
  - “Sex: The Annabel Chong Story” – a documentary about a prostitute who engaged in sexual marathons with hundreds of men. Annabel Chong explains how she survived gang rape and engages in self-harming through cutting in a way that is apparently sexualised. Her bid to break records on the number of men one woman has had sex with in one session appears to re-enact the gang rape she survived. Towards the end of the “gang bang” session she is clearly injured and it is moot whether she is still fully able to consent. The documentary was nominated for a prize at the Sundance Film Festival. First broadcast on Channel 4 on 3 February 2001.
14. Channel 4 currently has a number of documentaries in production and/or about to be broadcast which we fear without proper defences could fall foul of the new law as currently stated. One will examine issues of consent in the context of sexual violence using actual footage of consensual beatings filmed in an S&M dungeon. In a series starting week of December, “the Dark Side of Modern Love” one documentary, “Death by Sex”, will examine deaths which have occurred as a result of the (consensual) practice of so-called “breath control” (auto erotic asphyxia). The film will include reconstructions by actors of these practices which lead to the death of one of the sexual partners in a number of cases, which we are satisfied accord with our obligations under the Ofcom

Code. In addition, Channel 4 will next year broadcast a second “Dark Side of Porn” season. In the last series one documentary, “Porn Shutdown”, looked at unprotected and extreme sex in porn films showing how HIV forced the industry in Los Angeles to close down. This documentary featured scene which could be considered to show “serious sexual violence” and was broadcast on 25 April 2005. In the new series a number of documentaries will aim to expose the grim and gritty reality of working in this often unregulated industry. One film will go in search of the actors who took part in one of the notorious adult films involving sex with animals, “Animal Farm”, at the most extreme end of the porn industry. Another documentary will deal with serious violence in a sexual context exploring new scientific evidence which suggests that hardcore porn can be as addictive as crack cocaine. In addition it will examine the users of extreme porn who turn to criminality and ask whether so-called “snuff” films really exist. The programme teams making these two films have liaised with Scotland Yard’s Obscene Publications Squad and have ensured that access to this material in the course of their research is carefully restricted only to essential members of the production team. This access is through a dedicated computer which is locked inside a “cage” in the production office so it can only be accessed by those with the authority to do so and cannot be viewed by anyone else.

15. In the course of the making of most, if not all, of the above programmes, the film makers and producers will have had in their possession, even if it is not (and could not be) broadcast, material which the current wording of the consultation document suggests it would be a criminal offence to possess. All of the programmes were, or will be, carefully edited and scrutinised, both legally and editorially to ensure that they meet acceptable standards for broadcasting and comply with the law and with the Ofcom Code – this will include broadcasting them well after the watershed (generally 11.00pm) and preceding them with clear and specific warnings as to their content. However, all of the documentaries have artistic and educational value. By exploring extreme adult sexuality and pornography they enlighten viewers who choose to watch them on the human condition.

### **Feature Films**

16. When it issued its new Broadcasting Code in July of this year, Ofcom confirmed that no broadcaster could show a film which had been classified by the BBFC as R18. Such films are only available in licensed sex shops. However, even films which are classified as 18 and can be shown on television may include extreme sexual behaviour, sometimes portrayed, sometimes real. No broadcaster in the UK can show a version of a film refused classification by the BBFC. The BBFC has classified many films as suitable for home video with an 18 rating which are too strong for broadcast on a terrestrial or free to air channel. As it is a premium subscription service, FilmFour has been able to broadcast films containing more graphic sexual content than Channel 4 because it is a subscription service available only to adults (over 18) and can be PIN locked by subscribers. In its history, it has attracted very few complaints and none of these have been upheld by the regulators. We fear that the following films shown on FilmFour could well be affected by these proposals:-

- “Salo 120 Days of Sodom” this 1976 film by the poet, novelist and filmmaker, Pasolini, deals with the fascist enclave of Salo during the Second World War, telling the story of the sadistic torture of kidnapped locals. The acts depicted include bondage, flogging, rape and humiliation. The BBFC passed the film uncut in 2000 and it is a widely acknowledged masterpiece which portrays serious sexual violence.
  - “Ai No Corrida” – Nagisa Oshima’s 1976 depiction of sexual obsession and mutual erotic destruction shows the lovers engaging in strangulation during actual penetration. The culmination of the film depicts a man’s penis being cut off with a knife by his lover. Clearly it portrays and shows serious sexual violence. The film has been seen in cinemas for over 30 years and was classified as 18 by the BBFC in 1991 for cinema and in 2000 for video. The film has been screened 22 times on FilmFour.
  - “Snuff” – Broadcast on FilmFour eight times since 9 May 2004. A “film within a film” which resembles the Sharon Tate murder by the Manson “family”. This was one of the most notorious of the “video nasties” which achieved this reputation on the basis that it was believed, wrongly, that it included actual filmed rape and killing. This was subsequently revealed and is known to have been simply a publicity stunt. The film was not submitted to the BBFC until 2003 and was classified, uncut, as 18. Nevertheless, the film still includes graphic and detailed scenes of rape and a violent killing.
17. In addition, there are a number of films screened by Channel 4 and other free to air channels which could well fall foul of the new provisions, these include:-
- “A Clockwork Orange” – Stanley Kubrick’s adaptation of the Anthony Burgess novel includes a notorious rape scene which depicts “serious sexual violence”. The film was made in 1971 and classified as 18 by the BBFC. Channel 4 has screened it twice and FilmFour 37 times.
  - “Crimes of Passion” – Ken Russell’s highly regarded film rated 18 by the BBFC, depicts a rape scene and scenes in which a steel pointed dildo is used to menace, penetrate and murder. The film portrays serious sexual violence.
  - “Straw Dogs” – this 1970’s film made by Sam Peckinpah portrays a controversial rape which caused concern to the BBFC who only passed it uncut in 2002. Channel 4 has since screened the film once and it has been screened 13 times on FilmFour.
  - “Peeping Tom”. This controversial film ended the distinguished career of Michael Powell in 1960 after a storm of critical disdain, but which now secures his pre-eminence as a film-maker’s film-maker, who is championed by distinguish contemporary directors, such as Martin Scorsese. The film depicts a sadistic killer who films the faces of his victims as they are about to be murdered. Last broadcast on Channel 4 on 30 April 2005.

## **Conclusion**

18. Channel 4 is committed to responsible programme making and broadcasting within the parameters of the Ofcom Code and the law. We would have concerns about any proposed legislation which would criminalise legitimate programme making activities and the broadcast of responsibly made and edited documentaries exploring extreme sexual behaviour and pornography.

We believe that such documentaries have a valuable role to play in educating the public and have artistic merit in many cases. In addition, there are a number of cinematic works, many critically acclaimed, which could potentially fall foul of the proposed legislation which have been classified 18 by the BBFC as suitable for home video release as well as the cinema. If the intention is not to catch R18 material then it is clear that material passed by the BBFC should explicitly not be caught by the proposed legislation.

19. We urge the draughtsmen to ensure that the legislation, should it be decided at the end of the consultation process that it should be enacted, is framed so as not to criminalise the above material. This could be dealt with by way of properly drawn defences which clearly exempt legitimate programme making, journalism and artistic works. We would be happy to be involved in further discussion about the drafting of such defences.

**Channel 4 Television Corporation**  
**30 November 2005**