

## Section Seven

# Fairness

## I General Summary of Responses

### Responses to the Consultation

We have received substantive responses from the BBC, Channel 4 and Five, S4C, ITV, ITN, Capital Radio, Chrysalis Radio, the Commercial Radio Companies Association, mediawatch-uk, MediaWise and Emap. We also received responses from the Advisory Committee on Older and Disabled People, the Association for International Broadcasting, Campaign Against Censorship, Christian Broadcasting Council, Churches Media Council, the Communications Commission, the Church of Ireland Broadcasting Committee, the Evangelical Alliance, Ligali, the Maranatha Community, the Naturism Association, UKTV and four individuals. There were also three responses received in confidence.

Three individuals believe the principles and rules are adequate. The Maranatha Community, Ligali, Church of Ireland Broadcasting Committee, the Evangelical Alliance, the Communications Commission and Christian Broadcasting Council also support the Ofcom draft.

Suggestions have been made about ways to improve all the principles and rules.

Several broadcasters believe that many of the rules should be rewritten as guidance.

Chrysalis Radio notes that rules 7.2, 7.3, 7.5, 7.10 and 7.13 use the qualifier 'normally', suggesting that different behaviour may be acceptable in different circumstances. It notes the lack of guidance and suggests that if the Code may be broken, when to do so is in the public interest, then this should be explicitly stated.

ITV thinks the rules and principles are inadequate and directs Ofcom to its detailed responses to the rules and principles. ITV submits that the proposed section "fails to acknowledge the weight which should be attached to the public interest in receiving information".

The BBC notes that it is important, in this section, to acknowledge the public interest in freedom of information. It feels that the draft code does not succeed where the legacy codes did in balancing private and public rights. It also believes there needs to be acknowledgement of increasing public media literacy.

Ligali says that Ofcom should provide rules for the provision of tapes and transcripts to others, and these should be made available on demand when there are grounds to question the offensiveness or impartiality of a programme.

MediaWise suggests there be reference to the fairness of contracts and waiver documents signed by the public.

One individual is concerned that there is little room for satire, a staple of British humour, and too much emphasis on protecting those in the public eye who are courting the media. Another individual is concerned about aggressive interviewing.

## Ofcom response

Ofcom accepts that, in many cases, rules in this section appear to be more in the nature of guidance. The Broadcasting Act 1996 (“the 1996 Act”) contains the legislation that provides for the consideration of complaints about unfairness. The fairness and privacy Code is to be a Code giving guidance as to principles to be observed, and practices to be followed, in connection with the avoidance of-

(a) unjust or unfair treatment in programmes to which this section applies...

However the regulatory regime under the Act is aimed at securing observance of the provisions of this section of the Broadcasting Code. We have therefore included in this section a clear statement of those principles and practices Ofcom considers most important whilst also reflecting, where appropriate, and taking into account the consultation responses, the statutory description of ‘practices to be followed’ rather than ‘rules’. Reference to this has been included in the Foreword.

For the avoidance of doubt, the summary of consultation responses to this section maintains respondents’ reference to the draft ‘rules’. Ofcom’s response only refers to draft ‘rules’ when referring to those ‘rules’ as consulted on. References to the Broadcasting Code will be new ‘practices to be followed’.

The expression ‘normally’ is used several times in this section. This is to allow for justified exceptions which, depending on the circumstances of the case, may include the public interest or consent. It is also a recognition that a complaint will only be upheld if failure to observe a rule results in unfairness in the programme. Ofcom will issue guidance on these aspects from time to time.

In considering whether a programme is fair, one of the factors which Ofcom may need to consider is the public interest in receiving information, in other words, the right to freedom of expression. The importance of freedom of expression for the broadcasting industry is explained in the Introduction to the Broadcasting Code via a clear statement that, in applying the Broadcasting Code, Ofcom will always consider freedom of expression. Ofcom anticipates that broadcasters will do the same. Reference to Article 10 has been added to the list of legislation under the title of this section so that the importance of this Article is clear.

We recognise the importance of media literacy not only in this section but all sections of the Broadcasting Code. We have therefore made reference to media literacy in the Foreword to the entire Code.

We have been asked to include a requirement under the Broadcasting Code for broadcasters to provide transcripts and tapes to members of the public. Under section 115(4) of the 1996 Act, where a fairness or privacy complaint has been made to Ofcom, the broadcaster must make suitable arrangements so that the complainant can view or hear the relevant programme, if in its possession, and, where it is able to do so, a transcript of the programme. This is reflected in the obligations imposed on licensees by their licences. Therefore it is not necessary to include such a requirement in the Broadcasting Code.

Ofcom’s remit is to consider fairness in the programme itself and we are not in a position to require specific terms in contracts and waivers signed by members of the public who feature in programmes. However, in some circumstances, failure to obtain fully informed consent from a participant in a programme may result in unfairness in the programme. In these cases, Ofcom will take into consideration the terms of any contract or waiver signed. Rule

7.3 makes reference to the need to inform potential contributors of their contractual rights and obligations and those of the broadcaster.

Aggressive interviewing will be a matter to be taken into account in considering whether there was unfairness to an interviewee in a particular programme.

In assessing complaints, Ofcom takes into account the type of programme that is being complained of, whether it be satire, drama, factual etc. There is no intention of preventing satire or humour nor is there any intention of protecting those in the public eye above and beyond the level of protection given by the Broadcasting Code to any individual.

### **Proposed Code, Section Seven: Fairness**

(sections 3(2)(f) and 327 of the Act and section 107(1) and 130(1) of the 1996 Act, TWF Directive Article 23.)

## **II Foreword**

This section and the following section on privacy are different from other sections of the Code. They apply to how broadcasters treat the individuals or organisations directly affected by programmes rather than to what the general public sees and/or hears as viewers and listeners. In this section, programmes includes advertisements.

This section contains rules Ofcom expects broadcasters to observe in order to avoid unfairness in programmes to individuals or organisations. However, failure to observe any rule in this section will normally only constitute a breach of this section of the Code where it results in unfairness in the programme. Importantly, the Code cannot foresee every eventuality and does not set out all circumstances in which there may be unfairness.

## **III Principles**

To ensure that broadcasters avoid unjust or unfair treatment in programmes of individuals or organisations.

### **Responses to the Consultation**

mediawatch-uk requests a clearer definition of 'unjust or unfair.'

MediaWise observes that the principle is represented as a rule and suggests that the principle might be extended "to ensure that broadcasters avoid unjust or unfair treatment of individuals or organisations in the making or broadcast of programmes".

### **Ofcom response**

Ofcom's statutory obligation is to consider complaints relating to 'unjust or unfair treatment' and it must make a judgement, when adjudicating on complaints, as to whether the treatment of the complainant has been unjust or unfair. What is unjust or unfair is difficult to define because it can encompass a variety of situations.

Attempting a definition may exclude complaints that should be considered. This section itself is designed to try and help broadcasters avoid unjust or unfair treatment of individuals or organisations in programmes.

Under the 1996 Act, it is not within Ofcom's remit to consider unfairness in the making of programmes unless unfairness in the making results in unfairness in the programme itself.

We have also amended the Foreword in this section in the interests of clarity.

## **IV Rules**

### **Rule 7.1**

Broadcasters should avoid unjust or unfair treatment of individuals or organisations in programmes.

#### **Responses to the Consultation**

Channel 4 and Five do not believe that this should be stated as a rule.

The BBC believes this should be either a rule or a principle, not both, and suggest combining it with a redrafted 7.2.

#### **Ofcom response**

As previously stated, there are occasions where rules will duplicate principles. That is because the principles express the intention of the Act, as set out in standards objectives in section 319, which permeate the rules in each section of the Broadcasting Code (or in the case of Section Seven: Fairness and Section Eight: Privacy, the rules and practices to be followed) to which they apply, whereas the rules themselves are binding. Therefore in some sections, including this one, it has been necessary to include the objective as a rule as well as a principle.

### **Dealing fairly with contributors and obtaining informed consent**

#### **Draft Rule 7.2 (now Rule 7.2)**

Broadcasters and programme makers should be straightforward and fair in their dealings with potential contributors to programmes. This normally includes making clear what the nature and purpose of the programme is and the nature of their respective contractual rights and obligations.

#### **Responses to the Consultation**

ITN believes it is inappropriate to refer to contractual matters in the Ofcom Code. It also notes the omission of the following BSC Code wording: "the requirements of fairness in news reports pose particular challenges and the speed of newsgathering means it is not always possible to provide contributors to news reports with all the information mentioned above. However, that does not absolve journalists from treating journalists fairly". ITN recommends a rewording that takes into account the special position relating to news.

The Commercial Radio Companies Association says that it would be better if it said 'broadcasters must not mislead contributors'.

Capital Radio would like this to be rewritten as "broadcasters and programme makers should not mislead contributors unless it is editorially justified" and that, in its view, the second line should just be guidance.

Channel 4 and Five would like to add the word 'duly' to the first sentence.

ITV believes this rule should be amended to read, "broadcasters and programme makers should normally be straightforward and fair in their dealings with potential contributors to programmes. Wherever practicable, this includes making clear what the nature and purpose of the programme is and, when appropriate, the nature of their respective contractual obligations."

The BBC believes only the first sentence is, in substance, a rule and that the remainder is guidance. It believes the rule should echo the BSC Code on Fairness and Privacy with the inclusion of phrases such as 'wherever practicable' and 'whenever appropriate'. The BBC asks for clarification of the meaning of 'normally' and points out that in investigative exposes it may be necessary to conceal the true intent of the programme from contributors. The BBC also asserts that it is onerous to have a regulatory code for contributors' contractual rights. In certain formats, such as radio phone ins, it is not practical to explain to contributors the nature of their contractual rights. The BBC suggests its concerns be reflected in guidance and that the rule be rewritten as: "Broadcasters and programme makers must be straightforward and fair in their dealings with contributors to programmes."

### **Ofcom response**

We do think it is relevant to refer to contractual matters. Whether any consent to contribute is given or fully informed may be relevant to fairness. As a result the terms of any contract entered into with a broadcaster may be relevant. However, as this provision, and that relating to the nature and purpose of the programme, is a specific example of the type of information normally required we have moved them to the "practice to be followed" that is set out at 7.3 (dealing with circumstances where a person is invited to make a contribution to a programme – referred to in Broadcasting Code as "informed consent").

Ofcom recognises that there may be circumstances in which it will not be possible to provide all or any of the information set out in "practice to be followed" 7.3 (dealing with circumstances where a person is invited to make a contribution to a programme) and we have accepted that there should be an exception where there is a public interest justification or circumstances specifically permitted under other provisions of this section. Specific circumstances, such as those referred to in the BSC code in relation to news, will be covered in separate guidance. The word 'normally' allows for such circumstances (e.g. radio phone-ins or news).

We consider the concept of fairness to be different to that of 'not misleading'. The use of the word 'normally', and the exception for public interest now in "practice to be followed" 7.3 (dealing with circumstances where a person is invited to make a contribution to a programme), should mean there is no need for further qualifications, for example, via the insertion of the word 'duly'.

We have shortened the "practice to be followed" in line with the BBC's suggestion, while retaining 'should' instead of 'must', in order to allow for the exception in 7.3 (dealing with circumstances where a person is invited to make a contribution to a programme).

### **Draft Rule 7.3 (now "practice to follow" 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:

- be told the nature of the programme, what the programme is about and be given a clear explanation of why they were asked to contribute and when and where it is likely to be first transmitted;
- be told what kind of contribution they are expected to make e.g. live, pre-recorded, interview, discussion, edited, unedited etc;
- be informed about the areas of questioning, and, wherever possible, the nature of other contributions;
- be made aware of any significant changes to the programme as it develops which might reasonably affect their original consent to participate, and cause material unfairness (e.g. relevant changes in programme title or tone of the programme);
- be told, if offered an opportunity to preview the programme, whether they will be able to effect any changes to it;
- if the contributor is a child, consent should normally be obtained from a parent or guardian, or other person over the age of eighteen in loco parentis. In the case of an adult, who is not in a position to give informed consent, a person over the age of eighteen with primary responsibility for their care should normally give it on their behalf.

## Responses to the Consultation

The Churches' Media Council states that this is good description of how contributors should be treated. It believes it should be established as the behavioural norm to communicate changes to contributors. The perceived arrogance of broadcasters should be eroded. The rule ought to ensure that contributors are better informed and better prepared, and therefore provide a better contribution to the programme.

mediawatch-uk agrees, in particular, with the requirements in rule 7.3 but would add that contributors should be advised as to who else, if anyone, is taking part.

The Commercial Radio Companies Association says that this is guidance, not a rule. ITV also believes this rule would be better placed as guidance. Capital Radio submits that this rule be deleted and rewritten as guidance.

The BBC asserts that rule 7.3 and all clauses using 'should', not 'must', are guidance. It suggests:

- the first clause should be rewritten as guidance as follows: 'be told the nature of the programme, what the programme is about and be given a clear explanation of why they were asked to contribute and where it is likely to be first transmitted';
- the second clause should be deleted and included as guidance;
- the third clause should be rewritten as guidance as follows: "be informed about the areas of questioning, and, wherever possible, the nature of other likely contributions";
- the fourth clause should be rewritten as follows: "be made aware of any significant changes to the programme as it develops which might reasonably affect their original consent to participate, and cause material unfairness";
- the fifth clause should be rewritten as follows: "be given clear information if offered an opportunity to preview the programme about whether they will be able to effect any changes to it"; and

- the sixth clause should be deleted and included as guidance with a ‘public interest/warranted’ justification to remain consistent with rule 8.22.

ITN believes the age limit of eighteen in the final bullet point is too high and should be reduced to those under sixteen.

Channel 4 and Five would like the first sentence to read ‘where a person is interviewed for or contributes to a programme’ and in the third bullet point they would like to replace the word ‘possible’ with the word ‘necessary’. They would like the examples in the fourth bullet point to be deleted. Further, they would like the rules regarding children’s consent to take account of the ‘Gillick Test’. They would like the term ‘parental responsibilities’ to replace ‘in loco parentis’ (and generally ask for Latin to be avoided). They also feel that the requirement to ask a vulnerable person’s carer’s consent lessens the opportunity for vulnerable persons to express criticism of their carers and/or care institute.

### Ofcom response

As explained at the start of this section, we have changed the wording of the Broadcasting Code in this section to replace the reference to rules (except the first rule) with “practices to be followed”.

The measures (outlined in “practice to be followed” 7.3) are likely to result in “informed consent”. We have therefore made this apparent in this “practice to be followed”.

We agree with the Churches’ Media Council as to the importance of informing contributors of changes if it may result in unfairness. We, therefore, consider that practices to be followed in relation to this issue are needed, in this and the following sections, to give broadcasters and the public guidance as to the matters Ofcom will take into account.

We consider that making clear the nature of other contributions in a programme will indicate who else is likely to contribute. However, we do not think it is practicable to expect programme-makers to specify precisely who the other contributors will be. We have also accepted the BBC’s argument that it is not always possible to give firm information about other contributions and have accordingly adopted the wording ‘likely contributions’. We have adopted the BBC’s wording on ‘clear information’ in relation to effecting changes on previewing. We have also accepted the BBC’s argument that it is not always possible to say when a programme will be transmitted. We have, therefore, limited the obligation to notify contributors of the date of broadcast to situations where the broadcaster knows the date of transmission. Whilst we acknowledge Channel 4 and Five’s assertion that informing a contributor of the nature of other contributions is only relevant where it is necessary for fairness, this applies equally to all the provisions listed here, and so an amendment is not necessary.

We accept that the age limit at which parental consent ceases to ‘normally’ be required should be sixteen, not eighteen. Young people of that age are able to join the armed forces, smoke, live away from home, have children etc, they should be capable of judging whether they should contribute to or feature in a programme. We have adopted sixteen as the appropriate age of discretion throughout this and the following section. We sympathise with the desire to avoid Latin within the Broadcasting Code but ‘in loco parentis’ is the correct term in law to describe the relationship referred to in this section. This is now dealt with in a “practice to be followed” in the Broadcasting Code (“practice to be followed” 7.4).

We accept that it may sometimes be appropriate to interview a vulnerable person (for example, in relation to the quality of care provided by their primary carer) without first being required to obtain consent from the carer. The word ‘normally’ is used so as to

accommodate exceptional circumstances such as this. Again, there is now a separate “practice to be followed” on this issue in the Broadcasting Code (“practice to be followed” 7.5).

Channel 4 and Five are concerned that the subject of an unwelcome investigation could use these provisions to fish for information without having any intention to contribute. We have, therefore, included an exemption from the obligation to comply with the requirements in the “practice to be followed” where it is justified in the public interest or under other provisions in this section of the Broadcasting Code. We do not agree that this concern should be addressed by limiting the application of the requirements in this draft rule to those who are actually interviewed for, or contribute to, a programme. It is important that a contributor is aware of the facts before s/he gives consent.

#### **Draft Rule 7.4 (now “practice to be followed” 7.6)**

When a programme is edited, contributions should be represented fairly.

#### **Responses to the Consultation**

The Commercial Radio Companies Association says this is guidance not a rule. Capital Radio submits that this rule should be deleted and rewritten as guidance.

The BBC submits that the use of ‘should’ means that this ‘rule’ is, in fact, ‘guidance’ and that its intended effect will be covered by other rules in this section.

#### **Ofcom response**

Fair editing is clearly an important part of fairness in broadcasting and we consider this provision to be of sufficient importance to be included as a practice to be followed.

#### **Draft Rule 7.5 (now “practice to be followed” 7.7)**

Guarantees given to contributors, e.g. relating to the content of a programme, confidentiality, or anonymity, should normally be honoured.

#### **Responses to the Consultation**

The Commercial Radio Companies Association says that this is covered by the amendment they suggest in Rule 7.2.

ITV does not believe this should be subject to regulation.

Capital Radio believes that this is a contractual matter between the parties and should not be subject to regulations. The BBC makes the same submission and seeks clarification of the rule from Ofcom.

#### **Ofcom response**

Compliance with guarantees, although a contractual matter, may be relevant to fairness and we have, therefore, kept this as “practice to be followed”.

#### **Draft Rule 7.6 (now “practice to be followed” 7.8)**

Broadcasters should ensure that the reuse of material, i.e. use of material originally recorded for one purpose and then used in a later or different programme, does not create unfairness



(or an unwarranted infringement of privacy). This applies both to material obtained from others and the broadcaster's own material.

### Responses to the Consultation

ITN considers this rule unnecessary as the matter is covered by rule 8.19.

The BBC believes that this is covered by the section on Privacy. Also, the use of 'should' makes this guidance, not a rule.

The Commercial Radio Companies Association says that this rule is, in substance, guidance and that privacy is covered in Section Eight: Privacy.

Capital Radio believes that this rule should be deleted and rewritten as guidance.

ITV would prefer the rule if it was written so that broadcasters should 'make best efforts to ensure'.

### Ofcom response

We have slightly amended this "practice to be followed" for clarity.

We consider this draft rule to be of sufficient importance to be included as a practice to be followed. Section Eight: Privacy in the Broadcasting Code concerns minimising the potential distress to victims and/or relatives when making or broadcasting programmes that examine past events that involve trauma to individuals only covers causing distress to relatives. It does not cover unfairness or other infringements of privacy that may arise through the re-use of material.

The reference to privacy has been removed, since privacy is dealt with in Section Eight: Privacy.

The obligation on broadcasters is to prevent unfairness. It is not an obligation to use their best efforts to do so. However, the efforts made by a broadcaster may be a factor taken into account by Ofcom when adjudicating on a complaint.

Opportunity to contribute and proper consideration of facts

### Draft Rule 7.7 ("practice to be followed" 7.9)

Broadcasters should satisfy themselves, before transmitting a factual programme, that all material facts have been considered and are fairly presented.

### Responses to the Consultation

Capital Radio suggests the complete deletion of this rule. The Commercial Radio Companies Association says this is, in substance, guidance and is probably impossible to comply with.

ITN believes that the issue of accuracy should not be raised here as fairness is separate from accuracy. It recommends deleting the phrase 'and proper consideration of the facts' from the heading, and replacing 'the' with 'all' in the body of rule 7.7.

Channel 4 and Five believe that this is an extraordinarily high test and that factual accuracy is not the same as fairness. They assert that Ofcom is not equipped, empowered or resourced to make judgements regarding the truthfulness of a programme.

ITV would like this rule to read: “Before transmitting a factual programme, broadcasters should satisfy themselves that relevant facts have neither been omitted nor presented in such a way as to create unfairness to an individual or organisation”.

UKTV points out that a literal interpretation of this could create an impossible situation for repeat programming, and suggests the addition of the words ‘where relevant’.

S4C objects to rule 7.7 given the existence of rules 7.9 and 7.12. If it remains, it believes it will be very difficult for commissioning houses (which commission programmes from independent production companies) to achieve.

The BBC believes that this rule duplicates the regulation proposed in the section on Due Impartiality, Due Accuracy and Undue Prominence. The BBC believes it is an important principle that a single complaint against a programme maker cannot come before both the BBC Governors and Ofcom. It notes that the rule seems to suggest that any balance cannot be provided across a channel or strand, but must be included within the same programme. The BBC suggests that this rule should be deleted.

### **Ofcom response**

This provision is now in “practice to be followed” 7.9 and has been slightly amended for clarity. A new bullet point has been added which states that broadcaster should satisfy themselves that... “anyone whose omission could be unfair to an individual or organisation has been offered an opportunity to contribute”. (This is based on guidance given in a legacy regulator’s code)

We recognise that fairness is different from accuracy. However, inaccuracy and the selection of relevant facts can be major factors that are indicative of unfairness to an individual or organisation. In order to meet respondents’ concerns we have amended this rule along the lines suggested by ITV.

We note UKTV’s concerns, but take the view that it is a matter for the broadcaster to ensure that, if a programme is repeated, it still complies with the Broadcasting Code. We do not believe there is any reason to depart from this approach in the case of this rule.

The rules referred to above by S4C relate to the contributions necessary to achieve fairness, not selection or omission of relevant facts. We note S4C’s concerns about independent producers but would point out that, under the 1996 Act, it is the responsibility of the broadcaster to ensure that programmes which it broadcasts, that are made by independent producers, comply with the Broadcasting Code.

We appreciate that the BBC may face a complaint on accuracy made to the Governors and a complaint on unfairness made to Ofcom in relation to the same material. However, this is an inevitable consequence of the division of regulatory powers and Ofcom must perform its statutory duty to consider complaints of unfairness. The issue, referred to by the BBC, concerning balance is more relevant to the concept of due impartiality (a matter for the BBC Governors).

### **Draft Rule 7.8 (“practice to be followed” 7.10)**

Non-factual programmes (such as drama and drama-documentaries) should not distort facts in a way which is unfair to an individual or organisation. Care should also be taken in the characterisation or casting not to convey an unfair impression of the characters on whom the drama is based.

### Responses to the Consultation

Capital Radio submits that this rule should be deleted and rewritten as guidance.

British Naturism (Eastern Section) says this rule should be extended to protect minority groups, and that its view reflects growing concern amongst naturists at the distorted view of society that drama programmes present and the negative influence that this exerts.

The Commercial Radio Companies Association says this is guidance and that the word 'characters' should read 'individuals'.

ITV believes that this rule should read "non-factual programmes (such as drama-documentaries) should not portray events, individuals or organisations in a way which is unfair to actual individuals or organisations".

The BBC suggests rewriting this rule as follows: "Non-factual programmes (such as drama and drama-documentaries) must not portray facts in a way which is unfair to an individual or organisation."

Channel 4 and Five would like an amendment as follows: "Factual dramas and dramas based on real events should not distort facts in a way which is unfair to an individual or organisation." They also suggest the following amendment: "An individual or company should normally be consulted where failure to do so would otherwise result in unfairness to them in the programme."

### Ofcom response

This provision is now in "practice to be followed" 7.10. We accept that the two elements of this draft rule can be combined into one sentence and have redrafted it along the lines suggested by ITV and the BBC, incorporating the Commercial Radio Companies Association's reference to individuals rather than characters.

Ofcom considers that it is unnecessary to extend the rule specifically to include minority groups. All the "practices to be followed" within this section deal with unfairness and therefore any individual or organisation, including a group of people (and/or a relevant representative body) who felt they had been treated unfairly could complain to Ofcom.

We do not believe it is appropriate to confine the rule to factual dramas. It is possible that a non-factual drama can be unfair in an portrayal of a real person and can also be unfair to a group of people, whose representative body may wish to complain on their behalf.

### Draft Rule 7.9 (now incorporated into "practice to be followed" 7.9)

All relevant parties should be offered an opportunity to contribute where that is necessary to achieve fairness.

## Responses to the Consultation

ITN recommends the deletion of the word 'all' because it imposes a test that is far too wide.

The Commercial Radio Companies Association says that this seems to be an attempt to grant a right to contribute and is not the same as a right to reply.

ITV believes this rule should be deleted. Capital Radio submits that this rule be deleted and rewritten as guidance.

Chrysalis Radio believes that parties only have a right to reply and not a right to contribute. It may be impractical to offer all parties an opportunity to contribute and if a party refuses to contribute, it should not prevent broadcasting.

Channel 4 and Five identify and contest the implied right to contribute. They suggest rewriting as follows: "an individual or company should normally be consulted where failure to do so would otherwise result in unfairness to them in the programme".

The BBC suggests this rule is deleted as it is neither necessary nor achievable. 'All' is impractically broad. A right to contribute is not the same as a right to reply.

## Ofcom response

This draft rule has been incorporated as a bullet point in "practice to be followed" 7.9 which relates to the steps that should be taken by broadcasters prior to the broadcast of a factual programme and now reads as follows:

"Before broadcasting a factual programme, including programmes examining past events, broadcasters should take reasonable care to satisfy themselves that ...anyone whose omission could be unfair to an individual or organisation has been offered an opportunity to contribute."

We accept that 'all' is too far-reaching. 'Contribute' is intended to cover either an interview or a report of a statement or comments. We have also amended the wording in a way that emphasises the primary concern of the practice to be followed which relates to unfairness. We do not believe consultation is sufficient, as suggested by Channel 4 and Five, as fairness can require a contribution in the programme itself.

## Draft Rule 7.10 ("practice to be followed" 7.11)

If a damaging critique is made in a programme, those concerned should normally be given an appropriate and timely opportunity to respond.

## Responses to the Consultation

ITV accepts this rule.

Chrysalis Radio worries that this rule would prevent broadcasting a negative review of a film without allowing a director a platform to reply.

ITN recommends the replacement of 'a damaging critique' with 'allegation of wrongdoing'.

The Commercial Radio Companies Association recommends deleting 'damaging' and insert 'significant'.

Capital Radio would like this to be rewritten as ‘significant critique’.

The BBC suggests the rule is rewritten as follows so as to ensure clarity:

“Where a programme reveals evidence of iniquity or incompetence, or makes a damaging allegation about an individual or institution, those concerned should normally be given a timely opportunity to respond”.

Channel 4 and Five say that rather than ‘those concerned’ it would be clearer to state ‘those who are the subject of criticism’ and they also have concerns about the expression ‘damaging critique’.

mediawatch-uk strongly agree with the requirement of a ‘right to reply’ but are concerned that there is no mechanism suggested as to how this might be achieved.

### **Ofcom response**

We accept that fair comment in review programmes is intended to be outside the ambit of this practice to be followed. We have adopted a mix of wording from ITN, the Commercial Radio Companies Association, Capital and the BBC and have replaced ‘damaging critique’ with ‘allegations of wrongdoing or incompetence or other significant allegations’. This should also meet the concern that ‘damaging’ requires proof of damage which was raised in one reply.

‘Those concerned’ includes those affected by the allegations as well as anyone who may be the main subject of the allegations.

We consider it a matter for the broadcaster to determine how the opportunity to respond is given, subject to the proviso that any such opportunity should be timely and appropriate. It would be difficult to prescribe all possible ways of providing such an opportunity in the Broadcasting Code.

### **Draft Rule 7.11 (“practice to be followed” 7.12)**

Anyone has the right to refuse to participate in a programme, but that need not prevent the programme from going ahead. Where a person chooses to make no comment or refuses to appear in a broadcast, the broadcast should make clear that the individual concerned has chosen not to appear and their explanation, if it could be unfair not to do so.

### **Responses to the Consultation**

The Commercial Radio Companies Association says that this rule should be deleted. ITV also believes this rule should be deleted and that guidance should be given instead. ITV believes that having to provide such explanations might undermine the programme by implying that the makers are not as well informed as they truly are. It suggests deleting the rule and including it as guidance.

Capital Radio submits that this rule should be deleted and rewritten as guidance. The BBC suggests that this rule is included as guidance and qualified with the word ‘normally’.

### **Ofcom response**

We accept that the first sentence of draft Rule 7.11 is more in the nature of guidance and have deleted it from the Broadcasting Code. However, we consider the remainder of this provision to be of sufficient importance to be included as a “practice to be followed”.

The broadcaster is only required to include an explanation when it would be unfair not to do so. This should be adequate protection for broadcasters against the circumstances referred to by ITV.

The word 'normally' is not needed because this only applies if it could be unfair not to comply with it.

### **Draft Rule 7.12 (“practice to be followed” 7.13)**

Where it is appropriate to represent the views of a person or organisation that is not participating in the programme, this must be done in a fair manner and tone.

### **Responses to the Consultation**

Capital Radio submits that this rule should be deleted and rewritten as guidance.

The BBC suggests that this rule should be deleted as fairness to people and organisations is dealt with sufficiently by other rules in this section. Additionally, it states that the rule does not take into account the idiosyncratic differences in the tone of programmes.

The Commercial Radio Companies Association says that this seems to read as ‘the death of satire’ and should be deleted or redrafted. ITV believes this rule should be deleted.

Chrysalis Radio also suggests that this rule would destroy satire and prevent people from airing their critical assessments of political parties.

Channel 4 and Five suggest this section should cross-refer to ‘doorstepping’ in the section on Privacy, otherwise the rule unintentionally proscribes the practice. They note that it may, on occasions, be correct to draw an inference from the absence of a contribution from an individual, such as a Government minister. Also, they assert that tone is a matter for editorial consideration and should not be referred to. Dropping the reference will not preclude Ofcom from determining that a programme’s tone was unfair.

### **Ofcom response**

We believe that representing the views of someone who is not participating should be done in a fair manner and is too important to be included as web-based guidance only.

We accept that tone may vary according to the type of programme and have, therefore, removed the specific reference to tone from the draft rule. We consider that tone may nevertheless be part of the manner in which views are represented and we expect that to be fair. The type of programme and any inference that can legitimately be drawn from non-appearance are matters that Ofcom would take into account when adjudicating on whether views had been fairly represented.

Broadcasters are required to represent views only where it is appropriate to do so.

Doorstepping may in certain circumstances be a fair way of representing views. We have not added a cross-reference in the Broadcasting Code but will refer to it in web-based guidance.

Deception, set-ups and ‘wind-up’ calls

### **Draft Rule 7.13 (now incorporated into “practice to be followed” 7.14)**

Broadcasters or programme-makers should not normally obtain or seek information, pictures or an agreement to contribute through misrepresentation or deception.

## Responses to the Consultation

ITN recommends the addition of 'unless it is justified in the public interest'.

ITV believes that this rule should be rewritten as follows: "Broadcasters or producers should not normally gather information, record pictures or audio, or obtain an agreement to contribute to a programme through misrepresentation or deception. Such deception may be deployed where it is reasonably believed to be warranted in the public interest, and when the material cannot reasonably be obtained by other means. In these circumstances material obtained by deception may be broadcast without the consent of those deceived."

The BBC believes that there needs to be a qualifying 'normally' and clarification of the phrase 'or an agreement to contribute' and whether this extends to entertainment programmes. It suggests combining this rule with rule 7.14 as follows: "Broadcasters or producers of factual programmes must not gather information, pictures, audio or obtain an agreement to contribute through misrepresentation or deception, except where this is reasonably believed to be warranted in the public interest and the material cannot reasonably be obtained by other means. Where there is no adequate public interest justification, consent should be obtained from the individual(s) concerned before the material is broadcast or that person(s) should be disguised on transmission."

The BBC also suggests including information from the BSC Code on the meaning of 'normally' in this context. The BBC say that if rule 7.13 is changed as the BBC have suggested then a new rule is required for entertainment and they suggest:

"Broadcasters and producers of comedy and entertainment programmes must ensure that when they have gathered information, pictures or audio or obtained an agreement to contribute through misrepresentation or deception they obtain consent from the individual(s) who feature prominently before the material is broadcast or that person(s) should be disguised on transmission, without clear editorial justification."

S4C asks whether rules 7.13, 7.14 and 7.15 extend to surreptitious filming.

## Ofcom response

As suggested by the BBC and ITV, we have combined the wording from this draft rule with the two draft rules which followed (as set out below), as they deal with related provisions, and we have made it clear that misrepresentation or deception may be justified in the public interest and that 'normally' allows for this.

We accept the BBC's and ITV's additional test that there should be no other reasonable means of obtaining the material. We have also included ITV's addition of 'audio'.

We recognise, as suggested by the BBC and ITV, that if a person or organisation is not identifiable then consent for broadcast will not be needed. (Ofcom will issue guidance on the term "identifiable"). We have therefore added this as bullet point 3 under "practice to be followed" 7.14.

We have included entertainment programmes under this practice to be followed and so have not adopted the BBC's point that a new rule is required.

We accept S4C's point that surreptitious filming or recording can be deception for these purposes and have amended the provision accordingly.

### **Draft Rule 7.14 (now incorporated into "practice to be followed" 7.14)**

Use of material obtained through misrepresentation or deception may be warranted if it is in the public interest. Where there is no adequate public interest justification, consent should be obtained from the individual concerned before the material is broadcast. Material with celebrities and those in the public eye can be used without consent, however it should not be used without a public interest justification if it is likely to result in unjustified public ridicule or personal distress.

### **Responses to the Consultation**

ITN recommends the addition of 'normally' before the word 'not' in the final sentence.

ITV believes that this rule should be rewritten as follows: "Misrepresentation or deception may also be deployed in the absence of public interest justification, such as in the production of an entertainment programme. Where there is no adequate public interest justification to warrant broadcast without consent, consent to broadcast must be obtained from the individual(s) concerned before transmission. Alternatively, the identity of those individuals should be concealed on transmission or other adequate safeguards taken to avoid unfairness or unwarranted infringement of privacy. Material with celebrities and those in the public eye can be used without consent; however, it should not be used without a public interest justification if it is likely to result in unjustified public ridicule or personal distress."

Capital Radio suggests that if the proposed wording for the rule 7.2 is applied there is no need for rule 7.14.

The BBC, further to the suggested combination with rule 7.13, says that the final sentence on celebrities is guidance and should be treated as such.

S4C suggests that this rule may require revision in light of the recent decision by the European Court of Human Rights on Von Hannover v. Germany.

### **Ofcom response**

This is now incorporated in "practice to be followed" 7.14 in the Broadcasting Code,

Some entertainment programmes would not be able to utilise a public interest test and would have to rely on consent. This was possible under the draft rule but we have amended the wording to make it more explicit.

We have not added the word 'normally' before 'not' in the final sentence. By allowing material to be used without consent even where there is no public interest, the "practice to be followed" already makes an exception, where celebrities and people in the public eye are concerned. However, it is reasonable to require a public interest justification wherever unjustified ridicule or distress is caused. We have also decided not to incorporate the suggestion that concealing identity will be sufficient to ensure there has been no unfairness because, in some circumstances, unfairness may still arise. However, as we have said above, this will be looked at on a case by case basis and concealing identity may be sufficient to avoid unfairness.



'Public interest' is explained by reference to the definition of the public interest provided in Section Eight: Privacy of the Broadcasting Code. It will also be explained in web-based guidance.

We believe the Broadcasting Code takes full account of relevant Court judgments and in particular the Von Hannover v. Germany case as referred to by S4C. The "practice to be followed" warns broadcasters against taking pictures or audio of celebrities without consent if it is likely to cause "personal distress", unless it can be justified by the public interest.,

### **Draft Rule 7.15 (now incorporated into "practice to be followed" 7.14)**

Unsolicited 'wind-up' style calls and set-up interviews require care and the person being 'wound up' should not be exploited. Consent should be obtained before broadcasting 'wind-up' calls and therefore such calls must normally be pre-recorded.

### **Responses to the Consultation**

Emap understands that the 'wound up' person must give permission before broadcast.

ITV believes this rule should be deleted should Ofcom accept the redraft of rule 7.14.

Capital Radio submits that this rule be deleted and rewritten as guidance.

The BBC finds this rule unnecessarily prescriptive and suggests rewriting as: "Unsolicited 'wind-up' calls and set-up interviews must normally be pre-recorded and consent obtained from the contributor before transmission."

### **Ofcom response**

Ofcom considers that it is necessary in terms of fairness that consent should be gained before transmission for wind-up calls unless there is a public interest justification.

We have not qualified the wording by adding 'normally', as suggested by the BBC. As with all provisions in this section, if there is no unfairness, a complaint will not be upheld. It is difficult to see why there should be any exemption where unfairness does result.

## **V New Rules**

### **Responses to the Consultation**

MediaWise suggests that when material recorded for one purpose is used for another, participants should be made aware. MediaWise also states "it is a matter of regret that Ofcom is not empowered to require broadcasters to issue apologies."

### **Ofcom response**

The re-use of material is already covered by other provisions in this section (as well as Section Eight: Privacy). Broadcasters have an obligation to avoid unfairness and unwarranted infringements of privacy in programmes, including those where material recorded for one purpose is used in another programme. This involves ensuring that those who would be distressed by a programme re-visiting past events are informed about transmission. In these circumstances, we consider participants are adequately protected and that it is not necessary to require that they be informed about the re-use of material in all cases.

Ofcom has no power to require broadcasters to issue apologies (only, where appropriate, to direct broadcasters to transmit an Ofcom adjudication) but encourages broadcasters to resolve complaints early by apologising if they feel they have made an error.