

Section Eight

Privacy

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, MediaWise and Emap. We also received responses from ACOD, 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, Discovery Networks Europe, Ligali, the Maranatha Community, the Muslim Council of Britain, Public Voice, RNIB, Satellite and Cable Broadcasting Group and three individuals. We received two confidential responses.

Three individuals believe the principles and rules are fair and comprehensive. The Maranatha Community, Ligali, Church of Ireland Broadcasting Committee, the Evangelical Alliance 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 these rules should be rewritten as guidance.

Channel 4 and Five believe the Code must clearly distinguish between gathering broadcast material and the actual broadcast. ITV states that insufficient weight is attached to the consequences of broadcasters deciding to do the former as opposed to the latter (and vice versa).

The BBC is concerned that this section does not reflect the balance to be struck between important public interests and private rights, and also wants to see a clearer distinction in this section between gathering material and decision to broadcast.

The RNIB agrees that the draft Code is acceptable but wishes to ensure that blind and partially sighted people are not exploited because they are unable to understand particular situations.

The Campaign against Censorship says there should be a standard of differentiation, as is applied in the United States, in that people in the public arena are entitled to less privacy than others.

The Maranatha Community argues that greater emphasis should be given to the dangers of highly selective editing of interviews and camera shots that distort truth.

An individual says organisations should not pass on any personal information, even if the individual concerned has given consent. The Commercial Radio Companies Association queries whether any complaint to Ofcom about the passage of personal information to a third party without permission would be considered by Ofcom.

Ofcom response

Ofcom accepts that, in many cases, rules in this section appear to be more in the nature of guidance. According to the Broadcasting Act 1996 (as amended) ("the 1996 Act"), the fairness and privacy Code (in so far as privacy is concerned) is to be a Code giving guidance

as to “principles to be observed, and practices to be followed, in connection with the avoidance of [...] (b) unwarranted infringement of privacy in, or in connection with the obtaining of material included in, such programmes.”

However, the regulatory regime under the Act is aimed at securing observance of the provisions of this section of the Code. We have therefore included in this section a clear statement of the principle 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 this Broadcasting Code will be to “practices to be followed”.

We also appreciate the concerns expressed by broadcasters that this section must distinguish between gathering material and broadcasting it and have sought to address their requests for clarity. We have, in particular, added a paragraph to the Foreword of this section which acknowledges the difficulty of making on the spot decisions - especially in emergency situations, and the Foreword explaining that Ofcom will take this into account, as appropriate, when adjudicating on cases and complaints.

Ofcom appreciates the position of blind and partially sighted people and will take their situation into account when adjudicating on relevant complaints. However, this is particularly relevant when adjudicating on complaints rather than setting the Code.

An infringement of privacy will be warranted if, for example, it is outweighed by the public interest. Infringing the privacy of people in the public arena may be more likely to be in the public interest. This section recognises that different considerations apply to those in the public eye than to those who are not. However, since the 1996 Act does not draw any further distinction, we do not consider that we should do so in the Broadcasting Code.

The dangers of highly selective editing of interviews and camera shots that distort truth are dealt with in the previous section of the Broadcasting Code Section Seven: Fairness.

Passing on personal information to a third party is only within Ofcom’s remit if it constitutes an infringement of privacy in the programme or in connection with the obtaining of material included in a programme, in which case it will be considered in that context. Otherwise, it is not a matter for Ofcom.

Other points are covered in the discussion under each of the draft rules that were consulted which have been included as headings below.

Proposed Code, section 8, Privacy

(Sections 3(2)(f) and 327 of the Act and section 107(1) and 130(1) of the 1996 Act)

II Foreword

This section of the Code and the preceding section on fairness are different from other sections of this 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/or listeners. In this section, programmes includes advertisements.

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

III Principles

To ensure that broadcasters avoid any unwarranted infringement of privacy in programmes and in the making of programmes.

Responses to the Consultation

ITV contend that ensuring the proper exercise of the balance between individual privacy and the freedom of expression should be central to this principle, thus reflecting Articles 8 and 10 of the ECHR. Accordingly the principle should be redrafted. ITV believes this should be rewritten as: “to ensure that broadcasters reasonably [balance] individual rights to privacy with the public interest in freedom of expression, in the gathering of material for programmes and in the programmes broadcast”.

Channel 4 and Five propose that the principle reads as follows: “to ensure that in the making and broadcasting of programmes an appropriate balance is struck between the importance of freedom of expression and the legitimate expectation of privacy enjoyed by individuals”.

The BBC suggests the following principle: “to ensure that in the gathering and broadcast of information and ideas, broadcasters balance the public interest in the freedom of expression with the individual’s right to privacy”.

Ofcom response

Ofcom recognises it must balance the right to respect for private and family life with the right to freedom of expression under the Human Rights Act (“HRA”). The importance of freedom of expression for broadcasting is acknowledged in the Introduction to the Broadcasting Code which makes it clear that in applying the Code Ofcom will always consider Freedom of Expression and that we anticipate that broadcasters will do the same. The 1996 Act already requires Ofcom to consider whether infringements of privacy are warranted. In doing so, Ofcom must inevitably balance the right to privacy against such factors as the right to freedom of expression. We have added a reference to Article 8 and Article 10 in the list of legislation under the title of this section so that the importance of these Articles in this section is fully appreciated. However we will maintain the same position in this section that we have maintained elsewhere in the Broadcasting Code – the principle will be based on the relevant wording from the 1996 Act. Therefore we have amended the principle to more closely reflect the wording of the Act.

IV Rules

Draft Rule 8.1 (now Rule 8.1)

Any infringement of privacy in programmes, or in connection with the obtaining of material included in programmes, must be warranted.

Meaning of ‘warranted’:

In this section ‘warranted’ has a particular meaning. It means that where broadcasters wish to defend an infringement of privacy as warranted, they should be able to demonstrate why. If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. Examples of public interest would include revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing significant incompetence in public office.

Responses to the Consultation

S4C welcomes the new rule.

ITV believes this rule should be accepted but would like more guidance on the accepted meaning of ‘warranted’.

Channel 4 and Five believe this is a repetition of a principle and should not be a rule.

They suggest adding to the meaning ‘revealing or detecting crime’, ‘revealing significantly antisocial behaviour’ and ‘exposing corruption or injustice’.

The BBC suggests this is either a rule or a principle but should not be both, and seeks additional clarification of the meanings of ‘warranted’, ‘significant incompetence’ and ‘public office’. The BBC thinks it should be able to obtain material before exercising judgement on its use.

ITN believes it is important to reflect the inherent importance of freedom of expression, and points out that the PCC Code states: “There is a public interest in freedom of expression itself.” They recommend the addition of wording that reflects the inherent importance of freedom of expression, and the deletion of the word ‘significant’ before ‘incompetence’. They also recommend the addition of the words “and what information is already in the public domain” at the end of the first sentence in the section on the meaning of legitimate expectations of privacy.

Public Voice would wish this wording to include “disclosing significant infringements or abuses of consumers’ or citizens’ rights”.

MediaWise suggests there should be special reference to coverage of inquest findings relating to suicide cases involving children; to some divorce and custody cases; and to school footage.

Ofcom response

We have replaced ‘the obtaining of’ with ‘obtaining’ in order to bring this into line with the wording of the Act. Otherwise the rule remains the same.

The BBC, Channel 4 and Five consider this rule repeats the principle. There are occasions where rules will duplicate principles. That is explained earlier in this statement.

The 1996 Act requires Ofcom to consider complaints about unwarranted infringements of privacy in connection with obtaining material included in a programme, as well as in a programme itself. This means that judgements about whether privacy is unwarrantably infringed in obtaining material cannot be avoided.

Several responses suggested changes to the meaning of ‘warranted’. The meanings are not intended to be exhaustive definitions of each term, but they are intended to indicate the

meanings of expressions used in rules or practices to be followed. They are therefore included in the Broadcasting Code, rather than in separate guidance, in order to assist with interpretation.

The BBC and ITV asked for further clarification of the word ‘warranted’. The public interest will be one way in which the infringement of privacy may be warranted, but there may be other ways in which an infringement of privacy can be warranted. Where a broadcaster wants to claim a public interest, they will have to demonstrate why the public interest, in the particular case, outweighed the infringement of privacy. However, given the very many different circumstances in which broadcasters may wish to argue that an infringement has been warranted, we consider it would be unhelpful to try to include more detail in the meaning of ‘warranted’. We will therefore continue to approach this issue on a case by case basis and this is reflected in additional wording that has been added to make it clear that broadcasters should be able to demonstrate in each case why “in the particular circumstances of the case” they wish to claim an infringement of privacy as warranted.

Ofcom recognises the need to balance the extent of any infringement of privacy, against the extent of any public interest and we have accepted ITN’s suggestion that the word “significant” be deleted from the meaning. We have also noted the BBC’s request for clarification of ‘public office’ and, having considered this further, we feel that our wording is too narrow. We have therefore changed ‘incompetence in public office’ to ‘incompetence that affects the public’. The examples given of ‘public interest’ are not intended to be exhaustive and we therefore do not consider it necessary to add to the list as suggested by Public Voice and Channel 4 and Five.

We have considered the additional wording suggested by all respondents, but believe that further additions will make the list unmanageable.

Private lives, public places and legitimate expectations of privacy

Meaning of ‘legitimate expectations of privacy’:

Legitimate expectations of privacy will vary according to the place and nature of the information, activity or condition in question and whether the individual concerned is already in the public eye. There may be circumstances where people can reasonably expect privacy even in a public place. Some activities and conditions may be of such a private nature that filming or recording, even in a public place, could involve an infringement of privacy.

Draft Rule 8.2 (now incorporated into ‘Meaning of “legitimate expectations of privacy”’)

People taking part in programmes, including people under investigation or in the public eye, and their immediate family and friends, retain the right to a private life. Any private information about them should therefore only be broadcast with their consent, unless the disclosure of that information is warranted.

Responses to the Consultation

The BBC requested clarification of the phrase ‘legitimate expectations of privacy’. The BBC also suggests that people under investigation are not entitled to an unqualified right to private life in relation to gathering material, and suggests this rule be moved to guidance.

The Commercial Radio Companies Association believes this rule is unnecessary as it is covered in the first rule in this section under the heading ‘Consent’ and relating to the need to obtain a person’s consent if a programme would infringe their privacy, unless warranted.

Capital Radio submits that this rule should not be included as drafted but the matters it covers should be dealt with in guidance.

ITN believes this rule is over restrictive in making the requirement of obtaining consent an absolute requirement, and recommends the insertion of the word ‘normally’ before the word ‘therefore’. They also recommend the addition of the words ‘and what information is already in the public domain’ at the end of the first sentence in the section on the meaning of legitimate expectations of privacy.

ITV believes this rule should be rewritten as: “People referred to in programmes, including people under investigation or in the public eye, and their immediate family and friends, retain the right to a private life. Therefore, any private information about them which is not in the public domain should normally be broadcast only with their consent, unless the disclosure of that information is warranted.”

The Muslim Council of Britain recommends the term ‘private information’ should be defined to avoid ambiguity. Their suggested wording is: “‘Private Information’ includes, without limitation, a person’s age, financial status, racial origin, religious affiliation, physical or mental health or condition, political opinion etc. This includes information considered to be ‘sensitive personal data’ by the European Union and incorporated into British law since 1998.”

S4C does not challenge the definition of ‘legitimate expectations of privacy’, but it does question the necessity of inclusion of the definition, as it is only used as part of a heading and not in the text of the rules themselves.

Ofcom response

We have noted the suggestion by the BBC and Capital that the rule is unnecessary, and we agree with the Commercial Radio Companies Association that this rule duplicates to a large extent the draft Rule 8.6 (concerning ‘Consent’). We have therefore inserted the following wording to the meaning of ‘legitimate expectations of privacy’: “People under investigation or in the public eye, and their immediate family and friends, retain the right to a private life, although private behaviour can raise issues of legitimate public interest”, in the meaning of ‘legitimate expectations of privacy’. The remainder of this draft rule has not been included in the Broadcasting Code.

The BBC suggested that those under investigation were not entitled to an unqualified right to private life in relation to the gathering of information and that this should be moved to separate guidance. We accept that an infringement of privacy may be more warranted where those concerned are under investigation but an investigation does not mean that those who are under investigation have no right to a private life. We have not moved it to separate web guidance but have changed the draft rule to refer to private behaviour that raises ‘issues of legitimate public interest’ to meet the BBC’s concern.

The suggestion by ITV and ITN that we add the word ‘normally’ to the draft rule is no longer relevant since the rule no longer exists.

We have accepted ITV's and ITN's suggestion that the extent to which information is in the public domain is relevant and included it in the meaning of 'legitimate expectations of privacy'.

The Muslim Council suggested a definition of 'private information'. As the rule has been deleted there is now no mention of "private information" in the Code.

We note S4C's comment that the phrase "legitimate expectations of privacy" does not itself appear in the Broadcasting Code. However, we consider that the explanation of legitimate expectations of privacy provides helpful information of fundamental importance to those working in production to assist them in understanding this section of the Broadcasting Code.

Draft Rule 8.3 (now "practice to be followed" 8.2)

The location of a person's home or family should not be revealed without permission, unless it is strictly relevant to behaviour under investigation and/or the disclosure of the information is warranted.

Responses to the Consultation

The BBC argues that 'strictly relevant' is too high a test and that this may undermine a broadcaster's right to 'doorstep', and suggests this be moved to guidance.

ITN recommends the inclusion of the word 'normally' or 'usually' after the word 'not', and the deletion of the word 'strictly', which creates too high a test.

Emap says that it must occasionally name the address of people to avoid legal action.

The Commercial Radio Companies Association reply indicates that the rule does not require the wording 'relevant to behaviour under investigation' and suggests the addition of the word 'matters' before 'under investigation' instead of behaviour.

ITV believes this rule should be rewritten as: "The precise location of a person's home or family should not normally be revealed without permission, unless it is relevant to behaviour under investigation and/or the disclosure of the information is warranted."

Channel 4 and Five suggest the deletion of the word 'strictly' and the insertion of the word 'precise' before 'location' to avoid uncertainty in interpretation.

Capital Radio submits that this rule be deleted and rewritten as guidance. It asserts that it is well established by the courts that a person's address is not private.

Ofcom response

The draft rule relating to the location of a person's home has now become the first practice to be followed in the section "Private lives, public places and legitimate expectation of privacy" ("practices to be followed" 8.2).

We agree with the BBC and ITN that the word 'strictly' created an unnecessarily high test. We have redrafted this to ensure that disclosure only has to be warranted.

We believe that ITN's suggestion that 'normally' be included is unnecessary as there is already an exception for warranted disclosure. This exception also addresses the point made by Emap that it may sometimes be necessary to disclose the address in order to avoid confusion with another person of the same name.

We have deleted the whole of the phrase relating to “behaviour under investigation” in accordance with the submission from the Commercial Radio Companies Association. It is consequently not necessary to insert the word “matters” as they had suggested.

However, we consider that Channel 4, Five and ITV’s suggestion of adding the word ‘precise’ to location is too prescriptive. The location of a person’s home and family can sometimes be ascertained from the information in the programme without it disclosing precise details such as a house number or street name. We have however reflected the point they make and have inserted at the beginning of this provision the words: “Information which discloses the location of a person’s home”.

The degree to which a complainant’s address is already in the public domain is a factor that is taken into account when assessing whether an infringement of privacy is unwarranted. Complaints will therefore be dealt with on a case by case basis, as Capital Radio suggest.

This provision clearly plays an important part in preventing unwarranted infringement of privacy and we consider it to be of sufficient significance to be included in this section and therefore we have not moved it to guidance.

Draft Rule 8.4 (now “practice to be followed” 8.3)

When people are caught up in events which are covered by the news their situation should not be abused or exploited in the making or transmission of a programme, unless it is warranted. This applies both to the time when these events are taking place and to any later programmes that revisit those events.

Responses to the Consultation

The BBC does not think it is ever possible for ‘abuse or exploitation’ to be ‘warranted’ and suggests that this rule be deleted.

ITN, Channel 4 and Five recommend the deletion of ‘abused or exploited’, which they regard as overly emotive. Words should be added to the effect that individuals’ privacy should be appropriately respected.

The Commercial Radio Companies Association wants to know what kind of abuse and exploitation are warranted and also wants clarification on what Ofcom is seeking to prevent.

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

ITV believes this rule should be deleted.

Ofcom response

We have accepted the BBC, Channel 4, Five and ITN’s contention that the original wording referring to abuse and exploitation was inappropriate. We have substituted these words with “...people... still have a right to privacy in both the making and the broadcast of a programme, unless it is warranted to infringe it”.

We believe that, as amended, this is of sufficient importance to be kept in this section of the Broadcasting Code and not to be moved to guidance. In particular, it is possible for someone caught up in a news story to have a right to privacy at the time of the news story and later if the story is revisited.

Draft Rule 8.5 (now “practice to be followed” 8.4)

Broadcasters should ensure that words, images or actions recorded in, or transmitted from, a public place, are sufficiently public to justify their broadcast without the prior consent of the individuals concerned, unless to do so without their consent is warranted.

Responses to the Consultation

ITV accepts this rule.

ITN believes it is unclear what this rule is trying to regulate and suggests that it be reworded. Channel 4 and Five believe that this rule is the wrong way round.

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

SCBG believes that the lack of reference to CCTV could result in catch all protection of anyone filmed in a public place in the UK or abroad.

Discovery Networks Europe believes this rule could provide a disproportionate level of protection for people filmed in public places.

Ofcom response

We have accepted that it would be more appropriate for the wording to refer to what is private, not what is public, and have amended this provision accordingly.

As amended, we consider that following this practice is an important part of preventing unwarranted infringement of privacy and therefore of sufficient significance to be included in this section.

This “practice to be followed” (as well as others) recognises Ofcom’s right (in certain circumstances) to determine whether an organisation’s privacy has been infringed.. This was specifically in connection with standards in broadcasting and the jurisdiction of Ofcom under the 1996 Act. (See Court of Appeal judgment in R v Broadcasting Standards Commission ex-parte British Broadcasting Corporation ([2001] QB 885, the ‘Dixons’ case.)

Programme-makers need to make a judgement as to whether footage, whether originating from CCTV or otherwise, is already sufficiently in the public domain not to require the prior consent of the individual concerned or, if not, if it is warranted to show it. We do not consider that this provision offers a disproportionate level of protection as Ofcom will only uphold a complaint if there is an infringement of privacy which is unwarranted.

It is well established in law that privacy can be infringed in a public place. This will aid those in production who may not have realised that it is possible to have a right to privacy in a public place.

Consent

Draft Rule 8.6 (now “practice to be followed” 8.6)

If a programme would infringe the privacy of anybody featured in it, that person's consent should be obtained before the programme is broadcast, unless the infringement of privacy is warranted. (Callers to phone-in shows are deemed to have given consent to the broadcast of their contribution.)

Responses to the Consultation

Discovery Networks Europe believes that this rule goes beyond the previous rule and cannot see how this is justified.

SCBG is concerned that the wording could require programme makers to have consent from anyone featured in a programme, even where material is in the public domain.

ITN recommends the addition of the word ‘significantly’ before the word ‘featured’.

Channel 4 and Five believe that the rule should apply to any one ‘identified’ rather than ‘featured in’. The BBC also suggests that ‘featured’ is too imprecise and that, given the prevalence of CCTV, people should not be automatically able to claim this.

The BBC suggests the rule be rewritten as follows: “If a programme would infringe the privacy of a significantly featured and/or named individual, that person’s consent should be obtained before the programme is broadcast or the individual’s identity should be concealed for transmission, unless the infringement is warranted.”

ITV believes this rule should be redrafted to read: “If broadcast of a programme would infringe the privacy of anybody who features significantly or is named within it, that person’s consent should be obtained or the individual’s identity should be concealed before broadcast, unless the infringement of privacy is warranted. (Callers to phone in shows are deemed to have given consent to the broadcast of their contribution.)”

Ofcom response

This provision is now “practices to be followed” 8.6. It follows a “practice to be followed” 8.5, which states that “Any infringement of privacy in the making of a programme should be with the person’s and/or organisation’s consent or be otherwise warranted”.

Draft rule 8.6 has been divided into two separate “practices to be followed”. One, “practice to be followed” 8.5, dealing with infringement of privacy in the making and one, “practice to be followed” 8.6, dealing with infringements of privacy in the broadcast.

We have changed the drafting of this practice to allow for companies’ right to privacy (see commentary under draft rule 8.5 above)

The reference to consent being obtained before the relevant programme is broadcast has been amended to “...before the relevant material is broadcast...”. This is because the “practice to be followed” concerns the issue of infringement of privacy in the broadcast of a programme (as opposed to the making of the programme). In order for there to be a possible infringement of privacy in the broadcast, the relevant material must be included in the programme as broadcast.

It should also be noted that there is a reference to this “practice to be followed” in the Foreword with regard to emergency situations and the acknowledged difficulty of judging whether or not privacy has been unwarrantably infringed whilst filming or recording at a disaster or emergency situation.

This “practice to be followed” requires any infringement of privacy to be warranted. Material that is already in the public domain may be less likely to result in an infringement of privacy and, in these circumstances, the concern of Discovery Networks Europe and SCBG that they would have to obtain consents from everyone featured is unlikely to prove a genuine difficulty. Consent is only required where there is an infringement of privacy and only then if

it is not warranted. However, it remains for the broadcaster to ensure that, if privacy is infringed, either consent is gained or it is warranted.

We have not adjusted the wording to add ITN's suggestion that we include the word 'significantly'. It is still possible to infringe someone's privacy even if they are not featured significantly.

We have also not added an exemption for the cases where an individual's identity has been concealed before transmission as suggested by the BBC. Unless an individual's identity is totally concealed so that no-one (with the exception of the production team who worked on the programme) can recognise the individual, it is possible that privacy may be infringed. Therefore adding these words may provide a false reassurance to those working in production who do not fully realise the extent to which identity has to be concealed.

It is not practicable to give an exhaustive definition of what infringes privacy. This section of the Broadcasting Code is intended to indicate some of the ways in which unwarranted infringements are most likely to occur. Ofcom will also be guided by case law as it develops. Separate guidance may also be given from time to time.

Draft Rule 8.7 (now “practice to be followed” 8.21)

Where the individual is under eighteen, consent must be obtained from a parent, guardian or other person over eighteen in loco parentis, unless the subject matter is trivial and the participation minor, or it is warranted to proceed without consent.

Responses to the Consultation

ITN believes that the requirement for a person under eighteen to have parental consent is too strict and is disparate from the PCC regulation for newspaper reporters. It maintains the age for parental consent should be those under sixteen. It also recommends adding the words 'or uncontroversial' after the word 'trivial' in the third line, and adding 'normally' or 'usually'. ITN also believes the rule relating to 'vulnerable people' that appears later in this section should be deleted, and the term 'vulnerable people' added to this rule.

Emap believes this rule is too restrictive, particularly for those aged fifteen eighteen.

Channel 4 and Five believe that 'in loco parentis' should be replaced by 'parental responsibilities'.

ITV believes this rule should be amended to 'under sixteen' and it also argues that there is a substantial minority of young people living independently of parental or other control, to whom such consent is neither available nor acceptable, and that there is an inconsistency between this provision and the rules governing print media, which leads to discrimination against the broadcaster and the young person.

Chrysalis Radio notes that this appears to prevent the participation of any person under eighteen in any programme; no guidance is given as to what might be a 'trivial' or a 'warranted' situation.

The BBC suggests that parental consent is too tightly drawn, that the rule undermines the needs and wishes of under-eighteens to discuss serious issues, and suggests the following revision: "Where an individual is a child under fifteen, consent must normally be obtained from a parent, guardian, or other person over eighteen in loco parentis to contribute to a factual programme, unless the subject is trivial and the participation minor, or it is warranted to proceed without consent".

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

Ofcom response

In the Broadcasting Code this provision now appears in “practice to be followed” 8.21 in relation to people under the age of sixteen and vulnerable people. This was suggested by ITN although ITN proposed amalgamating the two rules. We have accepted ITN’s suggestion that the words ‘vulnerable people’ and ‘uncontroversial’ should be included. We do not consider the word “normally” is needed as the rule is qualified by an exception for an infringement that is warranted.

We accept that the age limit at which parental consent is not normally required should be sixteen, not eighteen. Young people of that age are able to join the armed forces, smoke, have children, leave home; they should therefore 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 previous section. We sympathise with the desire to avoid Latin terms, but the term ‘in loco parentis’ is the correct term in law to describe the relationship referred to in this section.

Whether something is ‘trivial’ or ‘warranted’ is a matter of judgement to be made by the broadcaster.

We have not confined this “practice to be followed” to factual programmes as the BBC suggests. An entertainment programme, like a factual programme, may raise privacy issues regarding under sixteens.

We have added provision for broadcasters to follow the practice of obtaining consent where possible from the young or vulnerable person in recognition of the rights of children and young people, as well as the parent/guardian or adult in loco parentis.

Draft Rule 8.8 (“practice to be followed” 8.7)

If an individual or organisation’s privacy is being infringed, and they ask that recording or live transmission be stopped, the broadcaster should do so, unless it is warranted to continue the recording or live transmission.

Responses to the Consultation

ITN opposes the creation of a prescriptive rule of this nature. ITV believes this rule should be deleted. The BBC believes this is neither necessary nor achievable, that a contributor cannot stop a live broadcast for reasons of libel, and that no distinction is made between gathering and broadcasting; it suggests this should be deleted.

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

Channel 4 and Five suggest that the rule should be amended to: “If an individual is being filmed, whether for broadcast live or not, and asks for the recording to stop, the broadcaster should normally do so unless to continue the filming or live broadcast is warranted”.

Ofcom response

This provision is now in “practice to be followed” 8.7 but in recognition of the broadcasters’ concerns about the difficulties and the need to gather material included a new paragraph in

the Foreword to this section acknowledging the difficulty of making on the spot decisions - especially in emergency situations - and explaining that this is something that Ofcom will take into account when adjudicating on cases and complaints.

While we appreciate the concerns raised, there is a distinction between unfairness and infringement of privacy when gathering and broadcasting material – once a person’s privacy has been infringed, it cannot be remedied in the way unfairness can (by, for example, a broadcast correction or right of reply). In these circumstances we consider it right to retain this provision.

Despite Capital Radio’s suggestion that this practice should appear instead within separate guidance, following this practice is a significant part of preventing unwarranted infringement of privacy in connection with the making of programmes and we consider this provision to be of sufficient importance to be included as a specific practice to be followed.

We do not believe that the word ‘normally’, as suggested by Channel 4 and Five, is needed as there is an exception where an infringement is warranted.

Draft Rule 8.9 (“practice to be followed” 8.8)

When filming or recording in institutions, organisations or other agencies, permission should be obtained from the relevant authority or management unless it is warranted to film or record without permission. Individual consent of employees or others whose appearance is incidental or where they are essentially anonymous members of the general public is normally not required.

Responses to the Consultation

ITN recommends the use of the word ‘normally’ with regard to permission being sought when recording or filming in institutions.

The Commercial Radio Companies Association does not believe the word ‘normally’ in reference to not normally requiring consent from those individuals whose appearance is incidental is helpful.

Channel 4 and Five believe that the words ‘essentially anonymous’ should perhaps be replaced by ‘random’.

ITV accepts this rule but would welcome clarification of what is meant by ‘organisations or other agencies’.

Capital Radio requires clarification on when consent is required.

The BBC suggests this rule be moved to guidance.

Ofcom response

This is now “practice to be followed” 8.8. We have amalgamated this provision with draft rule 8.10 (below) for clarity and because they should be read together.

We believe that adding ‘normally’ in respect of gaining permission for filming in institutions, as ITN suggested, is unnecessary, since the rule is already qualified by an exception where an infringement is warranted .

However, we considered it important to continue to stipulate that consent from essentially anonymous members of the public will not normally be required. There may be situations where someone has exceptional reasons for not wishing to be identified who has informed the broadcaster at the time, for example, someone avoiding a violent ex-spouse or someone on a witness protection programme.

We already use the word ‘incidental’ which gives broadcasters scope in this area. But we do not consider replacing ‘essentially anonymous’ with ‘random’, as Channel 4 and Five suggested will work as they are two different concepts.

‘Other agencies’ is intended to cover services such as the police and the RNLA, for example.

Capital Radio requested further clarification on when consent is required. Consent is needed from anyone whose appearance is not incidental or who is not essentially an anonymous member of the public or whose privacy may be infringed and such infringement is not warranted. For the measures that may be necessary to gain informed consent, please see Section Seven: Fairness (“practice to be followed” 7.3)

We consider this a significant part of preventing unwarranted infringement of privacy and of sufficient importance to be included as a practice to be followed.

Draft Rule 8.10 (now “practice to be followed” 8.8 bullet point)

However, in potentially sensitive places such as ambulances, hospitals, schools, prisons or police stations, a separate consent should be obtained from those in sensitive situations unless the individual’s identity has been concealed (unless not obtaining consent is warranted).

Responses to the Consultation

The BBC suggests this is too widely drawn and gives the following revision: “In sensitive places such as ambulances, hospitals, schools, prisons or police stations a separate consent must normally be obtained prior to broadcast from those featured, unless the individual’s identity has been concealed.”

Capital Radio recommends that the rule is redrafted to make it clear that consent is required before broadcast.

ITN recommends the use of the word ‘normally’ regarding consents.

MediaWise believes this should be amended to: “...an appropriate consent should be obtained from those directly involved, before transmission, unless an individual’s identity has been legitimately concealed”.

SCBG believes this does not recognise the international origin of many cable and satellite programmes and the impracticality of securing consents in these. It suggests the wording should include ‘where practicable’.

Discovery Networks Europe believes that this rule fails to recognise the difficulties that its implementation would cause and therefore would like the wording to be changed to, ‘where practicable’.

Channel 4 and Five say that a rule cannot start with ‘however’.

Ofcom response

As explained above, this now appears within “practice to be followed” 8.8 (bullet point).

We have not accepted the BBC and Capital Radio’s suggestion that the wording should be amended so that it is clearer that any consent required from those in sensitive situations is to be gained before broadcast, rather than before filming or recording. This is because such situations in potentially sensitive places require particular care and therefore require consent before filming or recording as well as before broadcast. The wording recognises that there are some circumstances where it would be justified not to obtain consent. We have amended the drafting to move away from the idea of an individual’s identity being concealed and to say instead that separate consent will not normally be required for broadcast if the individual will not be “identifiable”.

We have added the word normally as suggested by ITN.

The intention of this provision is also to protect those in sensitive situations who may not be ‘directly involved’. We consider that MediaWise’s proposed rewording would not provide that protection.

We recognise the international origin of many cable and satellite programmes and the potential difficulties in gaining consent. However, it is necessary for programme-makers and broadcasters to seek to ensure that an individual’s privacy is not unwarrantably infringed in such potentially sensitive circumstances. Ofcom would consider the practicality of obtaining consent when considering what was or was not warranted in privacy complaints and cases.

Since the provision has become a bullet point within “practice to be followed” 8.8 it is acceptable to use ‘however’ to start the sentence.

Gathering information or images

Draft Rule 8.11 (now “practice to be followed” 8.9)

The means of obtaining material must be proportionate to the subject matter of the programme.

Responses to the Consultation

Chrysalis Radio notes this rule is difficult to enforce and does not see the problem it seeks to remedy. The Commercial Radio Companies Association does not understand the value of this rule.

Capital Radio requires clarification of this rule.

ITV accepts this rule.

S4C welcomes this rule.

Ofcom response

The proportionality of any means of obtaining material is important when considering whether any potential infringement of privacy is warranted. We have clarified the wording to make it clear that the means must be proportionate in all the circumstances and in particular to the subject matter of the programme. We believe this will be helpful to those working in production. Examples may be given in separate guidance from time to time.

Ofcom Note

Transfer of “practice to be followed” (now 8.10). We have transferred a new practice in respect of the reuse of material. This was originally included as a draft rule 7.6 in the Fairness section of the consultation document, but respondents felt that privacy should not be referred to in the Fairness section of the Broadcasting Code. Responses regarding that rule have been included in the Fairness section of this statement (under draft rule 7.6). We have therefore also changed the title of this part of the section to include the reuse of material.

Additionally to aid clarity, we have included here the provisions relating to ‘doorstepping’ and broadcasters identifying themselves to telephone interviewees from the outset. We will address the responses to these provisions, as they were drafted, in the order they were laid out in the consultation document.

Draft Rule 8.12 (now “practice to be followed” 8.13)

Surreptitious filming or recording should only be used where it is warranted, and:

- (i) there is prima facie evidence of a story in the public interest; and
- (ii) there are reasonable grounds to suspect that necessary evidence could be obtained; and
- (iii) it is necessary to the credibility and authenticity of the programme.

Responses to the Consultation

Channel 4 and Five believe that the definition should be changed to ‘secret filming’ and should only apply to factual TV. They also believe that the Code should explicitly state that this only refers to the recording of telephone conversations ‘where intended for broadcast’. Additionally, they request the Code explicitly states this regulation only applies to factual programming and not entertainment programming.

Capital Radio recommends that the rule is redrafted to exclude entertainment programming.

ITN requests that this provision and the following one should make clear that the requirements apply to secret recording of telephone conversations intended for broadcast, as in section 2.4 of the ITC Code. The term ‘secret filming and recording’ is clearly understood and should remain as such and should not be changed to ‘surreptitious filming’.

ITV believes that the first part of this draft rule should be read “surreptitious filming or recording of material intended for broadcast in factual programmes should only be deployed where it is warranted...”

S4C welcomes this rule.

Ofcom response

This provision is now in “practice to be followed” 8.13.

The wording ‘surreptitious filming or recording’ is clearer than the phrase ‘secret recording’ – it includes for example leaving the camera running when an interviewee is unaware that that is happening. Therefore we believe this wording is more helpful to those working in

production who may not have been aware that such practices might result in a breach of the Broadcasting Code.

Regarding Channel 4 and Five’s point about telephone conversations, the legislation requires Ofcom to consider complaints about unwarranted infringements of privacy in connection with the obtaining of material included in a programme (as well as its broadcast). This could include gathering material during secretly recorded telephone conversations regardless of whether the specific material is broadcast, for example by gaining private information whilst concealing the real identity and purpose of the caller. Whilst this technique may be justified, for example by the public interest, its use should be carefully considered as its abuse could be distressing and potentially damaging. That is why we cannot limit this simply to broadcast.

We accept that not disclosing identity/purpose when recording a telephone call, surreptitious filming or recording or doorstepping may be justified, in some circumstances, if done in order to gather material for entertainment programmes, even if there is no public interest involved. We have therefore drafted a new practice for broadcasters to follow relating specifically to entertainment programmes (see “practice to be followed” 8.15 in the Broadcasting Code). We have also added the word ‘normally’ in relation to surreptitious filming and a cross reference to “practice to be followed” 8.15.

However, we consider safeguards are still needed for those concerned in entertainment programmes and we would consider such means of gathering material justified if they are intrinsic to the entertainment, do not amount to a significant infringement of privacy and do not cause significant annoyance, distress or embarrassment. Moreover, where there is no public interest justification, the resulting material should not be broadcast without the consent of those involved. We have drafted the practice accordingly. These changes should allow programme-makers to produce entertainment programmes that rely on the techniques in question, while protecting those featured.

To ensure that the “practice to be followed” is in line with our proposed policy, we have clarified ii) of the draft rule. We have replaced “there are grounds to suspect that necessary evidence could be obtained” with “there are grounds to suspect that further material evidence could be obtained”. This ensures that surreptitious filming or recording is conducted in order to substantiate a story where there is already prima facie evidence.

Draft Rule 8.13 (now “practice to be followed” 8.14)

Material gained by surreptitious filming and recording should only be transmitted when it is warranted.

Meaning of ‘surreptitious filming or recording’:

Surreptitious filming or recording includes the use of long lenses or recording devices, as well as leaving an unattended camera or recording device on private property without the full and informed consent of the occupiers or their agent. It may also include recording telephone conversations without the knowledge of the other party, or deliberately continuing a recording when the other party thinks that it has come to an end.

Responses to the Consultation

The Commercial Radio Companies Association says that wind up calls should continue and these rules as they stand will kill a key part of radio entertainment.

ITV believes this rule should insert the words ‘for inclusion in factual programmes’ after the word ‘recording’.

The BBC suggests the following revision: “Surreptitious filming or recording for factual programmes must only be used where it is warranted by the broadcaster establishing prima facie evidence of an issue of public interest; where there are reasonable grounds to believe that the necessary corroboration could be so obtained; and it is necessary to the credibility and authenticity of the programme”.

Ofcom response

This provision remains unchanged. However we have added a cross reference after this provision to the “practice to be followed” 7.14 and the practices to be followed that are set out in paragraphs 8.12 to 8.13 and 8.15 (relating to obtaining material through misrepresentation or deception).

We have covered the points made by,ITV and the Commercial Radio Companies Association in our response on surreptitious filming above.

The BBC’s suggested amendment to expand on ‘warranted’ is more relevant to the gathering of the material rather than its transmission and so we have not adopted it.

Draft Rule 8.14 (now “practice to be followed” 8.12)

Broadcasters should identify themselves to telephone interviewees from the outset, and explain the purpose of their call, or seek agreement from the other party, if they wish to broadcast a recording of a telephone call between the broadcaster and the other party, unless it is warranted not to do so.

Responses to the Consultation

Channel 4 and Five say that it must be made clear that it is only the other side of the telephone conversation that this relates to.

The BBC suggests this be moved to guidance in relation to the covering the use of material obtained by deception in the Fairness section.

Capital Radio believes that this should be cross referenced to the provision covering the use of material obtained by deception in the Fairness section.

Chrysalis Radio believes this would prohibit wind up calls, commonly used by radio stations for entertainment.

Ofcom response

This provision has been simplified and now appears as “practice to be followed” 8.12.

It cannot apply only to the ‘other side of the call’ as it applies to the broadcast of any part of a recording of a telephone call between the broadcaster and the other party, and broadcast of the programme-maker’s part of the call may infringe privacy.

We do not believe this practice is specifically addressed by the provision covering the use of material obtained by deception in the Fairness section. That practice to be followed relates to deception and misrepresentation and does not relate to potential infringements of privacy. We therefore consider this provision should remain here in the privacy section of the

Broadcasting Code and that it is of sufficient importance to be included as a specific practice to be followed.

As explained above, we have drafted a new practice to be followed in respect of entertainment programmes. This covers wind-up calls.

Draft Rule 8.15 (now “practice to be followed” 8.11)

Doorstepping should not take place unless a request for an interview has been refused, or there is good reason to believe that an investigation will be frustrated if the subject is approached openly, and it is warranted to doorstep. Broadcasters may normally however, without prior warning interview, film or record people in the news when in public places.

Meaning of ‘doorstepping’:

Doorstepping is the filming or recording of an interview or attempted interview with someone, or announcing that a call is being recorded for broadcast purposes, without any prior warning.

Responses to the Consultation

The BBC suggests that ‘public places’ is too restrictive, that the rule does not take into account phone interviews for entertainment purposes, and suggests the revision: “Doorstepping for factual programmes must not take place unless it is warranted. Normally this will be because a request for an interview has been repeatedly refused, or there is good reason to believe that an investigation will be frustrated, or allegations avoided, if the individual is approached openly. Broadcasters may, however, seek to interview, film or record people in the news without prior warning”.

ITN recommends the addition of ‘in places open to the public’ at the end of the sentence.

Capital Radio believes that this rule should make clear that entertainment programmes are not covered. Emap says that this will prevent ‘doorstepping’ for comedy or entertainment. The Commercial Radio Companies Association also says that this will kill doorstepping entertainment.

Channel 4 and Five suggest that this might be taken to include vox pops and suggests the words be amended by adding ‘in order to put an allegation to them’.

ITV believes this rule should be redrafted to “Doorstepping for inclusion in factual programmes must take place only when warranted. Normally, this will be because it has not been possible to make a request for interview or the request has been refused, or there is good reason to believe the inquiry will be frustrated or significant allegations or criticisms avoided if the individual is approached openly. However, broadcasters may seek to interview those in the public eye when relevant, without prior warning and at times when their actions or whereabouts are not intrinsically private”.

Ofcom response

This provision now appears at “practice to be followed” 8.11.

We have accepted ITV’s suggestion that doorstepping should also be permitted where it is not possible to make a request for an interview – since this is accepted common practice.

We do not consider that ‘public places’ is too restrictive. It can include places to which the public have ready access, such as railway stations, as well as places that are publicly owned. However, it would not necessarily include all places open to the public, for example a hotel lounge. The degree to which individuals or their actions are in the public domain, which may be affected by the nature of the location, will have to be considered on a case-by-case basis.

As explained above, we have drafted a new practice to be followed in relation to entertainment programmes.

We have amended the meaning to exclude vox pops and therefore have not added the words Channel 4 and Five suggested as we believe that doorstepping may be used for reasons that are wider than putting allegations to people.

We believe that the changes we have made deal with the substantive points that ITV has raised through their redrafting.

Suffering and distress

Draft Rule 8.16 (now “practice to be followed” 8.16)

Broadcasters should not take or broadcast footage or audio of people caught up in emergencies, victims of accidents or those suffering a personal tragedy, even in a public place, where that results in an infringement of privacy unless it is warranted.

Responses to the Consultation

The Commercial Radio Companies Association says that the words ‘take or’ should be deleted.

Capital Radio believes that this should be redrafted to: “broadcasters should not broadcast footage or audio of people”.

SCBG notes that this – along with rules relating to people being in distress and not being put under pressure to take part, broadcasters trying to minimise the potential distress to victims when making or broadcasting programmes intended to examine past events; and informing of surviving relatives whose experiences feature in the programme will prevent many cable and satellite channels from using footage of emergencies, raises risk of retrospective complaints, and should be issued as web based guidance. Discovery Network Europe also makes these arguments and says that this wording is overly prohibitive for example ‘should not take or broadcast’, rather than ‘should avoid’.

ITN maintains that this section needs to incorporate the contents of Article 10 of the HRA 1998 and ITC Code (section 2.2(iv)) concerning scenes of human suffering being an integral part of news reporting. They object to the restriction on the taking of footage as this is a matter of detailed journalistic procedure that is not appropriate for regulation by Ofcom. ITN recommends that the words ‘caught up in’ should be changed to ‘involved in’, and suggests the insertion of the word ‘such as’ after ‘emergencies’.

Channel 4 and Five believe that this should be amended to read: “When broadcasting material featuring people involved in emergencies, accidents or personal tragedies broadcasters should ensure that consent is obtained, identities concealed or that any infringement of privacy in the broadcast is warranted”.

ITV believes this rule should be redrafted to: “In broadcasting material relating to emergencies, accidents and disasters, or personal tragedy, suffering and distress, broadcasters must responsibly weigh freedom and responsibility to report with individual rights to privacy and respect for human dignity in judging whether any intrusion into privacy is warranted”.

The BBC believes this rule should refer to the respect of human dignity and avoidance of unnecessary suffering not in the gathering but the broadcast of material, that the rule needs to take live coverage into account, and that safeguards need to be in place for use of material at a later date. It suggests the following revision: “Broadcasters must balance the freedom to report incidents involving human suffering and distress with the individual’s right to privacy and respect for human dignity and the material broadcast must be warranted”.

AIB believes that this fails to take account of the live nature of much broadcasting, particularly 24 hour news channels, and wonders who will adjudicate whether infringement of privacy is ‘warranted’.

Ofcom response

This draft rule is now “practice to be followed” 8.16

The “practice to be followed” also adds an exception for infringements of privacy where those involved have given consent.

There was a strong response to this rule with almost all broadcaster respondents listed above suggesting this rule should be limited to the broadcast rather than the taking of footage.

Ofcom understands that a broadcaster’s right to freedom of expression to take and impart information is one that should be particularly imperative in newsgathering. We also understand that the pressures on camera and sound operators at the scene of disasters and emergencies make it difficult for them to judge at the time whether filming or recording is an unwarrantable infringement of privacy and that sensitive editorial judgements about whether the footage or audio can be broadcast can be made more easily afterwards. However, the 1996 Act requires Ofcom to consider complaints about unwarranted infringements of privacy in connection with the obtaining of material included in a programme, as well as in a programme itself. This means that on-the-spot judgements about whether privacy is unwarrantably infringed by filming or recording cannot be avoided. As outlined in the Foreword, Ofcom will take into account, when adjudicating, the pressures on broadcasting crews filming or recording in emergency situations and the strong public interest in broadcasting footage of disasters. A paragraph has been included in the Foreword explaining this..

Ofcom does not believe that this rule will prevent cable and satellite broadcasters from using footage of emergencies for fear of retrospective complaints. The strong public interest in the broadcasting of material reporting on emergencies applies to those broadcasters too.

Although considering potential infringements of privacy in the circumstances referred to in this provision might involve consideration of respect for human dignity, these are separate issues. Ofcom has a specific remit to consider complaints concerning unwarranted infringements of privacy. In the circumstances, we considered that it would not be helpful to refer to respect for human dignity.

Concealing identities as proposed by Channel 4 and Five may be sufficient to avoid an unwarranted infringement of privacy when broadcasting footage or audio. However, we

have not amended this draft rule because the “practice to be followed” only concerns actions that result in infringements of privacy.

To aid clarity we have amended this provision by adding the wording “... or the people concerned have given consent”.

We consider the expression ‘caught up’ is more geared to those who this practice is designed to protect, rather than the wider ‘involved in’. We have not included “such as” before “...accidents or those suffering a personal tragedy...” as the practice for broadcasters to follow is intended to protect victims of accidents generally, not just those caught up in emergencies.

Draft Rule 8.17 (now “practice to be followed” 8.17)

People in a state of distress should not be put under pressure to take part in a programme or provide interviews unless it is warranted.

Responses to the Consultation

Channel 4 and Five wonder what this rule is trying to achieve. ITN believes this rule adds very little and should be deleted.

Public Voice believes there is a further consideration here relating to human dignity and media representation: people who are being shown in a state of distress should have a right to a voice in order not to be made into degraded or exploited objects of pity.

ITV accepts this rule.

Ofcom response

This draft rule is now “practice to be followed” 8.17. Ofcom considers that it is important that programme-makers should be aware of the need not to add to the distress of individuals by putting them under pressure to participate in a programme unless it is warranted to do so.

We appreciate Public Voice’s position and believe that this “practice to be followed” achieves the right balance between the need for programme makers to report on events and those in distress not to be put under undue pressure.

Draft Rule 8.18 (now “practice to be followed” 8.18)

Broadcasters should take care not to reveal the identity of a person who has died, or of victims of accidents or violent crimes, unless and until it is clear that the next of kin have been informed, unless it is warranted.

Responses to the Consultation

UKTV points out that it is unclear if ‘until it is clear that the next of kin have been informed’ means the original police notification of death at the time of the crime, and states that the broadcaster cannot always ‘re contact’ relatives, as recognised by the rule relating to surviving relatives whose experience is to feature in the programme. They seek clarity on this rule.

Emap asks if the phrase “...unless the identity is confirmed by the emergency services” could be included here.

ITV accepts this rule.

AIB asks who will be the arbiter of whether or not a broadcaster's mention of the name of a person who has died was or was not warranted.

Ofcom response

This is now “practice to be followed” 8.18. We acknowledge that the wording in the draft rule may be ambiguous and have amended it to make clear that it relates to notification to the next of kin of the event itself, not notification of the broadcaster's intention to revisit the event.

We do not consider that it is appropriate to reveal the identity of a person who has died, or of victims of accidents or violent crimes, simply because the emergency services have confirmed their identity. The rule is intended to protect those involved and their families, by ensuring they are informed first.

Again emergencies and disasters throw up particularly difficult scenarios. Ofcom understands that there are pressures on reporters at the scene of emergencies and that they will need to make sensitive editorial judgements about whether to reveal or conceal specific details. However, care should be taken not to reveal the identity of a person who has died, or of victims of accidents or violent crimes, unless and until it is clear that the next of kin have been informed or it is warranted. This means that on-the-spot judgements about whether privacy is unwarrantably infringed by revealing details of someone's identity cannot be avoided. As stated in the Foreword to this section, Ofcom will take into account, when adjudicating on whether revealing someone's identity was warranted, the pressures on broadcasting crews in such circumstances as well as the importance to society of the broadcaster's right to freedom of expression in reporting such events.

Draft Rule 8.19 (now “practice to be followed” 8.19)

Broadcasters should try to minimise the potential distress to victims and/or relatives when making or broadcasting programmes intended to examine past events that involve trauma to individuals (including crime). This applies to dramatic reconstructions and dramas, as well as factual programmes.

Responses to the Consultation

ITN recommends the replacement of the word ‘minimise’ with the term ‘take into account’. Channel 4 and Five believe that rather than having to “minimise the potential distress” they should be asked to ‘be aware’ or ‘take into account’.

The Commercial Radio Companies Association says this is guidance not a rule. The BBC also suggests that this is guidance.

Capital Radio submits that this be deleted and rewritten as guidance. It suggests that an exception could be made when the making of a programme is warranted but parents do not cooperate for example.

ITV accepts this rule.

Ofcom response

This is now “practice to be followed” 8.19. Having considered the responses we have changed the word ‘minimise’ to ‘reduce’ as we accept that ‘minimise’, if taken to its literal

extreme, could inhibit programmes that are in the public interest, for example a miscarriage of justice programme. We have also added the words ‘unless it is warranted to do otherwise’ for such cases.

This is a significant part of preventing unwarranted infringement of privacy and of sufficient importance to be included as a practice to be followed, not as separate guidance.

The wording now makes clear that broadcasters should ‘try to reduce’ the distress to victims and/or relatives. It is open to broadcasters to argue that they took all reasonable steps to reduce distress and satisfied this requirement, notwithstanding a lack of cooperation from relatives.

Draft Rule 8.20 (now “practice to be followed” 8.19, bullet point)

So far as is reasonably practicable, surviving victims, and/or the immediate families of those whose experience is to feature in a programme, should be informed of the plans for the programme and its intended transmission. Failure to do this might be deemed unfair or an unwarranted infringement of privacy, even if the events or material to be broadcast have been in the public domain in the past.

Responses to the Consultation

UKTV points out that ‘whose experience is to feature in a programme’ is too vague and leaves far too long a list of people who should potentially be contacted: “The words from the re use guidelines relate to the suffering or distress broadcast may cause and specifically cite that public interest may override objections to re use. The proposed Ofcom Code appears to lead to an automatic conclusion that failure alone could be unfair and it should accordingly cite the relevance of public interest exceptions”. UKTV again feels clarity is needed here.

According to Emap, the bands of this definition are too broad as major events affect many people both directly and indirectly.

The Commercial Radio Companies Association does not understand how this represents an infringement of privacy.

Capital Radio submits that this should be deleted and rewritten as guidance. It disputes the suggestion that failure to inform is unfair, as only programme content can be judged as unfair. It also suggests that failure to inform is not an infringement of privacy.

Channel 4 and Five say that the second line implies a pre judgement on behalf of Ofcom and should be deleted. ITV believes this rule should be deleted as the preceding rule relating to the minimising of potential distress to victims and/or surviving relatives is sufficient.

The BBC suggests that the rule relating to the minimising of potential distress and/or surviving relatives is covered here and thinks there should not be a reference to unfairness in this section on privacy. It also suggests ‘experience’ is too vague and offers the following amendment: “Broadcasters must seek to reduce any distress to victims and/or relatives that might be caused by news and factual programmes, reconstructions or dramas examining past events involving trauma to individuals. So far as is reasonably practicable, surviving victims, and/or the immediate families of the dead people who are to feature significantly in the programme, should be informed about it. The programme should proceed against the objections of those concerned only if there is a clear public interest”.

Ofcom response

This provision has been incorporated as a bullet point within the practice to be followed in “practice to be followed” 8.19.

We accept that this would benefit from further clarification. The second sentence was not intended to imply an automatic conclusion, or any pre-judgement on Ofcom’s part, that failure to inform could be unfair. We have therefore amended accordingly. In saying that there ‘might’ be an ‘unwarranted’ infringement of privacy, Ofcom leaves it open to the broadcaster to argue a public interest or other justification. We have also deleted the reference to fairness in this section since this section deals with privacy. A reference in terms of fairness in relation to programmes examining past events is now contained in “practice to be followed” 7.9.

This bullet point is of sufficient importance to be included in the Broadcasting Code and not written as separate guidance. The courts have accepted that the failure to inform surviving victims, and/or the immediate families of those whose experience is to feature in a programme, of any plans to revisit the experience might constitute an unwarranted infringement of privacy, even if the events or material to be broadcast have been in the public domain in the past.

Ofcom considers that this and the preceding practice to be followed by broadcasters are distinct and that they should be retained separately. One relates to minimising distress through the making and content of the programme, the other relates to minimising distress through informing of transmission plans. Nevertheless the two “practices to be followed” are related and so we have added this as a bullet point.

People under the age of eighteen and vulnerable people

Draft Rule 8.21 (now “practice to be followed” 8.20)

Broadcasters must recognise that people under the age of eighteen do not lose their rights to privacy because, e.g. of the fame or notoriety of their parents or because of events in their schools.

Responses to the Consultation

ITN believes this rule adds very little and recommends its deletion. The BBC suggests that this rule is covered elsewhere in the Code. The Commercial Radio Companies Association says this is guidance and compliance with this is not measurable.

ITV accepts this rule but believes it may be unnecessary.

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

Ofcom response

This provision (now in “practice to be followed” 8.20) is slightly amended in wording but remains the first practice to be followed under this section heading about people under the age of sixteen and vulnerable people.

We have amended the wording of the section title and of this provision so that it refers to persons under the age of sixteen rather than those under eighteen (please see reasons for age change earlier). We have also changed the wording by replacing ‘must recognise’ with ‘should pay particular attention to the privacy of’.

Ofcom considers that this is a useful inclusion as a practice to be followed. We do not believe that it is specifically covered elsewhere in the Broadcasting Code.

Draft Rule 8.22 (now “practice to be followed” 8.22)

Persons under the age of sixteen and vulnerable people should not be questioned about private matters or asked for views on matters likely to be beyond their capacity to answer properly, unless that is warranted.

Meaning of ‘vulnerable people’:

This varies, but may include those with learning difficulties, those with mental health problems, the bereaved, people with brain damage or forms of dementia, people who have been traumatised or who are sick or terminally ill.

Responses to the Consultation

The Commercial Radio Companies Association believes this rule should be deleted.

ITN believes this rule should be deleted and the term ‘vulnerable people’ added to the relevant rule under the section heading of ‘consent’.

Capital Radio believes this rule should be deleted as it is unclear.

ITV accepts this rule.

S4C suggests in the interests of consistency that Ofcom use either the term ‘children’ or ‘young persons’ as they have been clearly defined in section one.

Chrysalis Radio believes further definition is needed in terms of ‘private matters’ and ‘matters likely to be beyond their capacity to answer properly’, and says this seems an insult to presume the incapability of children.

The BBC points out that this is covered by the rule relating to the gaining of parental consent for those under eighteen under the section head of ‘Consent’, would like definition of ‘private matters’, notes this should be consistent with Ofcom’s definition of the age of a child, and gives the following revision: “Broadcasters must ensure that children and vulnerable people are not normally questioned about private matters or asked for views on matters likely to be beyond their capacity to answer properly in factual programmes”.

Ofcom response

This draft rule is now “practice to be followed” 8.22.

We believe that this is of sufficient importance to be included as a practice to be followed, not as separate guidance, and that it is not specifically covered elsewhere in the Broadcasting Code. We have, however, adopted ITN’s recommendation by moving the practice to be followed in relation to people under eighteen or vulnerable people to this part of the section and incorporating vulnerable people as explained in that provision.

We accept that we should be consistent here with the terms used to describe those under eighteen and have used the wording ‘persons under the age of sixteen’ (see earlier explanations concerning age).

We will consider addressing the questions on the meaning of the terms ‘private matters’ and ‘matters likely to be beyond their capacity to answer properly’ in guidance. We do not assume the incapacity of those under sixteen. We accept that a child of five has a different world view from a young person of fifteen and we expect those in production to frame their questions to those of different ages and different development appropriately.

We do not accept that this should be confined to factual programmes. We take the view that those under sixteen need some protection from intrusive or insensitive questioning in entertainment programmes as well.

We accept that there may be exceptional circumstances where it is warranted to proceed with questioning about private matters without the consent of a parent, guardian or those in loco parentis. For instance when those in such positions are themselves under investigation (e.g. an expose of abuse in a children’s home). The new “practice to be followed” has been amended accordingly.

We accept that it may be legitimate to ask those under sixteen or the vulnerable about private matters with appropriate consents. The “practice to be followed” 8.22 reflects this.

V Proposed New Rules

Responses to the Consultation

The BBC suggests the following rule addition: “Broadcasters must ensure that when children are questioned about private matters or asked for views on matters likely to be beyond their capacity to answer properly in comedy and entertainment programmes, consent must normally be obtained from both the child and a parent or guardian prior to transmission”.

S4C invites Ofcom to reassess this given the recent Von Hannover v. Germany case in the European Court of Human Rights.

MediaWise suggests clear strictures regarding ‘reality TV’ participants.

Ofcom response

We believe that the practice to be followed as set out now in “practice to be followed” 8.22 will deal with this issue. If a parent guardian or adult in loco parentis gives consent then interviewing can take place in all genres. We recognise the importance of giving a person under the age of sixteen or a vulnerable person a right to express their own view as to whether the resulting material should be aired. However as the person under the age of sixteen or vulnerable person has been asked about a matter beyond their capacity they are not in a position to give informed consent. Similarly if they have discussed private matters it should normally be for the parent guardian or adult in loco parentis to make a final decision to give consent on their behalf (accepting that there are also other exceptional circumstances).

We have taken the case of Von Hannover v. Germany into account when redrafting this section of the Broadcasting Code – please see earlier comments.

The requirement in the previous section of the Broadcasting Code to inform participants about the type of programme applies to ‘reality TV’ programmes.

A “practice to be followed” (8.21) has been introduced with respect to programmes featuring individuals under the age of sixteen or those who are vulnerable. This general requirement is for broadcasters to obtain consent from parents, guardians or those in loco parentis, as

well as where possible those participating. Such consent is required unless the subject matter is trivial or it is warranted to proceed without such consent. This requirement exists in the draft Code under Section Seven: Fairness, but it is considered to be relevant to privacy as well.