

## Response to Ofcom Consultation on New Broadcasting Rules for Protecting Participants in TV and Radio Programmes.

Submission from Professor Helen Wood (special adviser to the DCMS Committee Inquiry into Reality Television) in consultation with Dr Jilly Boyce Kay (University of Leicester) and Dr Tracey Jensen (University of Lancaster) on behalf of the Social Inequalities Research Centre, University of Lancaster.

### EXECUTIVE SUMMARY

In summary we recommend that the code:

- Include an additional principle which prevents prioritizing the needs of the programme over the needs of the participants - to avoid further examples of exploitation.
- Consider the impact of the new rules upon other areas of the Code – particularly in relation to the context of ‘audience expectations’ and the ‘minimising of offense’ to audiences.
- Consider the flexibility of the Code to include ‘participants’ of drama.

We recommend that Ofcom guidance on good practice should:

- Include ‘ethical testing’ in programme commissioning and development.
- Include a robust steer on the nature of ‘informed consent’ especially in relation to Section 7 under ‘fair treatment’.
- Raise awareness of the scope of the Code for potential participants.
- Consider ‘ethics training’ for production staff and include an independent arena to hear concerns of production staff.

### Q1. Do you agree with our rationale for proposed new Rules 2.17 and 2.18?

We strongly agree with the urgent need to address the wellbeing of participants taking part in television and radio, and are broadly supportive of the proposed changes to the Broadcasting Code. It is clear that the Code needs to reflect the changed landscape in which there is a blurring of the line between audiences-as-viewers and audiences-as-participants across broadcasting.

#### 1.1 Guarding against exploitation

We do however, want to draw attention to the time that this intervention has taken since the dramatic rise of members of the public taking part in television programmes for more than two decades. The current emphasis upon the wider social and cultural prominence of mental health issues is the factor that has drawn *attention to* television practices that have been established over a considerable amount of time, but in our view it is not the root of the problem per se. The mental health risks are part of a broader set of outcomes related to levels of exploitation that have been flourishing within the industry for some time.

We recognise the issue here as it is related to Ofcom’s role as a ‘post-broadcast’ regulatory body and we understand the need to protect creative freedom in programme-making as well as the protection

of Article 10 of the European Court of Human Rights ruling on freedom of expression. However, what has occurred over the period of time since reality television has grown, is that the welfare of participants has not been elevated over industry needs to pursue lucrative formats in the pressure to fill schedules with programming that both appeals to, and draws from, members of the public.

Whilst we understand that the new social media environment, as well as the broader proliferation of alternative platforms through which content can be distributed (for instance YouTube) creates another set of complex factors for participants to navigate, it is important for the Code to also protect participants *during* the production process and even during the conceptualisation of programme formats. The current focus on the post-broadcast environment may not do enough to prevent harms that may be *created by* programme-making, whilst attempting at the same time to protect the creative freedoms of programme-makers.

Overall, we would therefore suggest that the Code broadens its language from a relatively narrow version of wellbeing that is reacting to the current environment related to mental health awareness, to a broader statement which asks programme-makers to consider levels of exploitation at *all* stages from programme design to delivery.

Proposed new rules 2.17 and 2.18:

- *Due care must be taken over the welfare, wellbeing and dignity of participants in programmes.*
- *Participants must not be caused unjustified distress or anxiety by taking part in programmes or by the broadcast of those programmes.*

In addition, we would suggest 2.19:

- **Programme-makers must not subordinate the welfare needs of participants to the creative or editorial needs of the programme.**

## 1.2 New rules' influence upon other areas of the Code

It is our view that these new rules will have an impact upon, and should be read in relationship to, other areas of the Code.

### i. Audience expectations

Currently, under Section 2 of the Code the emphasis has been upon protecting audiences from harmful or offensive material.

*Section 2 'To ensure that generally accepted standards are applied to the content of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of harmful/or offensive material.'*

This has meant that where complaints have been made against reality television, they have not been upheld often because the harm is tested against perceived harm to audiences at home, rather than harm to participants. We understand that Ofcom now recognises this position and hence the extension of the Code to consider the wellbeing of participants over 18.

Nevertheless, there are still parts of the existing Code, which if left intact, may work counter to the proposed new rules:

For instance under Section 3 of the Code

3.3. *Material which contains abusive or derogatory treatment of individuals, groups, religions or communities, must not be included in television and radio services or BBC ODPS except where it is justified by the context.*

The subsequent meaning of ‘context’ includes:

*The genre and editorial content of the programme, programmes or series and the likely audience expectations.*

In our view the elevation of the audience expectations of the genre over the needs of the individual participants has been used as foil to continue with abusive or derogatory treatment of individuals on a programme like *The Jeremy Kyle Show* (ITV) which forms the backdrop to this consultation.<sup>1</sup> Because audience expectations have been generated over some time, without any ethical consideration around developing formats and styles of reality television, there is a danger that that this section of the Code could remain ambiguous.

We therefore propose that 2.17, 2.18 and a potential 2.19 should be read in conjunction with 3.3’s reading of ‘context’ and propose under 3.3 that:

- **Audience expectations of the genre and editorial content of the programme must not be elevated above the needs of the welfare of the participants as set out in 2.17 and 2.18 and 2.19.**

## ii) **Compromising care as part of the programme format**

In Ofcom’s response to the DCMS reality TV Inquiry, Ofcom recognised that:

*17. Viewers and listeners may be offended by what they perceived to be the lack of appropriate care of programme participants shown in challenging, distressing or otherwise disturbing circumstances. [...]*

*Under Rule 2.3, broadcasting can mitigate any potential offence caused to the audience if they provide “appropriate information” as to what steps they have taken regarding the treatment of those participants.<sup>2</sup>*

Rule 2.3 of the Code ends with the sentence: ‘*Appropriate information should also be broadcast where it would assist in minimising offence*’.

We would recommend that Ofcom revisit this line with regard to the proposed new rules. Under these current rules, the fact that the delivery and discussion of ‘after-care’ was framed as part of the broadcast of *The Jeremy Kyle Show* could have potentially served to ‘assist in minimising offense to audiences’. However, the care that was offered was compromised, generated by a serious tension

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<sup>1</sup> Evidence submitted by Dr Hayley Dare and Professor Helen Wood as special advisers to the DCMS committee on viewing rushes and whistle-blower evidence from *The Jeremy Kyle Show*.

<https://www.parliament.uk/documents/commons-committees/culture-media-and-sport/Joint%20submission%20by%20specialist%20advisers%20-%20Reality%20tv.pdf>

<sup>2</sup> Written evidence to the DCMS committee Inquiry submitted by Ofcom [data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/digital-culture-media-and-sport-committee/reality-tv/written/103185](https://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/digital-culture-media-and-sport-committee/reality-tv/written/103185).

between the needs of the show and the needs of the participants.<sup>3</sup> This further supports our argument for a more robust phrasing of the Code to avoid further examples of exploitation where the needs of the show are elevated over the needs of participants.

## **Q2 Do you agree with the proposed meaning of ‘participant’ for the purpose of these rules?**

*Definition of a ‘participant’:* for the purpose of these proposed rules, we are proposing a specific definition of a ‘participant’ as a person who has agreed to take part in a programme in any way, except presenters and reporters. The term ‘agree to take part’ is broader than the meaning of ‘informed consent’ (as set out in Practice 7.3 in Section Seven of the Code). Practice 7.3 makes clear that informed consent is normally required, except “where the subject matter is trivial or the participation minor”. Therefore the term ‘agree to take part’ would also cover those circumstances where ‘informed consent’ may not be necessary under the Code, but some level of due care may still be appropriate. [...]

### **2.1 Clarification on semantics**

We broadly agree with the definition of ‘participant’ used here, and we would welcome some further highlighting under the proposed Code of practice for programme-makers to refer to the same language. There is currently a range of language used here including ‘contributor’ which also draws from areas of publishing. The use of ‘contributor agreements’ may confuse audiences’ understanding of their position vis-à-vis the programme-maker. We recommend that the Code guidance also spells out good practice for the drawing up of ‘participant agreements’ for those not protected by a professional body and that these agreements should be followed up by good practice in gaining ‘informed consent’. (see 7.2)

### **2.1 ‘Participants’ in drama**

We would also welcome some clarification of the use of ‘participant’ in relation to drama, a genre which under the proposal is exempt from the new rules. This is difficult as some forms of reality television draw upon members of the public to create ‘structured reality’ or ‘improvised drama’ such as popular programmes like *The Only Way is Essex* or *Made in Chelsea* (ITV). It is important that the new guidelines are able to maintain pace with changes in programming whereby generic boundaries are becoming increasingly blurred, partly in relation to the new contexts created by reality television.

## **Q3- Q6 Do you agree that Rule 1.28 and 1.29 should be amended in this way? Please give reason for your answer.**

Yes we agree that these codes should reflect the broader inclusion for the prevention of the harm towards over 18s.

As with new Rules 2.17 and 2.18 we feel it is necessary to reinforce the principle that the needs of the show should not be elevated over the needs of the participant of any age.

## **Q7- 8 Do you agree with the proposed approach to the Code guidance.**

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<https://www.parliament.uk/documents/commons-committees/culture-media-and-sport/Joint%20submission%20by%20specialist%20advisers%20-%20Reality%20tv.pdf>

## Proposed guidance for different production stages

We welcome Ofcom's proposed guidance for all different production phases which is an important step forward. There are areas of good practice across the industry, particularly the BBC's relatively new guidance for programme makers, but it would be excellent to see this benchmarked across the sector.<sup>4</sup>

### 7.1 Ethical testing

The guidance sketch at the moment suggests that under 'a) before production' consideration of participants' welfare should begin with 'background checks'. We would suggest that this does not begin to ask ethical questions early enough. As can be seen from the evidence gathered by the DCMS in the questioning of the CEO of Channel 4, concerns were raised about whether there is an ethical line in the commissioning and development of television formats. We would like to propose that guidance on good practice begins with 'ethical testing' of the proposed programme format itself.

We do not intend that this proposal restricts positive editorial creativity, but that when using members of the public, who are not normally protected by any employment rights, programme-makers should adopt their own ethics processes which might mirror that used in research.<sup>5</sup> We suggest that, as in many other safeguarding or risk-assessment processes, that programme-makers should ask whether the format itself could cause 'unjustified harm' to potential participants. If likely harm is identified the extent of the nature of that harm should be carefully considered before the programme is 'green-lit'.

Where potential harms can be mitigated, for instance negative media attention being the most obvious, then this should form part of a rigorous conversation under 'informed consent.' (See 7.2.)

It is not expected that such 'ethical testing' should prevent vulnerable individuals from taking part in broadcasting, but that under 'due care' some risk assessment of harm should have been undertaken before any recruitment process gets underway.

### 7.2 Informed Consent

We would like to draw attention to is the issue of 'informed consent' which currently exists under Section 7 of the Broadcast Code under the Principle of Fairness.

We would like Ofcom to recognise some of the difficulties with regard to 'informed consent' as it is currently set out under the Principle of Fairness in section 7 in relation to reality television and the use of non-actors. Take for instance examples of 'rolling consent' that are procured during reality television filming that uses fixed rig cameras, such as in programmes like *One Born Every Minute* (Channel 4).<sup>6</sup>

***Principle: To ensure that broadcasters avoid unjust or unfair treatment of individuals or organisations in programmes. -***

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<sup>4</sup> <https://www.bbc.com/editorialguidelines/news/duty-of-care>

<sup>5</sup> Evidence submitted to the DCMS by the Social Inequalities Research Centre, University of Lancaster. [data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/digital-culture-media-and-sport-committee/reality-tv/written/103034.html](https://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/digital-culture-media-and-sport-committee/reality-tv/written/103034.html)

<sup>6</sup> <https://cstonline.net/fixed-rig-documentaries-how-they-do-it-by-john-ellis/>

*The relevant sections are:*

*2.2 Factual programmes or items or portrayals of factual matters must not materially mislead the audience. (Note to Rule 2.2: News is regulated under Section Five of the Code.)*

*Practices to be followed (7.2 to 7.14 below)*

*Dealing fairly with contributors and obtaining informed consent*

*7.2 Broadcasters and programme makers should normally be fair in their dealings with potential contributors to programmes unless, exceptionally, it is justified to do otherwise.*

*7.3 Where a person is invited to make a contribution to a programme (except when the subject matter is trivial or their participation minor) they should normally, at an appropriate stage:*

- be told the nature and purpose of the programme, what the programme is about and be given a clear explanation of why they were asked to contribute and when (if known) and where it is likely to be first broadcast;*
- be told what kind of contribution they are expected to make, for example live, pre-recorded, interview, discussion, edited, unedited, etc.;*
- be informed about the areas of questioning and, wherever possible, the nature of other likely contributions;*
- be made aware of any significant changes to the programme as it develops which might reasonably affect their original consent to participate, and which might cause material unfairness;*
- be told the nature of their contractual rights and obligations and those of the programme maker and broadcaster in relation to their contribution; and*
- be given clear information, if offered an opportunity to preview the programme, about whether they will be able to effect any changes to it. Taking these measures is likely to result in the consent that is given being ‘informed consent’ (referred to in this section and the rest of the Code as “consent”). It may be fair to withhold all or some of this information where it is justified in the public interest or under other provisions of this section of the Code.*

Many of the practices of reality television regularly flout these principles. It is questionable whether current ‘contributor agreements’ actually amount to ‘informed consent’ in the manner suggested here. We would suggest that the guidance on good practice includes a clear statement on what constitutes informed consent.

Reality television’s popularity is largely born from some element of unpredictability and the ability to edit particular scenes so as to highlight particular aspects of the drama. This is where this aspect of the Code comes into conflict with the creative freedom of expression. Participants can regularly be completely surprised, and even ‘ambushed’, in terms of the way in which their participation has been produced and edited for the broadcast show.

Participants in long-running shows cannot be given the opportunity to preview the broadcast version; indeed much of the conceit is that they have no idea how their participation is being viewed by the outside world.

This is another example of the way in which the Code has not kept up with the radical changes brought by reality television. We would suggest that ‘informed consent’ for each type of show needs to be spelled out clearly, that programme-makers ought to take into consideration whether there is a need for ‘ongoing consent’ to be obtained, and, importantly, that participants need to be made fully aware of the *specific* nature of their editorial control over their participation.

These issues could be addressed as part of basic ‘ethics training’, which is again standard for any type of research with members of the public.<sup>7</sup>

### **7.3 Raising awareness of Ofcom’s rules for participants**

We would also recommend that under ‘informed consent’ that participants are made fully aware of the Code’s regulations that are now being set up to protect their well-being.

It is clear that due to the nature of the Broadcasting Code’s emphasis upon the prevention of offence to audiences, that participants would not necessarily have understood their rights to complain under the Section 7 of Fair Treatment of the current Code – since they are often not public figures used to being in the public eye.

Clear messaging to potential reality television participants needs to accompany the changes to the rules. This could be included in the proposed guidance for good practice under ‘informed consent’ to ensure that programme-makers must insure that potential participants should be made fully aware of standard expectations under Fair Treatment and how that will be addressed in relation to the specific editorial practices of the programme.

### **7.4 Independent arena for production staff**

We would also suggest that in reality television production, due to the speed and nature of the production and the working environment of the production crew, that there should be an independent arena for crew to raise any concerns at all that they have about the treatment and welfare of participants in programme production. As can be seen by the evidence generated in the DCMS Inquiry into *The Jeremy Kyle Show*, ITV’s whistle-blower policy was not enough to prevent harm and abuse carried out over a 14 year period.

In summary we recommend that the code:

- **Include an additional principle which prevents prioritizing the needs of the programme over the needs of the participants - to avoid further examples of exploitation.**
- **Consider the impact of the new rules upon other areas of the Code – particularly in relation to the context of ‘audience expectations’ and the ‘minimising of offence’ to audiences.**
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