

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

## **Response of ITV plc**

### **Introduction**

ITV welcomes the opportunity to comment on Ofcom's revised proposals for the introduction of new Practices and a new Rule in the Broadcasting Code ('the Code') in relation to the protection of 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 welcomed Ofcom's acknowledgment in its first 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. We welcomed Ofcom's recognition that in most cases consenting adults are capable of making their own independent decisions about participating. In our view it remains essential that Ofcom should not introduce new Rules or Practices into the Code in a manner that could undermine or deny the agency and basic right of adult individuals, giving their properly informed consent, to choose to take part in television programmes.

We accept that programmes involving the public have evolved over time, as have the pressures on those who enter the public eye by 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 been cultural change and increased public awareness of mental health issues, and that greater concern is now expressed by some viewers about the welfare of TV participants.

As the first Consultation acknowledged, 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 nature of the participants themselves. ITV remains content for broadcasters to be required under the Code to do that which we regard to be no more than the basic practice of programme making, namely taking "due care" towards people taking part in our programmes.

We also welcome the second Consultation's statement that it would be for broadcasters to judge on a case by case basis what type and level of care is appropriate, and what steps should be taken to secure the necessary protection, according to the circumstances.

However, given these statements of principle by Ofcom, we have some concerns about the practical application and potential for uncertainty created by some of the new proposals in the second Consultation.

“Fairness” in programmes has an established statutory basis, and a large body of previously decided cases by Ofcom, from which broadcasters can draw guidance. The Consultation is stated to be concerned with “participants”; but as Ofcom acknowledges fairness in Section 7 is concerned with “the person affected” by the alleged unfair treatment, which can be participants and others “directly affected” by programmes. Many complaints to Ofcom about fairness come not from “participants” or “contributors”, but from individuals or organisations who are referred to in the programme. Therefore there may be some potential for confusion in the scope of the application of “due care”, and the individuals to which it potentially applies, by adding these new provisions in the Practices of Section 7. Ofcom’s Guidance should therefore make clear that these new Practices do not apply to those who are not willing participants or contributors.

We do not agree that the proposed new Rule 2.17, which is stated as a new requirement to provide adequate protection for viewers from potential harm and/or offence, is necessary or proportionate. The Code already provides for viewers to complain under Section 2 about programme content that they consider offensive or harmful arising from their perception of how a participant has been treated and that their welfare has therefore not been adequately protected by the programme makers.

We welcome Ofcom’s broad adoption in its new draft Guidance of the “risk matrix” approach, based on ITV’s own guidance on protecting participants which we issued to producers last year, and which we submitted to Ofcom in response to its first Consultation. However, we do not agree with all of the additional points that have been added to that risk matrix. For example, that the steps to be taken with participants even in a “low risk” programme should include providing information about anticipated potential risks of taking part, and intended steps to mitigate those risks. The terms of the entirety of the Guidance from Ofcom around the new Code, in addition to the “risk matrix”, will be very important, and we believe should include some of the qualifications to the new obligations indicated in the explanatory text of both of the Consultations, but not currently included in the new Code drafting or the risk matrix Guidance itself.

We respond further to the specific consultation questions below:

**Question 1: Do you agree with our proposed approach to the:**

- a) additional measure of informed consent set out in Practice 7.3**
- b) new Practice 7.15; and**
- c) new Rule 2.17?**

**Question 2: Do you agree with our proposed wording of the:**

- a) additional measure of informed consent set out in Practice 7.3
- b) new Practice 7.15; and
- c) new Rule 2.17?

#### Q1 & 2 a) – new addition to Practice 7.3

The proposed addition to Practice 7.3 adds to the practices normally to be followed with contributors, except when “the subject matter is trivial or their participation minor”, in order to obtain their informed consent.

We appreciate that the Code does not provide an exhaustive list of practices that are required in order for consent to be “informed”. But in our view this additional requirement could become onerous and potentially unworkable for programme makers, unless there is sufficient further explanatory text either in the body of the Code, or at least in the Guidance to the Code, that makes it clearer to programme makers when this requirement will and will not apply.

For example, in the previous Consultation Ofcom appeared to recognise that a duty to consider the welfare of “participants” 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 suggest that Ofcom’s Guidance should make clear that the proposed additional Practices 7.3 and 7.15 do not apply to anyone who does not agree to take part as a filmed contributor. For example, people who are:

- i) the subject of news, current affairs, serious documentary or other similar investigative programmes (and/or are subject to investigative techniques such as covert filming or doorstepping), including where a person chooses not to take part as a filmed contributor but provides a written response to any allegations made about them for inclusion in the programme;
- ii) the subject of discussion in programmes (for example live news and daytime programmes) as part of a discussion of stories that are in the news;
- iii) the subject of non-news programmes (for example programmes about celebrities and entertainers profiling their lives and careers).

We consider that the present inclusion of a version of this Practice in the draft Guidance risk matrix, as an example of a step to be taken for a “low risk” programme, and giving as an example an interviewee in a news or current affairs programme item, is misconceived. This also appears to contradict the clear theme running through both Consultations that any new Code obligations should be proportionate and take into account the programme format and the nature of the contribution, and specifically the statement in para 2.14 of the Further Consultation that “*in relation to the vast majority of the participants who take part in news and current affairs programming we anticipate that...it would be highly unlikely that any specific measures would need to be put in place by broadcasters*”. We consider that this statement should be included in the Guidance to the new proposed Practices.

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. It would be wholly impractical to have to assess any risks of participation for each individual and then provide warnings of those risks. 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 simply impossible to seek consent at all prior to broadcast.

To take another example, people who call to take part in phone-in programmes are by definition actively seeking to contribute, 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 exercise due care by using 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. But it would be difficult to assess the circumstances of such individuals sufficiently to enable the provision of information about potential risks of them taking part, in the usual timescales of such phone ins. If Ofcom intends that such individuals are "contributors" for the purpose of the new Practices, we suggest that the new Practices 7.3 and 7.15 require more Guidance on proportionality to avoid confusion for programme makers.

To take a third example, people filmed openly but incidentally in non-sensitive situations in public places in non-news factual or entertainment programmes ("passers-by"). It would be helpful for Ofcom's Guidance to state explicitly that such people are not "contributors" or "participants" for the purposes of the Code, and therefore broadcasters are not required to obtain informed consent from them to film or include them in programmes, as one example of "minor or trivial" inclusion.

We therefore believe that without clear Guidance, this extension of the requirements of informed consent in the Practice is likely to create significant practical obstacles that may seriously impede both news journalism and other forms of programme making.

### **Q1 & 2 b) - new Practice 7.15**

ITV accepts that broadcasters should take "due care" over the welfare of:

- a) vulnerable people who take part in programmes (as already defined in the Code) and
- b) someone who might be at risk of harm as a result of taking part in a programme.

We think it right that Ofcom retains the meaning of “vulnerable people” already in the Code in Section 8. We do not consider that meaning should be extended by other factors, as appears to be intended in the current drafting of Practice 7.15.

For clarity’s sake, we consider that any other factors referred to as relevant to Practice 7.15 should be expressly stated as referring only to the second category of contributor at b) above. Whilst we accept that a person’s age or health might be a factor as to whether a person might be at risk of harm as a result of taking part in a programme, we consider the wording “past or current personal circumstances” is far too wide, could literally thereby include anyone, and should be omitted.

“Due Care” – in this context Ofcom’s approach should be consistent with its 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 Guidance. The first Consultation recognised 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.

Since the new Practice requires broadcasters to take due care, we believe that an explanatory definition or Guidance relating to “due care” should be included. This should include a specific provision 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 on “due care” 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 a definition section of the Code 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 their personal or medical history or other vulnerabilities that would be relevant to their participation.

Since Section 7 relates to fairness in programmes, it would be helpful for Ofcom to make clear in Guidance that this new Practice will not apply to those who may apply to take part, and may even be filmed during production, but do not feature for editorial reasons in the final broadcast programme.

We consider that the drafting in the proposed Practice from “To determine the appropriate level ....” down to “....the production process” should not appear in the Code itself, but would sit more naturally as part of the explanatory Guidance of which the proposed “risk matrix” would form part.

We consider that the wording of ‘Where there is a low level of risk....’ is appropriate, but is itself contradicted by the current drafting of the risk matrix in the “Low Risk” section, which directs broadcasters to provide information as to potential risks of taking part. We think the box in the risk matrix for Low Risk programmes should omit the wording under ‘Before Production’ and replace it with wording that simply requires the obtaining of informed consent.

### **Q1&2 c) – new Rule 2.17**

We do not agree with the proposed approach to a new Rule 2.17, or the proposed drafting of this new Rule.

We note that no such Rule was proposed or deemed to be required in the first Consultation, and we do not consider that there are persuasive arguments for it being a new requirement of the Code. The second Consultation refers to the same concerns of viewers about the mental health and emotional wellbeing of participants that were set out in the first Consultation.

Viewers have always been able to complain about what they perceive to be harmful or offensive material concerning the treatment of both children and adults in programmes under Rule 2.3, and Ofcom has investigated such complaints in the past (see for example the investigations of complaints about *Love Island*, *Loose Women* and *Celebrity Big Brother* referred to in the first Consultation, none of which resulted in a finding of a breach of the Code). We submit there is no therefore need for the proposed new Rule, since the concerns of viewers it addresses are already covered by Rule 2.3, and Ofcom should be slow to introduce new binding Rules without a clear and compelling rationale that such a new provision is required to address a potential harm to viewers.

We are also concerned about the potential unintended editorial interference that the introduction of such a Rule might create. Ofcom recognises that much of the care given to participants takes place off air, and is not evident to viewers. In programmes forming part of a series, it may appear to viewers that a participant is distressed in one episode, and may construe or perceive a lack of care as a result, but in reality the care provided to participants offscreen is entirely adequate, and in the following episodes that distress has been resolved. Across a series the programme may therefore provide more than adequate context or reassurance to viewers as to the welfare of participants, but this is rarely appreciated by viewers focusing on a single incident in a single programme in the series.

We therefore submit that the new Rule in the proposed form would be disproportionate and potentially damaging to the editorial of programmes for programme makers, as they may feel pressured either to never show participants in distress, or to avoid any narrative that plays across more than one episode in resolving that distress. Should Ofcom consider that the ability of viewers to complain about the treatment of participants as causing harm or

offence under Section 2 needs to be more explicitly stated in the Code, then we consider this could be better achieved by extending the current drafting of Rule 2.3 as follows:

*“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 the treatment of participants who are vulnerable and/or might be at risk of harm; **Appropriate information to provide context should also be broadcast where it would assist in avoiding or minimising offence.**”* (amendment in bold).

We are also concerned that the proposed explanatory text below the new Rule is confusing and far too wide in referring to “past or current circumstances or experiences” (please see our comments on new Practice 7.15 above).

The further explanatory text about how broadcasters should make judgments on how to provide sufficient context and/or information to audiences is also already covered in the existing Rule 2.3, and therefore should be omitted. But again, Rule 2.3 could be made slightly more explicit in this regard, as suggested above.

### **Comments on the drafting of the proposed risk matrix for inclusion in Ofcom Guidance**

We broadly welcome the approach taken by Ofcom, and we note that the proposed risk matrix is not intended to be prescriptive.

We make the following suggestions as to drafting:

A1.2 a) – Type of participant - we suggest that the last bullet point (*Could the programme format make the participant vulnerable...*) is already covered in the “format” section, and sits more logically there. We also consider that - *“does the programme require them to discuss, reveal or engage with sensitive, life-changing or private aspects of their lives?”* is too widely drawn, is likely to include many situations which do not in fact create a risk to participants, and may create uncertainty for producers. We do not agree that these requirements of a format necessarily make a participant “vulnerable”.

A1.3 – Participants – again, we consider that *“...or their personal circumstances or experiences make them particularly vulnerable”* is too widely drawn, may therefore create uncertainty for producers, and should be omitted.

A1.3 – Identifying how to manage risk and steps to be taken –

We consider that Ofcom should be careful in the language employed when discussing producers drawing on expert psychological advice and assistance, to avoid appearing overly prescriptive as to the qualifications required of such experts. Ofcom is aware that a range of professionals with differing backgrounds, practices, and formal qualifications currently assist television productions, for example when assessing participants before filming, or supporting them during and after filming. These expert advisors may include medically qualified doctors (such as psychiatrists), psychologists (who have a range of different specialisms), psychotherapists, or other mental health professionals.

We therefore suggest avoiding the use of the words “psychologist” or “psychologists” throughout the Guidance as a general “catch all” term for such professionals, since this term does denote a specific discipline/qualification, and may therefore confuse producers. We suggest “expert psychological advice” is the better formulation, which is already used at points in the Guidance, or “expert psychological advisor”.

Low Risk – Before Production - we consider this bullet point should be omitted entirely. We do not agree that the steps to be taken with participants in a “low risk” programme should always include providing information about anticipated potential risks of taking part, and intended steps to mitigate those risks. We also suggest the example given of a “low risk” situation - an interviewee in a news item or current affairs programme – should also be omitted, for the reasons already outlined in our response above in regard to new Practice 7.3.

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**ENDS**