

## Ofcom's Further Consultation on Protecting Participants in TV and Radio Programmes

### BBC Response - July 7 2020

The BBC welcomes the opportunity to respond to Ofcom's further consultation on Protecting Participants in TV and Radio Programmes following feedback on Ofcom's initial proposals. As reflected in the BBC's response to Ofcom's first consultation, the BBC is committed to ensuring 'due care' of adult contributors in all content: this commitment is set out in the BBC's revised Editorial Guidelines (2019)<sup>1</sup> in the section on Fairness to Contributors and Consent<sup>2</sup> and in Guidance on "Working with vulnerable contributors or contributors at risk of vulnerability"<sup>3</sup> which has been available for some years.

It is worth restating that the BBC takes a bespoke approach to contributor care, one that is appropriate to the person involved, the nature of the participation and the type of programme/content. As a consequence, the proper exercise of our duty of care must take account of the *"editorial content, the nature and degree of the individual's involvement and their public position, along with other relevant factors such as safety risks or whether the individual is vulnerable."* A one size fits all or standardised approach to *"protecting participants"* is not appropriate.

On this basis the BBC supports Ofcom's continued objective of a *"targeted, flexible and proportionate approach to ensuring that programme participants are properly looked after by broadcasters."* And that the proposed new rules *"must allow broadcasters and programme makers to take account of different risks and considerations that arise, depending on the circumstances of a person's participation, and the nature of the programme in question."*

The BBC welcomes changes to Ofcom's proposals which address the concerns that the BBC and other broadcasters raised in the first consultation:

- the definition of a 'participant'
- the reinstatement of informed consent as the appropriate test for the agreement of participants to take part in programmes
- the abandonment of the concept of 'wellbeing' as part of Ofcom's proposed new rules and the clarification of this in practice 7.3

The BBC welcomes Ofcom's proposed use of section 7 of the Broadcasting Code, Fairness, for new rules on participation: we do not believe it is necessary for Ofcom to propose to deal with this issues arising through participation by creating a new rule in section 2, Harm

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<sup>1</sup> The Editorial Guidelines can be seen at: <https://www.bbc.com/editorialguidelines>

<sup>2</sup> Section 6 of the Editorial Guidelines on Fairness to Contributors and Consent: <https://www.bbc.com/editorialguidelines/guidelines/fairness>

<sup>3</sup> Guidance: Working with vulnerable contributors or contributors at risk of vulnerability: <https://www.bbc.co.uk/editorialguidelines/guidance/vulnerable-contributors>

and Offence. We set out below the reasons why we believe Ofcom can achieve its objectives with an amendment to an existing rule.

## Question 1

**Do you agree with our proposed approach to the:**

**a) Additional measure of informed consent set out in Practice 7.3**

- 1.1 The BBC is generally supportive of the new practice on due care to adults and agrees that the new approach should sit in section 7 of the Code which already provides a clear regulatory framework for participants who wish to raise a concern about their treatment in a programme. The BBC has no objection in principle to the additional measure of ‘informed consent’ in 7.3 designed to ensure that participants are notified of potential harmful negative consequences of their participation when giving informed consent. The BBC’s Editorial Guidelines (2019) on Fairness to Contributors and Consent already make it clear that contributors/participants should be made aware of the implications of consenting to take part.
- 1.2 As currently drafted, however, the measure is potentially very onerous and could be impossible to reach if broadcasters are expected to anticipate and inform participants about all the *“potential negative consequences arising from their participation in the programme which may affect their welfare...”*. In practice it may just not be possible to imagine all possible negative consequences. For example, the BBC has experienced a situation in which a contestant received death threats following their participation in a programme known for its more ‘gentle’ competitive format, which is well known to its core audience for having a light tone and where you would expect the welfare considerations to be comparatively low: such negative consequences could not have been anticipated at the time. This is exactly the kind of scenario where we do take a lot of care, but where it might not be enough under the proposed new rule. Furthermore, a person’s participation in a programme could have both negative and positive consequences and it is important that contributors are made aware of both of these potential impacts so that they can weigh up if there is a benefit to taking part. We have therefore suggested alternative wording to reflect this and our reasoning for it in our response to question two.
- 1.3 It is clear that practice 7.3 is directed at the agreement of informed consent at the point at which a contribution is solicited for a new programme or item. Inevitably the same process cannot be pursued for acquired content or for some archived content. For acquired content in particular broadcasters are forced to rely to a considerable extent on the assurances of the original broadcaster or content maker. For much archived material it will be impossible to re-consent participation to reflect the new practices. It would be helpful if Ofcom were to

acknowledge these difficulties as part of the guidance Ofcom intends to produce to help broadcasters implement practice 7.3.

**b) New Practice 7:15**

- 1.4 The BBC agrees in principle with the proposed new practice in section 7.15 which aims to ensure that fair treatment includes a requirement for broadcasters to provide 'due care' over the welfare of 'vulnerable people' who take part or as a result of their participation in a programme. The BBC's responsibilities in this area are set out in its Editorial Guidelines (2019) and would appear to be consistent with Ofcom's proposed amendment. For some time, the BBC has issued Guidance on *"Working with vulnerable contributors or contributors at risk or at risk of vulnerability."* In the BBC's response to Ofcom's first consultation we suggested that the rules should focus more on vulnerable participants and *"those at risk of becoming vulnerable"* by their participation in a programme and we therefore welcome the clarity that Ofcom has now provided on the application of 7.15.
- 1.5 However, the proposed new practice under 7.15 is very detailed and it has to be asked whether its requirements are proportionate to the range of contributors and participants to whom it is intended to apply. There is a considerable risk of unintended consequences in the many programme genres which did not prompt Ofcom's interest in the due care applicable to adults. Content makers and particularly content makers in near instantaneous genres like News, have been ensuring due care to contributors without noticeable complaint or significant negative consequences for many years of Ofcom regulation. It is unclear why the detail of 7.15, a form of check list, is required across the board and how, as Ofcom states, the new practice is *"proportionate and flexible"*. Ofcom's statement in 3.22 of the consultation that *"a news item featuring a participant commenting in a vox pop about the closure of shops on the high street would be very unlikely to require the broadcaster to provide any measures to actively manage the person's care"* is not reassuring in this respect.
- 1.6 The BBC's initial response argued that it would be problematic for programme genres, such as news and current affairs to be included. In news, where there is fast turnaround, on the day reporting and generally low level of risk it would not be practicable or proportionate in many circumstances to apply such a comprehensive checklist as proposed in both 7.15 or its accompanying risk matrix. The consultation statement that *"the vast majority of the participants who take part in news and current affairs programming we anticipate that, following any risk assessment, it would be highly unlikely that any specific measures would need to be put in place by broadcasters"* would seem to confirm this. It begs the question of whether the requirement to apply a checklist would be proportionate. It would not be practical in many fast moving stories to conduct the detailed assessments proposed and could have a detrimental effect

on such programming and the provision of high quality news. The BBC notes Ofcom's contention that the proposals are not intended to make programmes any less inclusive. However there is a consequential risk that it could limit the range of voices and restrict the diversity of those taking part in such programmes as broadcasters err on the side of caution and exclude them. The BBC remains of the view that news and current affairs should remain out of scope of these rules. If there is not a carve out for news and current affairs then there needs to be a clear expression in the guidance, based on the argument in the consultation paper, ie that the welfare considerations for news are likely to be the lowest or unlikely to be required at all. The BBC would ask that Ofcom consult with broadcasters on any guidance to accompany the new rules.

1.7 Paragraph 2.15 of the consultation suggests that the revised practice 7.3, new practice 7.15 [and the proposed rule 2.17], will apply, in principle, to all contributors in programmes, including actors, presenters and reporters. The consultation does go on to caveat that Ofcom would expect their welfare to be dealt with by their contractual arrangements with broadcasters and programme makers; they would still carefully assess any complaint received. Frankly, the suggestion is otiose. The definition of 'participant' in Ofcom's first consultation specifically excluded presenters and reporters. That exclusion should remain. It is the BBC's view that these proposals should be much more targeted at contributors that are of real concern ie vulnerable people or those who may become vulnerable as a result of their participation.

1.8 The BBC agrees that a proposed 'risk matrix' as part of the guidance to broadcasters may be helpful, but it should be just one part of a range of tools that might be used to take a decision about the level of care to be provided to participants in a programme: discussion about the content of the programme as well as personal judgement and professional experience may be just as important and in some circumstances more useful than applying a matrix. The BBC has in place its own matrix which is bespoke to its content and would therefore not want to be required to have to adhere to or apply separate guidance and to be judged against it. However, the BBC would be happy to contribute to the development of a risk matrix with Ofcom and other broadcasters that could be adapted to use as they see fit. The BBC would expect the proposed guidance and its accompanying matrix to be discussed with broadcasters before it is disseminated.

### **c) New Rule 2.17**

1.9 The BBC does not agree with the proposed approach to the new rule in section 2.17 of the Code and does not think it is necessary for Ofcom to deal with this issue through a new rule in section 2. The BBC firmly believes that the focus should be on the actual treatment of, and care shown to, participants which are matters of consent and fairness and not harm and offence. Given that section 2.1 and 2.3 already require broadcasters to provide adequate protection for the public from harm and offence, it seems to the BBC that an amendment to 2.3

which makes clear that the requirements extend to vulnerable people, or those put at risk as a result of their contribution to a programme, is a more appropriate way of addressing the concern that Ofcom has identified. Suggested wording as to how this could be achieved is set out below under question two.

#### Reasons for opposition to new rule 2.17

- 1.10 Ofcom states that the proposed rule 2.17 allows *“for viewers or listeners wishing to complain about a [subjectively perceived] lack of due care being provided for programme participants”*. This begs the question as to how audiences would know what level of duty of care has been carried out and indeed what is appropriate. In the BBC’s view it invites spurious ill-informed third party complaints.
- 1.11 The proposed rule 2.17 permits an audience member to bring a complaint which may raise medical issues about which they may know little in circumstances about which they know little or nothing. The proposal also requires that broadcasters explain publicly the measures they have taken behind the scenes to meet their duty of care without regard to whether this disclosure is in the interests of the participant or accords with their wishes. Indeed, it raises serious privacy concerns since this may necessarily involve highlighting the vulnerabilities of contributors and revealing how these have been addressed.
- 1.12 Ofcom has not explained how a third party complaint can be investigated without further encroaching into the privacy of a vulnerable participant. There are obvious problems. Any examination of the care and support offered to a vulnerable participant will involve the processing of ‘special categories data’ about their health and welfare. Indeed in the absence of the express consent of the participant, it is not clear what lawful basis Ofcom can rely on for such processing of this data under Articles 6 and 9 of the General Data Protection Regulations (“the GDPR”) and the corresponding schedules in the Data Protection Act 2018. Concerns also arise about the publication of any findings since a participant will be readily identifiable on account of their appearance in a broadcast programme.
- 1.13 The proposal is also too wide-ranging and sets the bar very low for intervention. In justifying the proposed rule 2.17 the consultation defines harm, inter alia, as *“if viewers experiencing a mental health condition are negatively affected by seeing how a participant with a similar condition is treated in a programme.”* It is unrealistic to expect a broadcaster to judge whether a programme it transmits is likely to have this effect on individual members of the audience who may have very particular personal circumstances. In the BBC’s view the application of this proposed new rule in this form would have a chilling effect on, for example, justified programmes on medical conditions which could not be guaranteed to avoid the outcome described by Ofcom.
- 1.14 Ofcom cites growing complaints about the wellness and wellbeing of participants in programmes as a reason for introducing the new rules. The BBC is

not aware of this being a concern or even a growing concern amongst its audiences. That said, complaints in themselves are also not evidence of there being an issue or an issue that necessarily requires regulatory intervention. The proposals continue to make the connection between potential offence to the audience and the duty of care to participants which in our view is unhelpful. The BBC continues to oppose new rules in section 2 and does not think it is necessary to have rules in both sections 7 and 2 of the Code.

1.15 The BBC urges Ofcom to abandon its proposal to include a new rule 2.17. In doing so the suggestion that it “may be necessary for broadcasters to take additional steps to include sufficient context and/or some other information in a programme to re-assure audiences that due care has been taken” could also be dropped. There are occasions at present when this reassurance can be provided subtly in the context of the programme but a general requirement to signal that “due care” had been taken would be likely to lead to some very clunky interventions which would not be in the best interest of audiences.

## Question 2

Do you agree with the proposed wording of the:

### a) Additional measure of informed consent set out in Practice 7.3

2.1 The BBC supports the new practice 7.3 and its drafting as it pertains to consent (and ensuring that broadcasters obtain informed consent). However, to inform participants about all the “*potential negative consequences*” of participation is too broad a requirement and puts too much burden on broadcasters and content programme makers. Broadcasters cannot be expected to imagine everything that might have a negative consequence. It needs to be recognised that there is also a balance to be had between an impact that might be beneficial and positive and a risk that some impact might be negative: the overall impact should be viewed in this context. The broadcaster or content maker and contributor would be expected to discuss the possible impacts in the round and put in place mitigations, where possible, in order to minimise such risks. There may of course be occasions, in spite of best endeavours, where it is not possible to mitigate them all. We would therefore suggest an alternative wording that refers to “*being informed about the impact of any likely positive and negative consequences of participation (insofar as these can be reasonably anticipated at the time).*”

### b) New Practice 7:15

2.2 Given the emphasis that the rules should focus more on those who are vulnerable or made vulnerable because of their involvement in a programme there would be benefit in adding “*take particular care*” in the first part of 7.15 to emphasise that vulnerable people deserve particular focus. As mentioned above, the rest of the drafting in relation to the new practice in 7.15 is very detailed and there is a risk that this becomes a checklist against which broadcasters are judged on every occasion.

**c) New Rule 2.17**

2.3 The BBC does not agree with a new rule 2.17 being added to the Code for the reasons set out above. The BBC believes an addition to rule 2.3 would fulfil the purpose Ofcom desires without creating the issues of third party complaints about duty of care issues outlined above.

2.4 As argued above the wording of rule 2.17 also sets the bar too low for complaint. It states *“For example if viewers experiencing a mental health condition are negatively affected by seeing how a participant with a similar condition is treated in a programme.”* It is difficult to ascertain how a broadcaster will be able to judge whether the programme it is broadcasting is likely to negatively affect a participant who has similar conditions eg people with eating disorders as compared to the effects, for example, of photosensitive epilepsy where there is a known cause and effect. The perception of harm in these circumstances is problematic: the proposed approach is likely to have a chilling effect, that could stop reporting of, discussion about and study into subjects that are of very significant matters of public interest, including but not limited to, the treatment of patients in psychiatric hospitals, the prevalence of self-harm among teenagers, the impact of domestic abuse and our understanding of eating disorders – all subjects that the BBC has produced very important content about, which would have been likely to be upsetting viewing for some of those with direct experience of the subjects.

2.5 The BBC’s preferred approach is for an amendment to section 2.3 of the Code as a more proportionate and appropriate means of protecting vulnerable participants. That section already deals with material that may include humiliation, distress and violation of human dignity, so acknowledging that the perceived treatment of vulnerable people may cause offence is a logical adjunct. Indeed, with its focus on the need for appropriate context and information, we believe that an addition to section 2.3 is the obvious way in which to address the concern Ofcom has highlighted.

2.6 In that context the BBC proposes the following amendment to rule 2.3 as an alternative to a new rule 2.17.

*“In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context (see meaning of “context” below). Such material may include, but is not limited to, offensive language, violence, sex, sexual violence, humiliation, distress, violation of human dignity, discriminatory treatment or language (for example on the grounds of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation, and marriage and civil partnership), **and treatment in programmes of vulnerable people and those who may be at risk of vulnerability as a result of their participation in a programme.** Appropriate information should also be broadcast where it would assist in avoiding or minimising offence.”*