

Submission to Ofcom consultation on
Protecting Participants in TV and Radio
Programmes – New Broadcasting Rules

pact.

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Introduction

- 1) Pact is the UK trade association representing and promoting the commercial interests of independent feature film, television, digital, children's and animation media companies.
- 2) The UK independent television sector is now one of the biggest in the world. In 2018, UK independent television sector revenues stood at over £3 billion.¹
- 3) Pact takes the health and welfare of all participants and employees in broadcasting and production seriously. This is why Pact welcomes the opportunity to respond to Ofcom's consultation on the new broadcasting rules to protect TV programmes' participants.
- 4) For further information, please contact Pact's Interim Head of Policy, Niall Stewart, at niall@pact.co.uk or on 020 7380 8232.

¹ Pact Census 2019

Consultation Questions

1.1 Pact has decided to group these questions together in order to provide the most succinct answers to this consultation.

Ofcom Question 1: Do you agree with our rationale for proposed new Rules 2.17 and 2.18? Please give reasons for your answer.

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

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

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

1.2 With regards to the rationale, Pact welcomes Ofcom's intention which is stated in paragraph 2.12 that Ofcom does not intend for the proposed rules to place an "disproportionate and unjustified burden on broadcasters". Pact holds the view that Ofcom's rationale for the rules which is to set a "clear, consistent generally accepted standard for the care of participants, supported by guidance on best practice in this area" is a positive step forward for the care of participants on television programmes. Pact also shares Ofcom's view that the level of care should be appropriate to each individual programme and Pact is pleased at the assurance given in paragraph 4.6 that the guidance provided by Ofcom is not meant to be prescriptive.

1.3 This is because Pact shares Ofcom's objective in paragraph 4.6 that it is for the broadcaster to decide whether any or all of the steps detailed in the guidance and/or any additional steps are appropriate for each particular programme. Pact would urge that the guidance should make clear that the appropriate duty of care steps for each programme should be agreed between the broadcaster and the independent production company.

1.4 In paragraph 4.9, Ofcom states that the Code's requirements should not hamper either "freedom of expression or programme-making". In order to ensure that the Code does not hamper programme-making, financial responsibility for the duty of care steps must be assigned to the broadcaster and the duty of care cost to be included in the programme tariff once the appropriate measures (if any) have been agreed between the broadcaster and the producer.

1.5 Pact also supports Ofcom's statement in the introduction paragraph 3.3 that viewers must trust that broadcasters are fulfilling their duty of care to programme participants. By providing duty of care information to the viewers, the broadcasters will avoid any public misunderstandings that the participants are under 'unjustified'

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duress during either the casting or the production process. Broadcasters may also wish to inform the television audience that further duty of care is provided to participants following the transmission of the series. This will reassure the audience that vulnerable participants are receiving the care necessary to cope with their raised public profile.

1.6 Pact shares with Ofcom the concern stated in paragraph 2.14 that there should not be unintended negative consequences of programme makers being deterred from casting people who have more complex care needs. This would lead to less diversity of the participants on television and curtail these individuals' freedom of expression. This diversity will rightly be protected by the flexibility and proportionality of the Code which will enable the broadcasters and the independent production companies to frame the duty of care steps to meet individual participants' unique care needs.

1.7 Pact notes Ofcom's statement in paragraph 3.14 that broadcasters must have clear procedures in place and ensure that "production companies have processes in place and retain records of any actions take in the due care of adult participants". Pact welcomes this statement for, as shown in Pact's answer to Question 8 on examples of best practice, independent production companies are already leading the way in the care of participants throughout the entire casting, production and post-transmission/streaming stages.

1.8 Pact welcomes Ofcom's statement that this duty of care must be provided for a "reasonable period of time". Pact believes that this reasonable period of time must be determined by an individual's particular care needs. Care costs for individuals should be included in the broadcaster's tariff for the programme with the provision that the broadcaster will provide extra care funding for individuals whose care needs require an extended period of time. This will ensure that broadcasters pay appropriately for this length of duty of care in their tariff. It will also ensure that the independent production company can provide the appropriate level of care for each participant from the outset and for the necessary period of time.

1.9 Pact notes that proposed new Rule 2.17 states that "Due care must be taken over the welfare, wellbeing and dignity of participants in programmes".

1.10 Pact supports the insertion of the word 'due' for the purposes of ensuring that the proposed new rules are "flexible and proportionate" as stated in paragraph 3.8. Pact also supports Ofcom's objective in ensuring that the rules reflect the requirement on broadcasters to judge the appropriate level of care for participants on the basis of their particular welfare needs, the nature of their participation in the programme and the type of programme.

1.11 Pact notes that the proposed new Rule 2.18 states that “Participants must not be caused unjustified distress or anxiety by taking part in programmes or by the broadcast of those programmes”.

1.12 Pact welcomes the introduction of the term “unjustified” in the proposed rule 2.18 as this will ensure that the guidance is not excessively restrictive. Each programme team and the overseeing broadcaster must justify the demands of each programme on their participants and the extent of their duty of care according to the demands of their programme. The need to carry out risk assessments on the programme format and every participant will ensure that no aspect of the programme is left unanalysed for potential dangers and so eliminate any possibility of any ‘unjustified distress or anxiety’.

1.13 Pact believes that the new rule will provide the necessary flexibility, proportionality and best practice guidance for independent production companies. This will allow these companies in partnership with the broadcasters to frame the duty of care procedures for the particular demands of each programme.

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

2.1 Ofcom states in paragraph 4.5 a) that under proposed rules 2.17 and 2.18, “‘Participant’ means an adult who has agreed to take part in a programme in any way, except presenters and reporters”.

2.2 Ofcom excludes from their list of participants on-air staff presenters and reporters. Reporters and presenters make up only two on-air employment roles. Pact believes that the Ofcom exclusion list should be extended to all on-air television staff including game show panellists and professional performers such as comedians, musicians and dancers. This is because these participants are freelance employees of the independent production company and so are already protected by employment and health and safety legislation. Pact believes that the rules should be directed at members of the public who have agreed to be on a programme through a volunteering and casting process and not paid professionals with independent access to advice from a trade union, legal or management representative.

2.3 With reference to news, current affairs and audience phone-in programmes, Pact notes that the programmes’ duty of care towards their participants are well-established under Section 2 ‘Harm and offence’, Section Three ‘Crime, disorder, hatred and abuse’, Section Five: Due impartiality and due accuracy’, Section 7 ‘Fairness’ and Section 8 ‘Privacy’ of the Broadcasting Code. Pact notes that, in these genres, rules 2.17 and 2.18 will not be sufficiently flexible to be effective in protecting participants. This is because the turnaround for programmes in these genres can be

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a matter of hours which negates the ability of the programme-team to carry out an effective risk assessment of the individual participants' duty of care needs.

2.4 Ofcom notes in paragraph 4.5 a) that the term 'informed consent' is explained in Section 7.3 of the Broadcasting Code. Paragraph 4.5 a) makes clear that informed consent is normally required except "where the subject matter is trivial, or the participation is minimal". Pact holds the view that production companies should obtain and hold written agreements from contributors regardless of the trivial nature or minor participation of the individual's contribution.

2.5 Ofcom states that 'agree to take part' covers those circumstances where 'informed consent' may not be necessary under the Code but some level of duty of care may still be appropriate. Ofcom defines 'agree to take part' in paragraph 3.11 which is when a person has given their agreement either in writing, verbally or by their conduct -whether on or off -camera. Pact notes that Ofcom qualifies this by stating that the rules would not cover people featured in coverage of an event such as a football match or filmed surreptitiously in the public interest.

2.6 Pact believes that the exceptions to the 'agree to take part' circumstances which were outlined in paragraph 3.11 of the Ofcom consultation document should be extended to news, current affairs and television audience phone-in genres. This would include vox-pops, live reporting and programmes that include questions from members of the public. This is because the welfare, well-being and dignity of the participants for these genres and sub-genres are already safeguarded by other sections of the Broadcasting Code as stated in paragraph 2.3 of Pact's submission.

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

3.1 Pact notes that Ofcom states on the Proposals page (page 12) that "the proposed rules [for 2.17 and 2.18] would apply to programmes including, but not limited to, the following genres: reality (including scripted reality shows), documentaries, news, current affairs, audience phone-ins, audience interaction shows, quiz shows, talent contests and other forms of factual and entertainment programming. The rules would not apply to drama content, including sitcoms and soaps."

3.2 Pact broadly agrees with the scope of these rules as the Ofcom document properly excludes dramas but Pact believes that news, current affairs and phone-in programmes should also be excluded as these programme types are covered by other sections of the Broadcasting Code more appropriately than 2.17 and 2.18. These other sections of the Broadcasting Code are listed in Pact's answer to the previous question.

3.3 Pact believes that all professional employees including those who are on temporary employment or services contracts with the production company should be added to the current list of exclusions which currently includes on-air presenters and reporters and drama production personnel.

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

4.1 Pact agrees broadly with Ofcom's proposed flexible and proportionate approach to the Code guidance which allows each duty of care to be tailored for each individual programme. Pact agrees that the Code should not be a barrier to the broadcasters' freedom of expression and innovative programme-making. There must also be no interruption to the audience's right to receive information and ideas.

4.2 The flexible and proportionate approach to the Code's guidance in which broadcasters will have the freedom to choose the duty of care approach for each programme will ensure that there is no 'unjustified' distress or anxiety for participants throughout the programme timetable. Pact would urge that the broadcaster, whilst accepting the financial responsibility for the duty of care cost, should work in partnership with the production company to ensure that participants receive the best possible duty of care in tandem with innovative programme-making.

Ofcom 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.

5.1 Pact has established from its consultation with members that independent production companies provide a wide range of support to participants before, during and after the production process. This is because the independent production sector produces a substantial amount of UK reality TV series and just under 50% of all PSB television production in the UK. This means that independent production companies bring experience, knowledge and expertise to bear on this subject.

5.2 Production companies take the care of the participants in their programmes seriously. The importance of this care has risen in recent years due to the increase in the scale and intensity of social media. The rise of online phenomenon, such as trolling, has presented new challenges to the participant care provided by production companies throughout the production process and beyond

5.3 Pact understands that a PSB has instituted a casting policy which brings together all the key stakeholder departments such as Editorial, Human Resources and Business Affairs. This approach ensures that all participant casting decisions are based on all the necessary expertise and experience.

5.4 Three examples of duty of care best practice from Pact member companies are listed below:

Duty of Care Best Practice Examples:

5.5 Independent Production Company A

Before

1. Potential contributors are asked to complete a questionnaire disclosing, amongst other things, the contributor's medical information.
2. Potential contributors will meet with the EP and SP to discuss any vulnerabilities or care needs identified in the questionnaire.
3. A doctor's note may be required to validate the details provided in the questionnaire.
4. When necessary, taking into consideration "red flags", disclosure of mental health by the contributor, the nature of the production or category of contributors, potential contributors will have a face-to-face meeting with a psychologist/psychotherapist (together "Therapist") who will assess and provide detailed feedback on the appropriateness of the contributor's participation.

During

1. The Therapist has frequent calls with the EP and SP to discuss the wellbeing of the contributors. The frequency of the calls is determined on a needs basis or where there is no immediate need, weekly.
2. Contributors are offered a phone call with the Therapist and informed that the Therapist is available to talk to them during filming if required.
3. A member of the production team is appointed to oversee the contributor's wellbeing and build rapport between the contributor and crew.
4. A member of the production team is tasked with and responsible for calling the contributor regularly throughout the 3-month pre-transmission period.
5. Contributors are required to adhere to Health and Safety regulations by ensuring that they eat regular meals, drink lots of water, rest and take exercise breaks.

After

1. Contributors are provided with the number of a member of the production team and a dedicated person in the team is tasked with and responsible for continuing to call the contributors throughout editing, during transmission and post transmission.
2. Contributors are offered and made aware that they can speak with the Therapist when required.
3. Contributors receive a written note post transmission informing them that they can still contact the production team if required.

5.6 Independent Production Company B

Audition Stage

5.7 During the audition stage, whilst the contestants are waiting, they are asked to do pre-audition interviews, during these interviews and also the auditions a qualified psychotherapist with significant experience in handling mental health assessments is in attendance. These interviews enable the production teams to look for signs of contestants appearing unduly anxious or agitated before auditions which the production team will flag to the attending psychotherapist. Once aware of an issue, or if having identified a potential problem themselves, the psychotherapist will chat to the contestant before the audition to assess the contestant's level of anxiety and possible causes of the anxiety. The psychotherapist also watches each performance with the intention of being able to advise production staff of concerns regarding contestants and takes the opportunity to speak to individual contestants' post-performance to assess their well-being and establish whether there is potentially an underlying problem which needs to be investigated further.

5.8 Contemporaneous notes are made by the psychotherapists, which are passed to the production doctor to decide whether further action is necessary. In the event that the psychotherapist raises a concern regarding a contestant that issue will be flagged to a senior member of the production team and, after consultation with the contestant, an appointment may be made for the individual to see the appointed production doctor for an assessment of the individual's mental and physical health and to establish whether that person is able to continue in the competition. The production doctor assigned to a programme is a general practitioner who has particular expertise in mental and occupational health and has access to a wide network of specialists, including consultant psychiatrists and ENT specialists, who are able to assist further if necessary.

5.9 All talent shows contestants receiving a 'no' are offered a one-to-one session with the psychotherapist before they leave the audition venue.

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5.10 Contestants who progress to the final stages are asked to complete a confidential health screening questionnaire which is submitted to the production doctor for review. The production doctor may ask to meet specific individuals for further assessment, based on comments in their questionnaires.

5.11 There may also be a follow-up screening interview with a psychotherapist or psychiatrist (as appropriate). If a further screening interview does take place, the psychotherapist or psychiatrist will provide a confidential summary of the assessment and welfare recommendations to the production doctor. The report will also include a recommendation on whether or not the contestant is able to proceed further on the programme and will advise whether any adjustments need to be made for particular contestant(s) or specific support strategies need to be implemented, such as regular consultations with the production doctor and/or psychotherapist.

Production Stage

5.12 During Production the programme psychologist attends live shows to provide support during the day and after elimination. The production doctor is on call and any medical or counselling appointments are made during the rehearsal week as appropriate. During the production process finalist contestants who will be spending any length of time together are introduced to a number of people who will support them during the production – the production doctor and/or the programme psychologist, the executive production team, the press and publicity team (as detailed above) and other members of the production staff– all of whom, it is made clear, will be engaged with and be available to the contestants throughout the production and in some cases post broadcast.

5.13 In the case of shows where contestants live in a house during their time in the programme, they are accompanied in the house by several experienced members of the production team including an allocated welfare producer. The contestants are informed that the resident house team are there to support them during the production and that they are always on hand for private conversations. The contestants are also issued with and talked through a code of conduct to be adhered to whilst living in the house.

5.14 The house teams monitor the welfare of the contestants on a daily basis. As part of that process, a daily welfare report is compiled by a senior member of the house team and this is shared with the senior production management, including the executive producer. Any welfare concerns are discussed between the executive producer and the house team and further support systems are implemented (such as visits to the doctor or psychotherapist) should they be deemed necessary.

Post Broadcast Stage

5.15 Exiting contestants are debriefed by a senior member of the production team, who may also stay with the contestant and support them depending on the response of the individual. Family and friends will also be called to support the exiting contestant at this time. The contestant is also encouraged to speak to the psychotherapist – who is on standby throughout.

5.16 With the talent shows, production teams are briefed to ensure contestants have check-in calls the day after broadcast and then again, a few weeks later in case circumstances have changed. This contact with contestants may also extend to discussions with family and friends. Contact with the psychotherapist/psychologist is also encouraged, if appropriate. Not all contestants engage with or take up the offer of continuing support, it is dependent on the individual and their specific needs.

5.17 There is no time limit on aftercare if needed and the production company assume an element of aftercare in the production budget, for example.

5.18 Independent Production Company C

5.19 The company creates bespoke cast care and wellbeing procedures for each show dependent on the nature and content of the programme. As an example, for fixed-rig, 24/7 reality-type programme the company provides psychological testing during the casting process, and during the shoot the cast liaison team works closely both with the cast and with senior management to constantly monitor the filming process and to flag any concerns either raised by the cast themselves or by production team members who may have overheard comments or witnessed behaviour which caused concern. The location shoots for the series are always attended by at least one senior member of staff who monitors these processes, alongside a qualified psychologist who conducts location visits and is available on phone and Skype for intermediate support. The senior management team and psychologist are on hand to support the cast and production team with any issues. Issues are escalated to the broadcaster when required. The location team also includes fully qualified medical staff as well as 24-hour security.

5.20 Dependent on the nature and content of the programme, for fixed-rig programming post-filming the production company arranges a post-filming psychological test to see if any cast are feeling concerned about anything, as well as conducting regular ‘keeping in touch’ calls and emails with the cast.

5.21 The production company also make sure that the cast know when a series is to be transmitted and remind the cast of their contribution to a particular episode. Further after-shoot care includes psychological support as requested, professional advice on social media and introductory information on potential agents from the broadcaster.