

ASA response to Dame Janet Paraskeva's recommendation for a review of other independent review and appeal processes to identify good practice



1. Executive summary

Following the publication of Dame Janet Paraskeva's audit in April 2017 and our response to 29 of her 30 recommendations in autumn 2017, the ASA has now completed work on the final recommendation: a thorough review of other independent review and appeal processes employed by other regulators, complaint handling bodies and other similar organisations in the UK and overseas.

Our review has established that the ASA's Independent Review process is in line with good practice across a range of comparable international organisations and exceeds those of comparable UK based regulators. We have established that there is no consensus around an ideal form that Independent Review systems should take, nor is there consensus on the use of oral representations as part of those processes. The review found that our grounds for review are amongst the most comprehensive seen in our global peer group of advertising self-regulatory organisations. Although we have not identified a compelling case for change at this time, we will however review the position on oral representations again in the light of an expected forthcoming review of our competitor complaint process.

2. Introduction and context

The ASA is committed to delivering high standards in its work, to continuous improvement in its approach to regulation, to listening to others and to challenging itself to evolve so it retains the confidence of those we regulate.

In autumn 2016 the ASA commissioned Dame Janet Paraskeva to conduct an independent audit of our [Commitment to Good Regulation](#) and our performance against it.

Dame Janet spent six months thoroughly investigating our performance against five of the key areas set out in our *Commitment to Good Regulation*. Her [audit](#) involved a detailed review of how we are delivering against it, looking at our processes, policies, ways of working and talking to people at all levels in the organisation. Dame Janet also met a wide range of industry stakeholders and listened to their views.

We published our response to 29 of her 30 recommendations in September 2017. That [report](#) confirmed that work would commence on the final recommendation in autumn 2017.

This final recommendation said:

The ASA should conduct a review of good practice in independent review and appeal processes in other UK regulators and in advertising regulators in other countries and consider improvements it might make.

This recommendation flowed from feedback Dame Janet received from some stakeholders, in particular some business compliance representatives, which suggested that there was a desire to see changes made to the process we currently have. The detailed feedback which was reported in the audit is extracted at appendix one of this paper.

We agreed that the recommendation from Dame Janet provided an opportunity to test the assumptions we've been hearing for some time, to reflect on current good practice elsewhere and to see whether change is warranted at this time.

The feedback heard in the audit can be summarised under the following main points:

- Desire for an appeal-like second decision based on the merits of the case, rather than the current process which requires there to be identified a substantial flaw in the rationale, process and/or evidential underpinning of a first decision.
- Desire for our process to send first decisions on review to a higher “appellate” Council or to a separate decision-making person or panel which sits above the current Council instead of back to the same Council.
- Desire to see oral hearings or representations included as part of the process; and

More details of the current Independent Review process can be found at appendix 2.

3. Our approach in carrying out this review

Our starting point was to look for any evidence in the performance of the current system that might suggest that the process is ineffective. This encompassed a detailed review of the outcomes of Independent Review requests in the last 12 months, and a high-level review of performance since the process was established in 1999.

Our review of other schemes encompassed the following organisations:

- **14** other regulators and complaint handling bodies or bodies which have a significant complaint handling and/or Ombudsman function in the UK.

These comprised: Bar Standards Board, BBC, Financial Ombudsman Service (FOS), General Dental Council, General Medical Council, Independent Press Standards Organisation (IPSO), Impress, Legal Ombudsman, Nursing and Midwifery Council, Ofcom, Parliamentary and Health Service Ombudsman (PHSO), Property Ombudsman, Scottish Legal Complaints Commission and Solicitors Regulation Authority.

- **39** other advertising self-regulatory organisations (SROs) that are members of EASA (European membership body) or ICAS (European and global membership body).

These comprised SROs in: Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, El Salvador, Czech Republic, Cyprus, Finland, France, Germany (both SROs in that country), Greece, Hungary, India, Ireland, Italy, Lithuania, Luxembourg, Mexico, Netherlands, New Zealand, Peru, The Philippines, Poland, Portugal, Romania, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, United Arab Emirates and USA

We inspected complaint handling procedures taken from organisation websites (translating where necessary) and, for European SROs, cross checked that information against EASA’s *Blue Book* (which is a resource for understanding how European SROs work).

4. Summary of key findings and decisions

4.1 *Is the current process fit for purpose or should we move to an appeal panel with different membership which would reconsider the merits of the case?*

- Our review of the performance of the current system indicates that the Independent Reviewer routinely returns significant numbers of decisions back to the Council for corrective action. There is good evidence that the Council routinely agrees to make changes. Out of some 510 cases reviewed, there have been only two occasions in 19 years where the Council has declined to agree to any changes recommended by the Independent Reviewer.
- There appears to be nothing substantive that is lacking in our current review process when set alongside the review or appeal processes of comparable UK self-regulatory and statutory complaint handling organisations/Ombudsmen. In fact, it could be argued that the ASA Independent Review process represents a gold standard in terms of providing an independent route for re-consideration of decision making on the substance as well as the processing of complaints.
- With respect to advertising SRO good practice, our research identified that operating a review process as opposed to an appeal process is not unusual. Our approach of having a review process with a reviewer who returns the case back to the original decision-making body is, in fact, standard practice amongst a sizeable number of our peers.
- Alternatively, if we set up a similarly sized and constituted appeal panel that replicated the experience and expertise of the 13 ASA Council members we would simply be substituting one set of views for another. We do not accept that one constituted panel of independent and advertising industry background experts should be better placed than the other to judge issues. Maintaining separate appeal panels is also expensive, causes duplication and thus goes against the grain for what the ASA system was set up to achieve, as Dame Janet herself recognised in her report.
- Given what we say above - that there are ample examples of SROs running what appear to be robust review, not appellate-type processes - given that the long track record of our own Independent Review process demonstrates that it sends healthy numbers of cases back to Council to be reviewed and given that Council invariably agrees with the Independent Reviewer's recommendation, we do not agree that there is a compelling case for the Independent Review process to be reformed to either create or to be replaced by a higher appellate panel.

4.2 *Should we introduce a form of oral hearing or oral representation as part of the Independent Review process?*

- Our review shows that there is a thoroughly mixed picture amongst our SRO peers on the issue of offering oral representations or hearings on both first decisions and

on review/appeal. Where they exist, the nature of oral processes varies widely, with some SROs offering limited information gathering meetings only where the reviewer deems it necessary, right up to the other extreme of full representation at hearings with lawyers and advocates present at decision making meetings.

- Just over half of SROs offer oral processes. In reflecting on this evidence it's important to remember that not all SROs are set up in the same way or perform the same function. Many SROs who offer oral hearings operate ring-fenced membership models, where limited numbers of members pay into a system and agree to abide by a set of procedural rules as a condition of membership. That might include abiding by strict elective procedures to appear before committees and to pay for that process. Similarly, some SROs are only set up to service or are primarily geared towards servicing industry complaints about competitors.
- The ASA on the other hand operates a self-regulatory model that does not distinguish between paying and non-paying members because we are funded at arms-length and we do not materially distinguish in process terms between public complainants and competitors. At around 30,000 complaints a year, we also deal with a vastly larger volume of work than any of our SRO peers. A proportion of Independent Review requests come from members of the public who are much less likely to have the financial wherewithal, time, skills, confidence or motivation to engage in an oral hearing or representation process. For reasons of accessibility and fairness, we need to ensure our processes do not become daunting or complex and put members of the public at a disadvantage in the complaint handling process.
- Having said this, we've taken note of the quite widespread use of oral representations/hearings amongst our SRO peer group, including specific oral and some expedited protocols for the processing of competitor complaints.
- The ASA is currently working on a new five-year. As part of our discussions we've recently encountered some commentary from senior industry representatives that suggests there may be interest in us re-visiting the way we process competitor complaints. (Note: we raised the idea of an expedited competitor complaints process in our *2009 – 2011 ASA Process Review* but there was insufficient industry interest in us developing the idea, at that time). Our strategy refresh is likely to recommend a review of the competitor complaints process and will be likely to consider whether any amended or expedited competitor complaint processes should incorporate some form of oral representations/hearing.
- Given that this is likely to be the case, we have decided that we will re-visit the issue of oral representations in the Independent Review process (insofar as that process touches on competitor complaints), when we have completed this anticipated further work.

4.3 Are there any other features of our current process that could be changed or improved?

- Our research has shown that our grounds for review are in the right place and amongst the most sophisticated and wide ranging of any SRO. There is no case for change in this respect.
- Our timescale for a party to request review is also extremely generous compared to practice seen elsewhere. Our suspension *request* facility appears to be unique albeit there is one other SRO that automatically suspends all rulings pending a review.
- Charging a fee is common in other jurisdictions. We think that this might be a factor for us to consider were we in future to offer oral hearings or representations on expedited competitor complaints and/or Independent Reviews about competitor complaints. However, at this time we believe the grounds, timescales, our suspension request facility and the free-to-use nature of the service are demonstrative of a system that meets or exceeds current good practice.
- Finally, we have decided to re-admit the Independent Reviewer to observe Council discussions on some investigated cases (these are usually those which happen to immediately follow on in the meeting from review cases he has himself presented). This is on the strict understanding that he will sit in an observer seat, not at the Council table and will take no part in discussions or in any other way discuss the cases he observes before, during or after the meeting with any member of the Executive or Council. Our assessment is that excluding him from some aspects of the decision-making process sends out a message that the ASA is preventing him from having access to and insights into all of our decision-making processes. On the other hand, we have reflected that the Independent Reviewer's understanding of our decision-making is in fact enhanced by him understanding the way in which decisions are reached at meetings. We believe he benefits from seeing the Council in action therefore and that this strengthens his understanding of our work. In the event that he was to listen to a debate on a case which he subsequently reviewed he would in any event see the Minutes of the discussion on the relevant ASA file. The Independent Reviewer and Council sign up to strict conflict management and lobbying rules and agree to abide by the *Nolan Principles*. We are therefore confident that his presence at meetings does not jeopardise his independence or effectiveness of action.

5. Detailed research findings

5.1 Independent review performance

- In 2017, out of 25 Independent Review requests received in relation to rulings, the Independent Reviewer recommended that 11 of them raised issues of merit warranting corrective action. That is **44%** of the rulings the Independent Reviewer considered in 2017.
- Out of the 9 rulings that were then returned to the Council for discussion to be re-considered at the request of the Independent Reviewer in 2017, **five** of those resulted in reversals of decisions and a further **three** had significant wording changes made to the ruling. One further ruling was deleted from the record.
- Since 2010, when Sir Hayden Phillips became Independent Reviewer, the Council has only on **one** occasion declined to make any changes to a decision brought back to it by him following a review request, (out of circa 370 cases he has reviewed). During the tenure of his predecessor, Sir John Caines, the Council only **once** declined to make any changes to a ruling sent back to them by him (out of circa 140 cases he reviewed).

These figures show that applicants who make a compelling case to the Independent Reviewer stand a good chance of persuading him to ask the Council to review their case and that Council invariably follows the recommendation of the Independent Review when he returns cases to it. The Independent Review process is no mere rubber stamp of ASA Council decision making and review requests stand a fair chance of resulting in substantive changes being made.

5.2 Review of UK regulators or organisations with significant complaint/redress functions

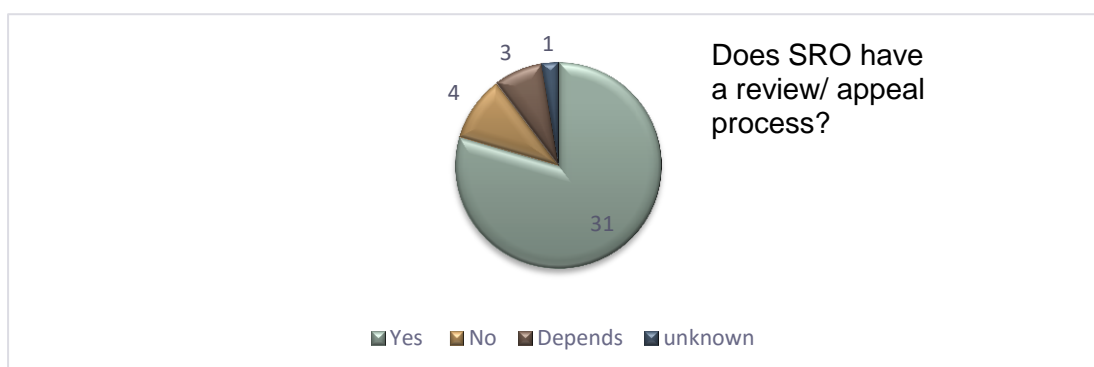
- We were surprised to find that other major complaint and redress organisations such as the **Financial Ombudsman Service** and **Legal Ombudsman** have no route for internal appeal or review of any substantive decision. Nearly all of them have *service complaint commissioners* but these allow only for reviews of how that organisation handled the customer service aspects of the work. One, the **PHSO**, says they have a “customer care team” that will look at “decisions” but we could find out no more about this process.
- Organisations that deal with professional standards and the rights of individuals to earn a living from professional employment in which they are in positions of trust such as the **Solicitors Regulation Authority, Nursing and Midwifery Council** and **General Dental Council** routinely have tribunal like appeal panels and/or access to appeals through the Courts. For obvious reasons however, these are not comparable organisations because they deal with professional practice standards.
- The **BBC** has internal complaint escalation and then referral to **Ofcom** on content and standard issues in their editorial output but this relates to ruling on the BBC’s own content.
- In the case of press regulation, **IPSO** has a review process but this has been directly and deliberately modelled on the ASA’s own Independent Review process. **Impress**

meanwhile don't have a process at all save for issues concerning "systemic failures", i.e. not for individual case-related decisions.

5.3 Other advertising regulatory organisations (SROs)

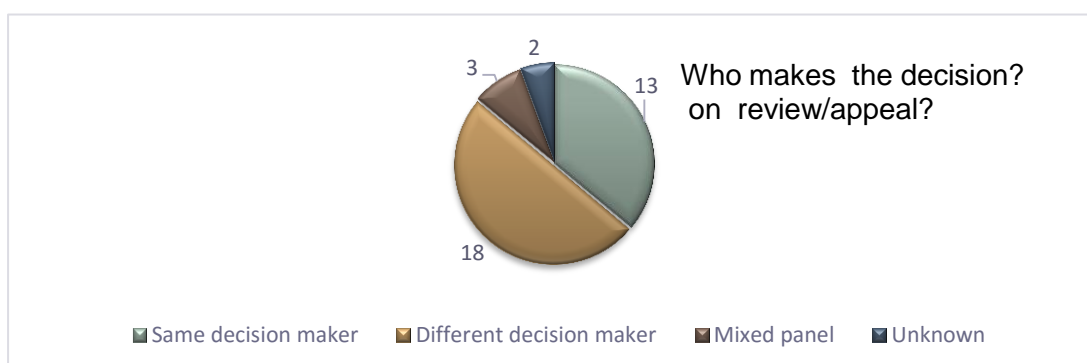
Much more can be learned from looking at the experience and practice of advertising SROs.

5.3.1 *Most SROs have some form of review process or appeal:*



- In three cases, the offer of a hearing on review/appeal depends on whether the first decision was made by way of oral hearing or not (e.g. New Zealand where it is not available where the first decision was heard orally), in one case it is available for harm and offence cases but misleadingness cases must be appealed through the Courts (Germany).

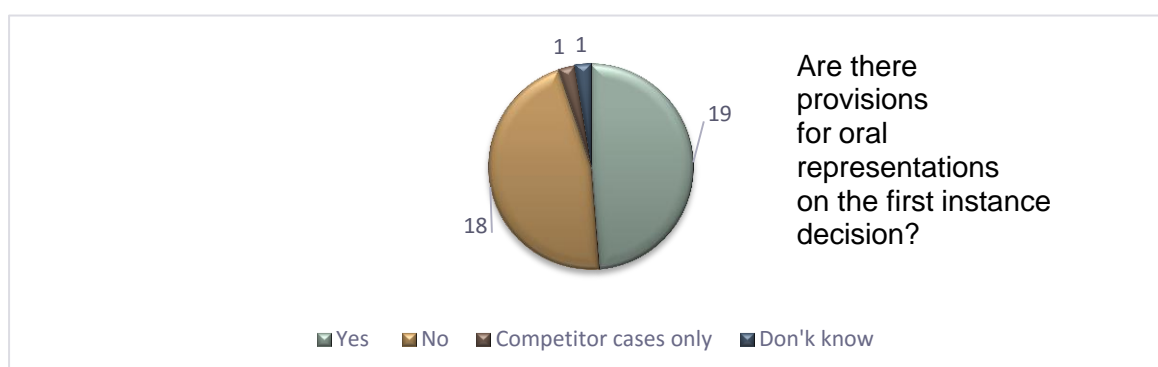
5.3.2 *Half of SROs have a different panel to hear the review/appeal. Around one third of SROs refer decisions back to the same panel on review/appeal.*



- There are a wide range of approaches to review/appeal processes across SROs. For instance, Australia, Ireland and France have very similar approaches to the UK with an "Independent Reviewer" or equivalent person or panel who considers the merits of a case and who then refers it back to the original decision-making panel if they think a prima facie case has been made.

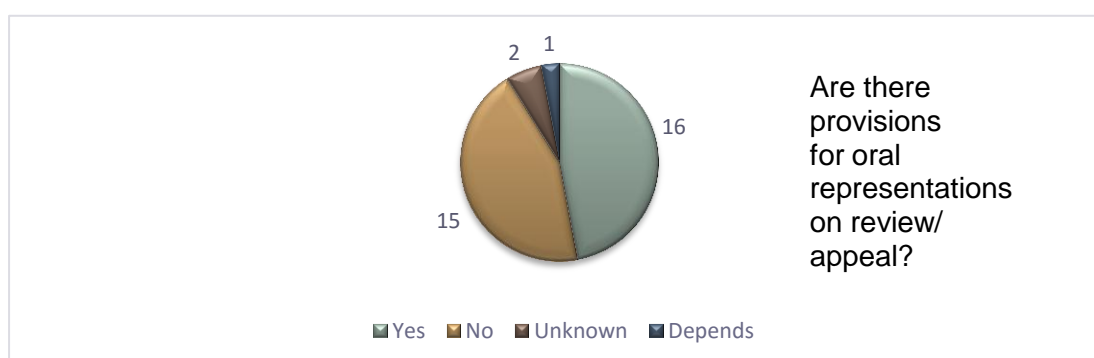
- However, in around half of cases, a different panel receives the review/appeal request and consider the matter afresh. This separate panel gives those systems more of the features of an “appeal process” rather than a “review process”.
- Where the decision is taken by a separate panel, those panels vary in size from a single decision maker (e.g. India), small panels of five or less (e.g. South Africa, Philippines, New Zealand, Spain), and a small number have larger panels of between 10 + members (e.g. Belgium, Bulgaria). There is no common size therefore, but it seems that they tend to be smaller panels than those that heard the first decision.

5.3.3 Just over half of SROs have provision for oral representation on the first decision



- This point is not directly relevant to this review but is worth noting. What really stands out here is how many SRO's have oral hearings on the first hearing of the case.

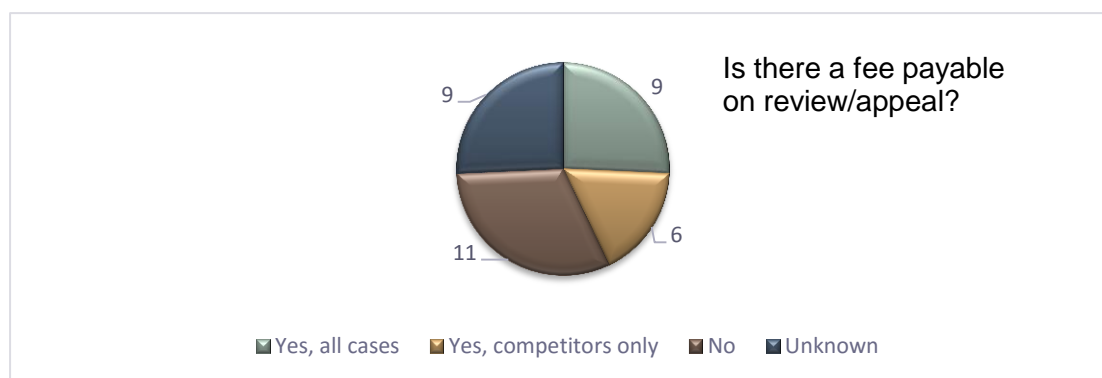
5.3.4 Just over half of SROs have provision for oral representations on review/appeal



- There is a near equal split in the division between those SROs which do and don't offer oral representations/hearings on appeal.
- Where oral processes are offered, in some cases, it is for the person managing the review/ appeal to decide whether they think that it is warranted to hear oral evidence.
- In one case, oral hearings are only allowed if there was no oral hearing at the first decision.

- In other cases, oral representations/hearings are not allowed on review/appeal if the parties have submitted to voluntary expedited competitor complaint processes.
- In some instances, the oral representation comes only at the information gathering stage.
- In others, the oral representation takes place with the parties giving statements and then retiring so the decision maker or panel can speak privately, with the decision following some time or a few days later.
- Some seem to allow for full representation and presence at the decision-making meeting.
- Some systems prescribe strict rules. (E.g. no lawyers allowed, 15 minutes max to present, parties restricted to no more than four attendees each.)

5.3.5 *A fee is payable in many jurisdictions on review/appeal, albeit for some cases only for competitor complaints.*



- Fees, when they are charged, vary enormously. For instance, the Dutch charge 23 Euros to be refunded if the party is successful. The USA charges \$15,000 for an advertiser and \$5,000 for a complainant or \$15,000 if the complainant/respondent cross-appeals.
- Many offer differing rates to complainants as opposed to advertisers, with some exempting NGOs, charities and Government agencies.
- Some offer partial or full refund if the review/appeal is successful.

5.3.6 *The grounds for review/appeal vary greatly between SROs*

Examples of grounds of review/restrictions placed on review	Country
Substantial flaw of process, substantial flaw of decision and/or extra relevant evidence available that could not have been submitted in the investigation	UK, Australia, New Zealand, Slovenia, Slovakia
Legal precedents not seen in the first investigation comes to light, but no new factual evidence allowed under any circumstances	USA
No new evidence permitted	Spain, the Philippines
The first decision must have been agreed by less than 75%	Colombia

of the jury and no new evidence is allowed	
Where the decision conflicts with legislation. However, no new evidence is allowed	Belgium
New evidence is allowed but nothing that post-dates the ad	Peru
New factual evidence MUST be produced	Czech Republic, Austria, Turkey
Procedural flaw or new evidence is available	Bulgaria
Process flaws are the only ground allowed	Hungary

- The grounds for review/appeal are not specified in many SRO process documents
- Of those that could be established, the UK's three stated grounds of review are the most comprehensive of any SRO, alongside Australia, New Zealand, Slovenia and Slovakia
- There were no grounds for review/appeal noted that we consider the UK could learn from and many more that were far more prescriptive and restrictive than ours.

5.3.7 Timescales for submitting a request for review/appeal following notification of a decision vary greatly

Time limit	SROs
4 days or less	6
7days or less	8
14 days or less	8
21 days or less	7
31 days or less	1
Unknown	5

- The UK is second only to Finland in generosity on timescales (UK: 21 days vs. Finland: 31 days from case decision notification)

5.3.8 The ASA is unique in offering to consider suspending publication of a ruling pending review/appeal on request, and only one other SRO suspends decisions in all cases

- As far as we could establish, only the UK and Colombia have a procedure to suspend a ruling from publication pending a review being dealt with. In the UK a party may apply to the Chief Executive for suspension citing "exceptional grounds".

In Romania the ruling is automatically suspended pending the review process completing.

- Many other SROs who mention the issue at all only do so specifically to state that an appeal or review does not suspend a decision under any circumstances.

Appendix 1

Extract from Dame Janet Paraskeva's April 2017 report:

“4.2.4 (n): Business compliance representatives see the grounds for review by the IR as very narrow and too focused on the conduct of the investigation rather than whether the Council made the right decision. The IR sees the whole file and is able to correspond with both parties directly on their own evidence and submissions made during the course of his investigation. They believed that whilst a party can supply the IR with further information to match the two grounds for review they believe that ‘you do not get a fair crack at making your own case’. They want to be able to present their case themselves. Another idea raised with me was whether support might be provided for the IR from a professional clerk to advise on code matters and consistency. Other ideas mooted were for the presentation of hearings in exceptional circumstances and in complex cases, perhaps those between competitors. One suggestion was that the ASA look at systems in use in other countries. This might include the presentation of written submissions to a ‘hearing officer’ with a limited time to file, supplemented by a chance to make time limited oral presentations. There could be the possibility of charging a fee for this level of review. This is based on a model seen in the USA. The ‘hearing officer’ would then present their report either direct to Council or via the case manager. There was also the suggestion of a three-person panel. The danger of this is an increase in time and therefore cost and the nearness to a judicial process. The system was built, at least in part, to avoid costly court cases and to provide guidance to advertisers through published guidance and judgments, which it does. It is also important to note that a final appeal to the courts is available through Judicial Review and that this opportunity has, although only rarely, been taken up. The IR himself believes that the system of review is expedient and works. He does not see any advantage in a three-person panel.

4.2.4 (o) BEIS has produced draft guidance for the ‘Small Businesses Appeals Champion’ stating that a regulator should have a process to challenge an unfair decision or enforcement action and identifies a number of helpful criteria against which the independent review processes can be reviewed. The independent review process, as currently agreed, meets many of these, although perceptions of operational independence and opportunities for a second opinion before making a formal ‘appeal’ (request for review) are areas worthy of further consideration.

4.2.4 (p): There were many ideas floated with me about how to improve and develop the independent review process, including oral hearings, panels and a clerk to the court for the independent review. While in general the independent review process works it would nevertheless be useful to see the ASA look more broadly at the independent review processes and good practice in other jurisdictions.” (Dame Janet Parakseva, March 17)

Appendix 2 (Independent review process - extracted from Non-broadcast complaint handling procedures)

“Requests for an Independent Review of an ASA ruling

50. The Independent Reviewer of the Rulings of the ASA Council will consider requests for a review of Council decisions against ads.

Terms of reference

51. Requests for a review should, in a self-contained format, contain in writing a full statement of the grounds for review in a single document and should not require the Independent Reviewer to cross-refer to previous correspondence with the ASA or other parties in setting out the grounds for review. The request for review should be addressed to the Independent Reviewer of the Rulings of the ASA Council, 7th Floor North, Artillery House, 11-19 Artillery Row, London SW1P 1RT (fax: 020 7580 7057, e-mail: indrev@asbof.co.uk). The request must be sent within 21 calendar days of the date on our letter of notification of the formal ruling or the Council decision that a complaint requires no additional investigation. The Independent Reviewer might waive the 21-day time limit if they judge it fair and reasonable to do so in exceptional circumstances.

52. Requests may come only from the complainant or the advertiser (the 'parties to the review'). Those from the advertiser or from the non-public complainant should be signed by the Chairman, Chief Executive or equivalent office holder; requests made only by their solicitor or agency will not be accepted. All dealings with the Independent Reviewer must be in writing. No oral hearings or meetings with the Independent Reviewer will be granted.

Grounds for a review

53. There are three grounds on which such a request can be made:

- if additional relevant evidence becomes available which could not reasonably have been shared during the course of the investigation

and/or

- where it is alleged that there is a substantial flaw in Council's ruling

and/or

- where it is alleged that there is a substantial flaw in the process by which that ruling was made.

54. No review will proceed if the point at issue is the subject of simultaneous legal action between anyone directly involved. Requests for a review should make plain that no such action is underway.

The Chief Executive and the Head of Casework

55. Before deciding whether or not a request for a review merits inviting Council to reconsider its ruling, the Independent Reviewer will request, in the case of a ruling following an investigated case, a formal response from our Chief Executive on the merits of the request for review. The Independent Reviewer will have regard to that response but is not bound by it. In cases where the request is for a review of a Council decision that a

complaint requires no additional investigation, the Independent Reviewer will request and then consider the formal response of the Head of Casework on the merits of the request for review. The Independent Reviewer will have regard to that response but is not bound by it.

The review process

56. If the Independent Reviewer decides that a ruling does not merit reconsideration by the Council because the request does not meet any of the three grounds set out above, he will inform the person making the request accordingly and close the file on the case; or

57. If he decides that a ruling contains minor factual errors that are capable of rectification without further referral to the Council by way of further investigation or referral and reconsideration he will have those changes implemented; or

58. If he decides that a ruling (in whole or in part) merits reconsideration by the Council he will undertake, either independently or with assistance from us or any other source of help or advice, such further investigation as they think appropriate. He will also inform the other party to the case and invite that other party's comments on the submission made by the party requesting the review. At the end of their investigation, the Independent Reviewer will make a recommendation to the ASA Council; or

59. If he decides that a Council decision that a complaint which has been closed on the basis that it requires no additional investigation merits reconsideration by Council, he will recommend to Council that it asks us to conduct a formal investigation of the complaint and will then close his file on the case; or

60. If he decides that a ruling (in whole or in part) merits reconsideration by the Council and they believe that it would be desirable for us to re-open our investigation, the Independent Reviewer will notify all parties to the review of that decision and they will invite the other party's comments on the submission made by the party requesting the review. When we make our recommendation to the Council at the conclusion of the re-opened investigation, the Independent Reviewer will advise the Council whether he considers all the relevant issues raised in the review request have been satisfactorily considered by the ASA on reinvestigation.

61. If a request for a review results in the Independent Reviewer inviting Council to reconsider its ruling, the Council must consider the Independent Reviewer's recommendation but is not obliged to accept it; the Council's ruling on reviewed cases is final.

62. In all cases the Independent Reviewer will inform the parties to the review of the

outcome of their work. A list of all review outcomes in the previous 12 months is published on www.asa.org.uk. All rulings that are reversed or amended following a review are republished and will remain on the ASA website for five years.

63. The Independent Reviewer contributes a report of their activities to our Annual Report.”


Contact us

Advertising Standards Authority
Mid City Place, 71 High Holborn
London WC1V 6QT

Telephone: 020 7492 2222

Textphone: 020 7242 8159

www.asa.org.uk

 Follow us: @ASA_UK