

Name of respondent: ITN Ltd

Protecting participants in TV and radio programmes

A6. Consultation questions

Question 1: Do you agree with our rationale for proposed new Rules 2.17 and 2.18?

Please give reasons for your answer.

Summary:

ITN does not believe changes to the UK broadcasting rules to further protect participants should incorporate news and current affairs programming. ITN's primary point in this Consultation is that any change should include a specific exemption for news and current affairs programmes.

News as a genre is already – and rightly – treated differently from other types of programming in regulatory terms and in the UK is already highly trusted by viewers. The concerns in this area about adults suffering harm from participation have not derived from news output and new restrictions on the production of news are not necessary or proportionate.

Editorial judgement and freedom to fulfil the role of impartial news in a democratic society is paramount and protected by law. ITN is concerned that extra controls would have a “chilling effect” slowing down the news gathering process where speed is critical, creating additional bureaucracy, narrowing the range of contributors and discouraging rigorous interviews or coverage of sensitive subject matter.

ITN proposes that Ofcom state that a “participant” does not include people subject of news events and investigative programmes. In practice, the nature of news coverage – reporting real events - limits the scope to select participants, for example to those caught up in events or witnesses. That contrasts to reality genres where producers have complete control in the choice of participant.

News in the broadcast media is already uniquely regulated under the Ofcom Broadcasting Code for Fairness, compared to online and print news media. Furthermore, ITN questions the legal analysis underlying the changes and considers that any regulation relating to “due care” should be placed in the Fairness and Privacy section of the Code, not the Standards section. New rules could be abused to limit editorial freedom if complaints can be made by everyone rather than just the individual affected.

Response

ITN makes and produces the news programmes for ITV , Channel 4 and Channel 5 News and longer form documentary and current affairs programmes and political debates (such as Party Leader Debates at the time of an election). ITN has very significant experience over 60 years of individuals participating in news and current affairs television programmes.

ITN recognises that the Code must develop and adapt to meet changes in society and programme genres and that concerns have been raised on the issue of adult participation, primarily in reality and immersive TV programmes.

ITN highlights the special and unique nature of news programmes. News is fundamentally different to other forms of programme. News and current affairs programmes are the most important form of public interest broadcasting and their central purpose is to inform the public on facts - to enable them to make decisions on issues that affect their lives, including political issues. News is linked to the requirement in a democracy of the public interest in the

public being informed. News is of the highest public interest and should not be restricted unless there is clear evidence-based justification to do so.

News is also different to other genres in that it is primarily about real events beyond any control of the broadcasters and there is no /limited choice on participants. In news the focus is on what has happened. The participants will be those who may have witnessed or been affected by a news event. Unlike a genre such as reality television, producers of news have limited control over participants.

News is also different in terms of statutory and regulatory control to other forms of programmes. It stands in many areas of regulation outside and distinct in its own right, separate from other types of programming. For example, in the requirement of due accuracy and due impartiality and by the special provisions reporting elections and doorstep reporting.

Although individuals in news programmes will often be vulnerable – for example a victim of crime or a member of the public caught up in a terror attack – it is notable that the present concerns about care for participants have not stemmed from treatment of participants in news programmes. In the thousands of programmes it has produced and broadcast on ITV, Channel 4 and Channel 5 ITN is not aware of any significant Ofcom problem on adult participation. The evidence is that the care of adult participation is not an issue of public concern in news.

By imposing a new rule Ofcom is placing a fetter on editorial judgements and freedoms. ITN has its own robust internal editorial guidelines, procedures and standards. ITN takes the issue of any form of participation in news programmes very seriously – and have always done so, applying as a matter of course careful editorial judgment to assess every contributor to our programmes. The importance of editorial discretion, editorial freedom and editorial judgements needs to be respected in news. There is not a definitive “right” or “wrong” way to report a story – the different editorial choices that can be made are myriad.

News is produced differently to other forms of programme. News production moves fast and there is not a culture of detailed assessment of participants’ welfare, potential distress and anxiety that might be caused by their participation. Time and speed are of the essence with little time for deliberation and news is a very perishable commodity.

The DCMS inquiry focused on a specific area, “reality tv”. News was not part of the Parliamentary Inquiry. It would be wrong in principle to broaden the issues from that inquiry into the areas of news and current affairs.

Reality television or immersive programmes are fundamentally different in nature to news programming. In the fast pace of news, decisions have to be made swiftly. News is not about intense depictions of individuals’ personal lives in staged setting, it does not have the benefit of full control on participant selection or significant time to make vetting and oversight assessments.

The legal context

The importance of news is a fundamental legal and ethical principle. News organisations have the right to impart information.

Article 10 of the European Convention on Human Rights is key to the issues raised in this Consultation. Article 10 engages both the rights of broadcasters and the viewing public to receive information. News is the area where Article 10 matters most.

Any restrictions on freedom of expression must be:

“prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or 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”.

Applying this fundamental principle, in the area of news are these new rules “necessary” and do they satisfy the Article 10 test?

It is not accepted by ITN that in the area of news that the new restrictions are “necessary”.

“Necessary” is a high test to meet. It suggests that the action *must* be taken, there is an imperative to impose a control. Any new extra restriction on freedom of expression, particularly news reporting, should be necessary and founded on fact-based evidence.

There is little to no actual evidence that this new restriction is necessary in news. The problems identified are nothing to do with news and current affairs. Concern on participation has derived from programmes areas distinctly different from news and current affairs - such as reality programmes and immersive programmes where individuals’ personal lives in an artificially created context are the focus of the programme.

The actual evidence is that the new rules are not necessary in news. Research continues to show that the public has more confidence and trust in the broadcast media news than other forms of news reporting. The actual evidence is the present system of regulation of the news broadcast media works well. For example, Ofcom’s own research on news consumption evidences high levels of public trust in news programming in the UK:

https://www.ofcom.org.uk/data/assets/pdf_file/0024/116529/news-consumption-2018.pdf).

The Code

The Ofcom Broadcasting Code already largely covers the issues engaged here, in particular through the requirement of Fairness. There is not a shortfall of regulation, the rules already exist. Where news producers have been deemed to have acted unfairly or in breach of privacy a remedy already exists. See, for example, the Ofcom adjudication circa 2012 against Press TV concerning the case of Maziar Bahari.

The Fairness requirement is unique to *broadcast* news regulation. There is no such requirement for newspapers or online news providers. The new rules will place an extra regulatory burden on news broadcasters over other forms of news. At a time when “Fake News” is a central concern of the public it is a backward step to impose an extra burden in the most reliable and regulated area of news provision – particularly with no evidence to justify the change.

We also question where the new regulations are being placed in the Code, given Ofcom’s powers in the 2003 and 1996 Acts. As presently drafted the new “due care” provision is being

placed in the Standards section of the Code but the legal basis for Standards regulation - s.319 Communications Act 2003 - does not seem to empower Ofcom to regulate the treatment of participants in the Standards section of the Code.

The right more appropriately falls into the “Fairness and Privacy” section governed by the 1996 Act. “Due care” of the individual is primarily for the individual affected or their family. It is essentially a personal right owned by the individual.

The net effect of placing “due care” in Standards (as presently proposed) is that *everyone* can complain - not only those with a direct interest and also removes the threshold procedures for entertaining complaints under Fairness and Privacy.

Legal and ethical problems will be created by placing the new rule in the Standards section of the Code. If the individual (whose due care may be in issue) does not want to complain but a member of the public does, this will raise significant privacy and human rights issues. In addition, allowing everyone to complain could lead to complaints, for example, from pressure groups, simply upset that their leader or spokesperson has been embarrassed.

Notable also is that under the 2003 Act, Ofcom’s role is to protect those “ whose circumstances appear to Ofcom to put them in need of special protection”. Regulation should focus on protecting the vulnerable who need special protection - not everyone. If everyone receives the same and one size fits all , it is not special protection. The starting point should be that adults appearing in programmes are not vulnerable and fully understand the nature of their contribution. Those who need special protection should be given it – not everyone.

The chilling effect

Bringing in the extra controls will have a detrimental effect on broadcast news and how it is made. It will have a “chilling effect” on journalism in the broadcast media. This will occur in a number of ways, including slowing down the process and disadvantage news broadcasters over other forms of media :

- Often news does have to interview people in distress or caught up unexpectedly in news events – in each case a judgement has to be made. The new regulation will inevitably increase the likelihood of due care assessments, background checks, engagement with medical experts and risk assessments of individuals. Such processes will slow the speed of news production and change tried and tested good practices in broadcast news.
- In news it is not presently industry practice to carry out psychological examination of those taking part and medical examination. Other than in specific defined areas (e.g. interviewing children, victims of sexual crime) form filling and release forms are not the normal practice in news production. When, for example, interviewing adults on political issues of the day, interviewing experts or individuals with a story to tell, release forms are not filled in which reflects the need for speed in the process.
- This new rule could lead to less people in a vulnerable, distressed or difficult position being interviewed in the broadcast news media. Broadcast news could be discouraged from tackling sensitive subjects and inhibit rigorous interviews. It will also narrow the range and diversity of people appearing in news.

- The imposition of a new rule creates an extra regulatory burden on news producers in the broadcast media over other forms of news media - such as online news providers or in print where there is no regulatory requirement of due care or fairness.
- New rules could be open to abuse by disgruntled participants / interviewees or third-parties or interest groups hostile to the media. Outrage/ harm and offence can be easily artificially created, for example on social media. Claims of vulnerability could be motivated by a desire to exert editorial control or to lead to the withdrawal of an interview that is regretted.
- An ongoing duty of care does not fit very easily in the normal practice of news. Each day events change. News is ephemeral and the notion of ongoing care will be a new and unusual regulatory requirement.

Question 2 and Question 3:

Do you agree with the proposed meaning of 'participant' for the purpose of these rules? Please give reasons for your answer.

Do you agree with the proposed scope of these rules? Please give reasons for your answer.

As stated above we are seeking an exemption for news.

General observations

The definition is drawn very widely:

“an adult who has agreed to take part in a programme in any way, except presenters and reporters”.

This would seem to capture almost *everyone* on television, however incidental their role.

It is unclear what “agrees to take part “ means.

“In any way” makes the scope of regulation too wide and encompasses those whose participation is minor.

The proposed change *will* create problems for news on an ongoing basis. Are the following “agreeing to take part... in any way”?

- a politician being door-stepped
- demonstrators seen at a public demonstration stating they do not want to be filmed
- those filmed caught up in a terror attack or natural disaster
- those broadly aware they are being filmed, e.g. in the street by the presence of a camera operator
- experts / professional participants who withdraw their consent after an interview
- suspects being interviewed and filmed in custody by police

- a family member laying a wreath at the scene of a crime aware of the presence of a camera
- patients filmed at a hospital where permission has been given by the hospital
- people filmed on police or trading standards raids
- a person making an incidental comment to camera in the street
- vox-pops
- use of footage of an interview on one news service being used on other news services
- families waiting to hear news from police, for example at an air crash
- public figures making statements they may regret or that go viral on social media
- defendants and their associates arriving at court who do not want to be filmed
- someone upset because his contribution failed to make the final edit

The definition would arguably include all the above, however controversial, uncontroversial, trivial or incidental the contribution. Often there will be circumstances where it is wholly unrealistic to seek consent prior to broadcast - for example, people in a terrorist attack or a natural disaster or at an event such as a demonstration.

We note Ofcom's reference to the term "due" in assessing what care might be appropriate but this is a very broad concept and open to broad interpretation.

Rather than creating problems for news broadcasters, news programming should be expressly excluded from the changes. Key is that news programme-makers have very limited discretion on selection, vetting and oversight of participants

Question 4:

Do you agree with the proposed wording for the new Rules 2.17 and 2.18? Please give reasons for your answer.

We repeat that we are seeking an exemption for news.

General observations:

We note the proposals:

Due care must be taken over the welfare, wellbeing and dignity of participants in programmes.

Participants must not be caused unjustified distress or anxiety by taking part in programmes or by the broadcast of those programmes.

The terms "wellbeing" and "dignity" and "anxiety" in the proposals are troubling. What does "wellbeing" mean? It is a vague concept and it is not clear how Ofcom will assess and

adjudicate on this psychological term.

“Dignity” is also a broad concept. An individual may believe he has maintained his dignity but an audience member may disagree.

Causing “anxiety” is a very low threshold.

Again this underlines the need to place any term in Section 7 and 8, rather than 2.

Question 5:

Do you agree that Rule 1.28 should be amended in this way? Please give reasons for your answer.

Question 6:

Do you agree that Rule 1.29 should be amended in this way? Please give reasons for your answer.

It is agreed "unjustified" is a more appropriate test than "unnecessary" when assessing distress or anxiety caused to an adult participant or to a child involved in a programme and is consistent with the Section 2 of the Code on potentially harmful and offensive material.

Question 7:

Do you agree with the proposed approach to the Code guidance? Please give reasons.

ITN repeats the need to exempt news from the proposed new regulations.

Care should be taken to avoid a one size fits all approach. Any change should be targeted and proportionate.

Guidance can be helpful in highlighting good practice but should not be used to regulate matters outside Ofcom’s statutory remit. Ofcom’s guidance should state that a ‘participant’ does not include people the subject of news events and investigative programmes.

Question 8:

Can you provide examples of best practice in the due care of programme participants which you think should be included in the guidance? Please share details if possible.

We believe regulation should be proportionate and there needs to be recognition of the unique challenges and context of news. News has a very limited say and control on selection, vetting and oversight of participants.

We are concerned at the broad scope of the proposed changes and believe they will have unintended consequences that could affect news and current affairs programming. The inclusion of news and current affairs in the new rules is unnecessary, not evidence-based and disproportionate.

