

Protecting participants in TV and radio programmes: Consultation on new broadcasting rules

Response of ITV plc

Introduction

ITV welcomes the opportunity to comment on Ofcom's proposals for the introduction of new Rules in the Broadcasting Code ("the Code") in relation to the protection of the welfare of adult participants in television programmes.

We have shared our response to the Consultation with our fellow Channel Three licensee STV, and they support the approach set out below.

We welcome Ofcom's acknowledgment in its Consultation that broadcasters should have the creative freedom to make the programmes that they want, and that people should be able to express themselves and follow their own ambitions by taking part in these programmes, if they want to. It is essential that Ofcom does not apply any new Rules in this area in a manner that could undermine or deny the agency and right of adult individuals, giving their informed consent, to choose to take part in television programmes.

We accept that, as programmes involving the public have evolved over time, so have the pressures on those who enter the public eye through appearing in these programmes; from ever greater media scrutiny and interest, and in particular from the intensity of social media interest. We accept that there has also been cultural change and increased public awareness of mental health issues, and greater concern is now expressed (by some viewers) about the welfare of TV participants.

We agree that the recent examples of viewer complaints cited in the Consultation demonstrate that increased concern. However, we also point out that Ofcom investigated all of those programmes, and did not find them to be in breach of the Code. We believe that this is not an area where there has in fact been significant non-compliance with the existing rules of Section 2 in relation to viewer offence.

As the Consultation acknowledges, many broadcasters already have comprehensive duty of care processes in place. These processes are (and should be) proportionate to the nature of the programme, the nature of the participants' contribution, and the participants' potential vulnerability.

We therefore do not consider that further regulation was required in this area, and we do have some concerns about the ambit and application of these new Rules, and the potential for uncertainty rather than consistency across the industry. We are concerned the new Rules might lead to excessive caution on the part of programme makers, who may fear that the new Rules require more extensive investigation or consideration of participants' backgrounds and psychological welfare than is practical or possible. Uncertainty could in

turn restrict opportunities for potential participants to participate in television, and thereby damage freedom of expression of both broadcasters and the public. The terms of the guidance from Ofcom on the new Rules will therefore be very important in this regard.

Nevertheless, broadly speaking ITV is content for broadcasters to now be required under the Code to do that which we have always regarded to be a basic practice of programme making, namely taking due care as regards the welfare of the people taking part in our programmes, and avoiding causing them anxiety or distress that is not justified by the editorial context of the programme.

We respond to the specific consultation questions below:

Answers to the 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.

We accept Ofcom's rationale for introducing these new rules, namely to ensure a clear and consistent approach across the broadcasting industry. We look forward to having further opportunity to comment on Ofcom's proposed guidance on these Rules once they are drafted, to ensure that the industry can clearly understand the parameters and practical requirements of these new Rules.

We also accept the logic of basing new Rules for adult participants on the existing Rules that concern under 18s. However we would note that, whilst it is accepted that children are inherently vulnerable by virtue of their age and understanding, that is not the case with most adults, who should be deemed capable of giving informed consent to take part in television programmes. Ofcom should therefore give that presumption due weight, and always carefully consider the participant's own wishes and agency, when considering viewer complaints about an adult participant's welfare, distress or perceived "vulnerability".

Question 2: Do you agree with the proposed meaning of 'participant' for the purpose of these rules? Please give reasons for your answer.

We have several concerns regarding Ofcom's proposed meaning of 'participant'.

Agreement to take part "in any way" and "verbally or by their conduct - whether on or off camera"

We accept that in a range of genres – whether it is a studio-based talent contest, a "reality" dating format, a factual observational series about people in their daily working lives, or a live daytime magazine "talk" show -

broadcasters and producers should of course take due care over the potential impact on participants' mental health and welfare.

However, the use of the wording "in any way" in the definition makes the scope of who is to be considered "a participant" in our view too wide, as is Ofcom's suggestion that a duty of care is still owed to those whose participation is "minor".

By way of example, this could potentially catch people incidentally caught in shot behind an interviewee filmed openly in a public place, or a person who deliberately "plays up" to the camera during such open filming in a public place, or is otherwise behaving in an anti-social manner. It could even catch members of a studio audience, whether or not they actively take part by speaking or responding to a presenter.

It is therefore unclear how "minimal" participation has to be to trigger the new Rule, and we would welcome clear guidance on this. We believe both Ofcom's definition and its guidance should provide that participation has to be more than minor, as well as requiring a clear and deliberate intent to take part in the programme at the time of filming. Someone simply being filmed incidentally in a place or situation, where there is no reasonable expectation of privacy, and who was aware of the filming at the time, should not be deemed "a participant" for the purposes of these new Rules.

We would note that where – as in the above examples – people have been filmed openly in a public place and are not engaged in activity that is inherently private or sensitive, Ofcom's view has traditionally been that they have little (if any) expectation of privacy, and that it is therefore warranted to include them and/or their behaviour in the programme without the need for their formal written consent.

If Ofcom remains of the view that such people are now also 'participants' in programmes for the purpose of the new Rules, and are therefore owed a duty of care by broadcasters, we believe that Ofcom's guidance should make it clear that in those circumstances the steps required to satisfy any duty of care owed to them is likely to be minimal. Likewise any distress or anxiety caused to them is unlikely to be deemed to be unjustified, given all the circumstances of the filming.

News, current affairs and factual programmes

We welcome Ofcom's apparent recognition that the new Rules would not apply to people who are the subject of journalistic investigation (for example those subject of surreptitious filming or recording) and who do not agree to take part in the programme. We agree that complaints from them regarding their treatment in programmes are more appropriately dealt with under Sections 7 and 8 of the Code. Were the duty of care obligation under Section 2 to be extended to them, we believe this would create significant regulatory and practical obstacles that would seriously impede journalism in the public

interest, and thereby infringe the Article 10 rights of both broadcasters and the viewing public who are entitled to receive such information.

Ofcom's guidance should therefore make clear that a 'participant' for the purposes of these Rules does not include people who have not agreed to take part but are:

- i) the subject of news, current affairs, serious documentary or other similar investigative programmes (and subject to investigative techniques such as covert filming or doorstepping), or
- ii) the subject of programmes that profile the lives and careers of celebrities and entertainers.

Where people are interviewed for the purposes of a news report or a current affairs programme, the nature of such programming (often recorded and broadcast on very short timescales) does not allow (and should not require) the same degree of consideration of the welfare of the participant as other programming. There may be many circumstances where people are filmed during a crisis situation such as a terrorist attack or a natural disaster, or a major public event such as a demonstration or concert, where the broadcast of this footage is of the highest public interest in reporting significant events, but where it is impossible to seek consent or to assess the welfare of individuals prior to broadcast.

We are concerned that the new Rules should not inhibit television journalism in the public interest, by creating the threat of unjustified complaints from "participants" in these circumstances on "welfare" grounds, where complaints of unfair treatment or unwarranted breach of privacy are unlikely to succeed under the existing Rules in Sections 7 and 8. We consider Ofcom's guidance should either exclude such programmes entirely from the new Rules, or make explicit how the new Rules will be applied, especially to news and current affairs programmes.

Celebrities

We accept the rationale for the new Rules applying to celebrities who appear in programmes such as "reality" shows involving competition, dating or other emotionally challenging elements. However, where they appear on other programmes such as daytime programmes (as interviewees, generally to discuss their latest career-related projects), game shows, or comedy panel shows, in the vast majority of such cases their participation is professional, and no more challenging in welfare terms than for a programme presenter or reporter, or for actors performing in a drama.

We believe that Ofcom's guidance should therefore make clear this distinction ie that celebrities who appear in the latter type of programmes would not expect the same level of concern for their welfare as "reality" programmes as described above. This is especially so if, at the time of their appearance, they have no relevant vulnerability and/or their contribution is not related to any personal vulnerability that they may have.

People who unsuccessfully apply to appear on programmes

When producers seek contributors for a programme many people might apply, of whom only a small proportion are likely to be accepted for filming and inclusion. We believe that if the scope of the new Rules extended to cover those people who apply to participate in programmes, but who do not actually participate in the programme by being filmed or included in it, this would impose a disproportionate and unjustifiable burden on broadcasters and producers. Our view is that Ofcom's guidance should make clear that unsuccessful programme applicants are not considered participants in the programme for the purpose of the new Rules.

People who initially take part in filming but do not feature in the broadcast programme

It is often the case that during the process of production and post-production, the contributions of some individuals who were originally selected to participate and who take part in some filming end up "on the cutting room floor", and do not appear in the broadcast programme. This can occur for a variety of editorial reasons, including limited programme running time, relevance to the subject etc. Again, we believe that the scope of the new Rules should be specifically limited in the guidance in relation to people that may have taken part in filming at some point, but do not feature in the broadcast programme.

Phone-ins

Generally speaking, people who call to take part in phone-in programmes are by definition actively seeking to participate, and are usually put on air only a few minutes after they call in. In these circumstances, if there are fairness, privacy or welfare concerns relating to a caller (or another person to which they wish to refer) broadcasters may use certain limited steps to protect them, for example by changing names, disguising the caller's voice, omitting certain details from their story, or in some cases reading out a summary of their contribution rather than broadcasting their voice or direct interaction with the presenters.

If Ofcom intends to include such contributors as "participants" for the purpose of the new Rules, we suggest that Ofcom's guidance might reference such techniques as a way of satisfying "due care" obligations in this context. Again, the operation of the new Rules in these circumstances requires detailed guidance on proportionality to avoid confusion for programme makers.

Due care

We believe that the proposed explanatory definition section relating to "due care" should also include a specific proviso that broadcasters will not be held accountable for matters outside of their reasonable control, such as adverse events occurring in the lives of participants long after their participation and the broadcast of the programme.

We also believe it would be helpful for this explanatory section to include explicit reference to the fact that due care will be exercised differently in different genres of programming, and that “one size cannot fit all” in relation to the steps to be taken by producers in the exercise of due care.

Either in the definition section or in guidance, Ofcom should also make clear that broadcasters will not be deemed to have failed to exercise due care if participants choose to withhold from them details of personal or medical history or vulnerabilities that would be relevant to their participation.

Acquired programming

Ofcom should set out clearly in guidance what (if any) the broadcasters’ obligations are in relation to acquired programming, particularly programming acquired from other jurisdictions, where the relationship between broadcasters and producers is more remote, and where obtaining information about producers’ procedures for participant welfare is more difficult.

Question 3: Do you agree with the proposed scope of these rules? Please give reasons for your answer.

Please see our response to Question 2 above regarding the scope of the definition of ‘participant’.

Scope of the new Rules vs the scope of Sections 7 and 8

We believe there is potential for some confusion between the scope of the new Rules in Section 2 and the existing scope of Sections 7 and 8, which the Consultation appears to acknowledge.

We believe the current regulation and enforcement of Sections 7 and 8 works well. In particular, we consider Ofcom’s approach to the issue of informed consent to take part in a programme, and complaints relating to the later withdrawal of informed consent prior to broadcast, has generally been balanced and proportionate.

We have carefully considered where the new Rules should properly sit within the Code, and we agree with Ofcom that the new Rules should sit in Section 2 rather than in Section 7 of the Code.

The Rules in Section 1 protect children as viewers, and children as participants both during the programme and on the broadcast of the programme. Section 2 will now contain Rules protecting adult viewers from harm and offence, and adult participants from harm during the programme and on the broadcast of the programme. The new Rules concern the welfare of all adult participants (except performers in drama), just as the existing Rules protect the welfare all child participants.

Whilst we understand Ofcom's wish to refer to informed consent as part of its guidance on steps to be taken by broadcasters in relation to due care over welfare, we consider that issues of informed consent are best dealt with under Section 7 of the Code, and this should continue to be the case going forward. Likewise, issues that properly relate to the potential infringement of participants' privacy, as opposed to their welfare, should continue to be dealt with under Section 8.

We therefore suggest that Ofcom's guidance on the new Rules should make this distinction explicit for the benefit of any participants who seek to complain to Ofcom after broadcast. Complaints about unfairness in the programme should remain entirely distinct from complaints that due care has not been taken regarding their welfare.

Likewise, we do not consider that the new Rules should result in a duty of care being owed to people other than programme participants, for example members of a participants' family. A family member or someone closely associated with a participant cannot be themselves a 'participant' in the programme in any sense of that word. Whether or not the programme might have some emotional impact on their lives, by virtue of their association with the participant, to consider the duty of care as extending to these third parties would result in a disproportionate, open-ended and unjustified burden on broadcasters and producers.

We note that Sections 7 and 8 already potentially offer such related persons redress, if they can establish that they are a person 'affected' by the programme, and that they have been treated unfairly in the programme, or that their privacy has been unwarrantably infringed in the programme or in the making of the programme.

Assessment of complaints under the new Rules

Ofcom currently has published procedures regarding the assessment and investigation of standards complaints (which typically come from viewers) and fairness and privacy complaints (which typically come from participants in programmes or the subjects of programmes).

Currently, fairness and privacy complaints from a person affected by a programme (usually a participant or its subject) are initially subject to Ofcom's complaint entertainment process, which ensures that unsustainable complaints are not entertained, and regulatory action is targeted only where there is an arguable case that Rules 7.1 or 8.1 are engaged.

We believe there is a risk that some participants who do not have a sustainable fairness or privacy complaint – or whose complaint has not been entertained – may seek to make an alternative complaint under the new Rules to attack programmes they are unhappy about. We therefore believe that Ofcom should formally amend its *Procedures for investigating breaches of content standards for television and radio*, and/or introduce new procedures for the entertainment of complaints under the new Rules from programme

participants, similar to the current entertainment procedures for fairness and privacy complaints. Initial assessment by Ofcom whether a “welfare” complaint is trivial or vexatious will be important to prevent potential abuse of the new Rules.

Complaints from viewers about offence caused by a perceived lack of due care towards participant welfare or dignity, or unjustified distress or anxiety, should be assessed by Ofcom just as it currently assesses other viewer standards complaints. It may be appropriate for Ofcom to seek further information from the broadcaster about the programme’s consideration of participant welfare before deciding that the Rules are engaged, and a formal investigation of the programme is launched.

Question 4: Do you agree with the proposed wording for the new Rules 2.17 and 2.18? Please give reasons for your answer.

Broadly we agree with the proposed text of Rules 2.17 and 2.18.

As regards the definitions that are included in the body of the Code, please see our comments on the definition of ‘participant’ in our answer to Question 2 above.

As regards the programmes that the Rules are stated to apply to, we suggest that it reads: "*They apply to other programme content including...*" and should also state explicitly that the Rules do not apply to drama programmes.

As regards Rule 2.17, we do not see the necessity or purpose of the inclusion of the term “*wellbeing*” in the Rule. If it is to be included, Ofcom must define specifically in the Code what is meant by “*wellbeing*” that is not already encompassed within the terms welfare and dignity.

Question 5: Do you agree that Rule 1.28 should be amended in this way? Please give reasons for your answer.

Yes, save that we do not see the necessity for the inclusion of the term “*wellbeing*” in the revised Rule. Please see our comments in our answer to Question 4.

Question 6: Do you agree that Rule 1.29 should be amended in this way? Please give reasons for your answer.

Yes.

We agree with Ofcom that “unjustified” is a more appropriate test than “unnecessary” when assessing distress or anxiety caused to an adult participant or to a child who is involved in or affected by the broadcast of a programme.

This approach is also consistent with the approach that Ofcom adopts elsewhere in the Section 2 of the Code when assessing potentially harmful and offensive material. Editorial justification is a key principle of Ofcom's regulation of programme content, and is therefore a term already used elsewhere in the Code, for example in Sections 1, 3, 7 and 9.

Question 7: Do you agree with the proposed approach to the Code guidance? Please give reasons.

We welcome Ofcom's acknowledgement that it does not intend the new Rules to place a disproportionate and unjustified additional burden on broadcasters and producers. We also welcome Ofcom's acknowledgment that the new Rules need to be flexible enough to work in a wide range of situations. With those clear aims in mind, we believe Ofcom's guidance should be clear but should not be overly detailed and prescriptive.

That said, there are a number of points that Ofcom makes in its Consultation that we welcome, and that we believe should be reflected in the guidance. We set these out below.

As Ofcom says in the Consultation, broadcasters and other stakeholders have engaged in the development of Ofcom's guidance on Rules 1.28 and 1.29 of the Code. It would be helpful for broadcasters to see and to have opportunity to comment on and discuss with Ofcom its draft guidance on the new Rules, before final publication.

"Due" care

We believe this is a key principle of Ofcom's regulation of broadcasting content, and that it is consistent with Ofcom's approach to regulation in other areas of the Code (for example Sections 1, 5, 6 and 9). This is something that should be emphasised in the guidance.

The Consultation also recognises that the steps a broadcaster takes are a matter of judgment as to the required level of care that would be appropriate to the circumstances of each case. We believe Ofcom should adopt a similar approach to that applied to the regulation of due impartiality, which recognises and respects the importance of editorial decisions. We believe the guidance should also reflect this.

We believe the guidance should recognise (as the Consultation does) the importance of flexibility and proportionality. With some types of programme content it would be wholly disproportionate to be required to carry out detailed assessment of the potential vulnerability of participants (for example vox pop interviews and phone ins). The latter usually involve a quick turnaround, with little time between a callout for viewer calls, the assessment of those calls, and their broadcast. See our answer to Question 2 above.

This is particularly the case in news programmes. News is a perishable commodity. Often it is imperative and in the public interest that a story is reported as quickly as possible. In practical terms, a story can be produced and broadcast in a matter of hours and sometimes with breaking news events in a matter of minutes, and in such circumstances there will be little (if any) scope for detailed consideration or assessment of participants' welfare or potential distress and anxiety that might be caused by their participation.

We believe Ofcom's guidance should acknowledge that where broadcasting content is required to be produced and broadcast with a quick turnaround, for practical reasons the due care to be afforded to participants should and will be correspondingly and necessarily more limited. The guidance should also acknowledge that in such circumstances, it is not always possible to document due care assessments that may be made, and it should not be necessary to do so.

Definition of 'participant'

Please see our response to Question 2 above.

Outcomes beyond a broadcaster's reasonable control

We welcome Ofcom's intention that the guidance will make clear that it does not intend to hold broadcasters to account for outcomes beyond their reasonable control or which might entail complex causes, and that provided appropriate steps have been taken, these circumstances would not necessarily lead to an automatic breach of the new Rules. This is in keeping with Ofcom's stated aim of a flexible and proportionate approach, and we believe this should be stated explicitly in the definition/explanatory section of "due care" in the Code, as well as in guidance to the new Rules.

Public interest

The Consultation rightly recognises that the subject matter of news programmes is in the public interest, but it seems to suggest that the content of other types of programme (such as entertainment or reality programmes) may not be. There is a public interest in all forms of programming, not least in the fact that they represent freedom of expression and the right to receive and impart information and ideas under Article 10 of the ECHR. We believe the guidance should reiterate this, and the general importance of freedom of expression.

We agree with Ofcom's statement in the Consultation paper that there may be significant public interest in programmes featuring people with vulnerabilities and exploring those vulnerabilities. We believe the guidance should make this clear, as well as Ofcom's stated aim not to deter broadcasters and producers from making such programmes.

Editorial techniques "such as lie detectors"

It is not clear what concerns Ofcom has about lie detector tests, or indeed any other unspecified editorial techniques. We welcome further clarification and explanation in the guidance on this.

Sections 7 and 8 of the Code

Please see our response to Question 3 above for our suggestions relating to guidance on this issue.

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 attach a copy of ITV's draft Guidance to producers on protecting programme participants, which sets out ITV's current thinking on best practice in the approach to compliance with the new Rules, and in assessing and addressing risks to participant welfare.

We also refer to our press release dated 22 May 2019 setting out the main features of our recent welfare processes for *Love Island Series 5*, which we consider to be a good example of best practice in relation to a high profile "reality" show, involving an extensive period of filming of participants in a controlled environment.

<https://www.itv.com/presscentre/press-releases/itv-outlines-duty-care-processes-ahead-series-5-itv2s-love-island>

Finally, we refer Ofcom to the recent public evidence of two former Love Islanders, Yewande Biala and Marcel Somerville, provided to the DCMS Select Committee on 4 September 2019, concerning their experience of the steps taken to protect their welfare before, during and after their participation.

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