

Your response

Question	Your response
<p>1. Do you agree with our proposed approach to the:</p> <ul style="list-style-type: none"> a) additional measure of informed consent set out in Practice 7.3; b) new Practice 7.15; and c) new Rule 2.17? <p>Please give reasons for your answer.</p>	<p>ANO TV Novosti holds two Ofcom licences broadcasting channels called RT. As we stressed in our response to Ofcom's first consultation on this subject, we have always been and remain committed to giving due care and protection to all participants in our programming. Our previous concerns about Ofcom's proposals in this area to introduce new protections for adult participants focussed on whether they were lawful, proportionate and practical.</p> <p>RT understand the driver for Ofcom's proposal to have been Ofcom's concern over recent well-publicised examples of participants in reality TV programmes perhaps not being given appropriate support by broadcasters, which resulted in tragic consequences. It was not surprising that in Ofcom's April 2020 Ipsos MORI research on "Audience expectations in a digital world" some of those surveyed spontaneously suggested that broadcasters "be made accountable for the welfare of those taking part in programmes". Concern in those research workshops however focussed on reality TV, and no specific mention was made of any other genre of programming.</p> <p>RT has noted that in its response to the original consultation ITN observed that "ITN does not believe changes to the UK broadcasting rules to further protect participants should incorporate news and current affairs programming. ITN's primary point in this Consultation is that any change should include a specific exemption for news and current affairs programmes".</p> <p>Similarly, the response of Sky News expressed a concern that "the broad scope of the new rules risks unintended consequences that could have a chilling effect on freedom of expression. We want to avoid anything that could have a detrimental impact on the representation of adults with vulnerabilities in public interest news and current affairs programming". Sky News stated: "In our view the inclusion of news and current</p>

affairs in the new rules is unnecessary and creates the risk Ofcom want to avoid”.

We respectfully agree with those views expressed by ITN and by Sky News and we do not consider that Ofcom’s revised proposals provide sufficient protection for free speech.

In our response to the initial consultation we expressed doubt as to whether statute has granted Ofcom the legal power to make such rules. If, however, there can be introduced a duty of due care on broadcasters as proposed by Ofcom, the regime should, of course, be otherwise lawful, proportionate and practical. We welcome in the further consultation Ofcom’s implicit acceptance that there was no statutory power to introduce the novel and disproportionate rules in Section 2 originally proposed i.e. to impose a new duty of care on all broadcasters to look after the welfare of adults taking part in all programmes. Instead, Ofcom now plan to amend one existing Practice and add a Practice in Section 7 of the Code (Fairness), and introduce a new Rule in Section 2 (but this time about harm and/or offence to viewers, and not participants).

We make suggestions especially with regard to the proposed Rule 2.17.

RT believe that the starting point for consideration of Ofcom’s proposal is that to circumscribe broadcasters’ activities in the manner under consideration would constitute an interference with the free speech rights protected by Article 10 ECHR. We are concerned to ensure consistency with Convention rights of audiences and broadcasters in respect of political speech and matters of public interest, which at law attract a particularly high level of protection. There is a burden on Ofcom to avoid interference with those Article 10 rights except as is necessary and proportionate. As we observed in our response to the previous invitation for comments, licensees already have a duty to take care under existing laws, such as negligence.

The necessity for this interference with Article 10 rights is, therefore, not apparent. As for proportionality, we comment below on certain aspects of the proposal but make a preliminary observation regarding the danger that Ofcom's proposed risk matrix approach will encourage attention to form over substance. The consequences of the disproportionate imposition of such a bureaucratic burden may well be: (a) the need to hire teams of people to worry about paperwork, (b) hold ups, and (c) unduly cautious editorial decisions. By way of analogy, a common experience of the functioning of GDPR has been the creation of paper trails of what has failed to be done rather than of what has been done. And the GDPR accountability mountain can mean that issues are looked at too much in isolation and there is a focus on generating legitimate interests impact assessments without stepping back and looking more holistically, for instance, at other linked activities that have happened previously. That can then impact on decisions. This is particularly the case in large organisations where a team is needed to generate these documents and people do not necessarily all talk to each other. Similarly, Ofcom's proposal risks imposing a disproportionate burden and degree of hazard for broadcasters.

Section 7

Overall, if the new regime is to be introduced, we welcome Ofcom's limitation of amendment to Section 7, rather than imposing new obligations on broadcasters by means of Section 2.

This change means that there is a much smaller risk of Ofcom and broadcasters having to spend valuable time and resources processing very weak, unarguable or even vexatious complaints made by viewers on behalf of participants - because all complaints under Section 7 can of course only be made by the participant or someone on their behalf on an Ofcom complaint form, and must be formally entertained by the regulator before an investigation begins. Secondly, Ofcom will need

to show that, whatever the broadcaster is supposed to have done or not done regarding participation of the individual complainant, in the circumstances of the case it resulted in unfairness to the individual concerned in a programme so that Rule 7.1 was broken. In making fairness adjudications taking account of these new Practices, Ofcom will also need on the face of any breach decisions to carefully and specifically balance the rights of the complainant not to be subject to unfair or unjust treatment against the right of the broadcaster and audience to freedom of expression.

The first Ofcom proposal is to extend the existing Practice 7.3 on "informed consent". This change would create an obligation on broadcasters whenever seeking such consent from anyone taking part in a programme to ensure they are also "informed about potential negative consequences arising from their participation in the programme which may affect their welfare ... and any steps the broadcaster ... intends to take to mitigate these".

In light of the important caveats:

- already in Practice 7.3 (that informed consent is only "normally" - not always - needed, and is not required when the matter is trivial, or a person's participation is minor, and it may be fair to withhold some information e.g. where it is in the public interest); AND
- included in the new wording discussing negative consequences ("insofar as these can be reasonably anticipated at the time"), RT considers the additional measure of informed consent set out in Practice 7.3 to be helpful.

The second Ofcom proposal is to introduce a wholly new Practice (7.15) which would compel broadcasters to take "due care over the welfare of: (a) vulnerable people who take part in a programme; and (b) someone who might be at risk of harm as a result of taking part in a programme, taking into account" their contribution and the nature of the programme etc.

RT welcomes the change that imposes a more limited obligation than previously proposed on broadcasters to avoid unfair treatment by defining a more restricted group of people to whom the duty of due care would be owed i.e. no longer to all adult participants but only vulnerable ones and those who might be at risk of harm. We do however have some apprehensions about the current wording of new Practice 7.15(b) because in our view it still risks imposing a disproportionate burden on broadcasters. This is because it imposes a duty of due care as regards **anyone** who **might** be at risk of harm as a result of taking part in a programme. Unlike with the proposed addition to Practice 7.3, this new duty is not limited by a requirement of being reasonably foreseeable at the time. Bearing in mind this proposed new obligation is more onerous overall than that added under Practice 7.3 it is even more important that it be proportionate. On the current wording it is circumscribed only by the rather vague list of subjective factors set out at the end of Practice 7.15(b) and in the suggested Guidance. These factors taken together are not sufficient in our opinion to make the new 7.15(b) obligation sufficiently certain, transparent, proportionate, and also consistent with the revised Practice 7.3. This issue is not addressed in the impact assessment.

Below we propose new wording that would help to address this concern. It should be remembered that the use of the word “due” provides flexibility in interpretation. But that flexibility also makes interpretation correspondingly much less certain.

Guidance may help the broadcaster. But whether it does so depends on its precise wording. We make two observations on the present Guidance.

First, in §3.27 it would be helpful to define in advance of what event or circumstance broadcasters may find it helpful to identify the type of protocols that may be required.

Secondly, though the Guidance states that the risk matrix is “not a tick box list of steps broadcasters must take”, such lists can tend to

become precisely what they are not intended to be. This was the experience in relation to what became known as the *Reynolds* “checklist”. In *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 Lord Nicholls set out 10 factors to take into account when determining whether a publication was subject to qualified privilege in a libel action. Though he described these as “illustrative” and “not exhaustive”, they quickly became set in stone, so much so that in *Jameel v Wall Street Journal Europe* [2007] 1 A.C. 359 Lord Bingham felt it necessary to remind judges they were intended as “pointers which might be more or less indicative, depending on the circumstances of a particular case, and not, I feel sure, as a series of hurdles to be negotiated by a publisher”.

As for the use of the words “due care” in the new proposed Practice 7.15, we note that Viacom, in its response to the original consultation, wrote: “The word “due” is an important way of ensuring that the requirement in Rule 2.17 is flexible and proportionate. It means that the care provided to adult participants should be adequate or appropriate for the person concerned and for the subject and nature of the programme. It does not mean that Broadcasters will be held accountable for all matters arising from their duty of care to the participant, only those matters within their reasonable control”. Because of the elastic meaning of the word “due”, we believe that, if indeed it is (as it should be) the case that broadcasters will be only be accountable for matters within their reasonable control, this should be clearly and unequivocally stated in the rule. RT agrees with these Viacom submissions in response to the original consultation and has accordingly proposed an amendment to new suggested Practice 7.15 (see below).

Section 2

The new suggested Rule 2.17 would oblige broadcasters to provide adequate protection to audiences from potential harm and/or offence arising from the treatment of “vulnerable people”, and those who appear to be put at risk

of harm, in programmes. We oppose this proposal for several reasons.

First, and principally, it is not necessary. Rule 2.1 already obliges broadcasters to ensure generally accepted standards are applied so as to provide adequate protection for viewers from harmful and/or offensive material. Rule 2.3 goes on to stipulate that in applying generally accepted standards broadcasters must ensure that content which may cause offence is justified by the context. To the extent therefore that "Audiences could be offended or caused emotional distress by their perception of how a participant has been treated in a programme" (to quote from Ofcom's further consultation, paragraph 2.11), viewers or listeners wishing to complain about a perceived lack of due care being provided for programme participants, are already able to do so.

We note that Ofcom first used Rule 2.3 for this purpose in the Channel 4 *Boys and Guys Alone* case in 2009 (see Bulletin 144, 26 October 2009), finding the broadcaster in breach for failing to provide appropriate information to protect viewers from offence. We were unable to find any analogous Ofcom published decision dealing with alleged potential **harm** caused to **viewers** by their being subjected to emotional distress through not being given sufficient information about protection of adult participants, but presumably Rule 2.1 would cover this eventuality as necessary.

Ofcom did not see any requirement for the new proposed Rule 2.17 in its first consultation. There was no reference at all to the need for such a rule. Ofcom's latest consultation gives no explanation as to how the situation has changed between the dates of the first and the further consultation.

The only justification Ofcom provide (in paragraph 3.29) for the necessity for the new Rule 2.17 is that they are "aware from viewer and listener complaints of a greater awareness and concern about mental health and emotional wellbeing of programme participants, and a sensitivity to broadcast content where participants appear to be put at

risk of harm or in some way negatively affected by taking part in a programme. This can cause audiences offence, and could trigger emotional distress or other harms, for example if viewers experiencing a mental health condition are negatively affected by seeing how a participant with a similar condition is treated in a programme. Therefore, rather than relying on the general requirements set out in Rule 2.1 and Rule 2.3, audiences would be able to raise such concerns under proposed new Rule 2.17".

This reasoning is inadequate to justify the introduction of this new rule, especially when Ofcom gives no detail of the number and content of the complaints to which they refer and - as Ofcom points out in paragraph 3.29 - when Rules 2.1 and 2.3 already exist and they have no demonstrable inadequacies pointed to by the regulator. This lack of justification is all the more remarkable in view of Ofcom's obligation under s.3(3)(a) of the 2003 Act to ensure all its regulatory activities are "transparent, ... proportionate...and targeted only at cases in which action is needed; ...". It is also remarkable in view of the Article 10 requirement to show necessity in interfering with freedom of expression. Indeed, the new Rule 2.17 is not specifically discussed or analysed at all in the impact assessment.

Further, we point Ofcom to its own recent Ipsos MORI April 2020 research on audience expectations. Some participants in that survey spontaneously proposed that Ofcom should be given new powers to ensure broadcasters owed a duty of care to look after the welfare of **participants** in programmes. But none expressed any concerns whatsoever that **viewers** were at present inadequately protected from any harm and/or offence which might be caused by watching how a certain individual in a programme was treated.

Broadcasters are already aware of the need to provide adequate protection to audiences from potential harm and/or offence arising from the treatment of "vulnerable people", and those who appear to be put at risk of harm, in programmes, through Rules 2.1 and 2.3. If new Rule 2.17 were introduced we are concerned

that this would encourage more ill-founded (albeit perhaps well-intentioned) complaints from viewers in this area (especially since as presently drafted it would cover all people who seem at risk of harm including for example actors, presenters or reporters). If the new rule were introduced, RT is concerned that like many other broadcasters they would feel obliged to include clutter in the form of unnecessary warnings or information in news and current affairs broadcasts to guard against the risk of complaints and regulatory intervention.

We therefore believe this new proposed Rule should not be introduced. If however Ofcom proceeds with this proposal we urge it to note the following. Viacom's response to the original consultation also expressed concern that, where "participants" (as defined in the original consultation for the proposed new Section 2 provisions) had been filmed openly but had not consented to taking part, they should fall outside the new rules. Viacom gave as examples programmes that reveal or detect crime, that protect public health or safety, expose misleading claims by individuals or disclose incompetence that affects the public. Viacom also expressed the view that the filming of people in the news without prior warning in a public place and the use of vox-pop interviews in many programmes should in terms of proportionality also be excluded from the meaning of participant. Viacom further noted that presenters and reporters were excluded from the definition of participants on the basis that their circumstances are very different from other adults who participate. Viacom proposed that this class of exception be extended to professional participants such as experts and those who hold public office, professional panellists and talking heads.

RT agrees with these Viacom submissions in response to the original consultation. Of course, there is no Ofcom definition of "participants in programmes" required in the context of Ofcom's latest proposals for Section 7, because the well-established concept of "contributor" is used instead as in relation to Ofcom's fairness, and not harm and offence,

	<p>duties. However, in addition to "vulnerable people", the vague and wide term "those who appear to be put at risk of harm as a result of their participation in a programme" is included in the proposed new Rule 2.17, but without any definition of this term as a whole or of "participation in a programme". If Ofcom decides to introduce the new Rule 2.17, we urge Ofcom at a minimum to add a definition of "those who appear to be put at risk of harm as a result of their participation in a programme" to include the exclusions put forward by Viacom in its submissions to the original consultation about "participants in programmes."</p>
<p>2. Do you agree with the proposed wording of the:</p> <ul style="list-style-type: none"> a) additional measure of informed consent set out in Practice 7.3; b) new Practice 7.15; and c) new Rule 2.17? <p>Please give reasons for your answer.</p>	<p><u>Changes to Practice 7.3</u></p> <p>We have no further observations to make on the wording.</p> <p><u>New Practice 7.15</u></p> <p>RT have explained above our concerns with the current proposed drafting of new Practice 7.15(b). To address these concerns we propose that, if there is to be such a provision at all, the wording be amended as shown in italics below:</p> <p>"In addition to obtaining a contributor's informed consent (as outlined in Practice 7.3), broadcasters should take due care over the welfare of:</p> <ul style="list-style-type: none"> (a) vulnerable people who take part in a programme; and (b) someone who might be at risk of harm as a result of taking part in a programme (<i>insofar as this can be reasonably anticipated at the time of making of the programme and was within the reasonable control of the programme maker</i>), <p>taking into account: the nature and degree of their contribution in terms of any potential</p>

risks; and the nature and genre of the programme.".

We consider this amendment is self-evidently sensible, ensuring people at risk of harm are appropriately protected, while providing through the wording of the Practice itself (and not relying just on subjectively interpreted Guidance) that the new duty of due care must be interpreted in an objective and proportionate way.

As a result of this proposed amendment, there is one consequential change i.e.:

"In addition to the examples in this meaning, other factors that may be relevant in the context of Practice 7.15 include a person's age, past or current personal circumstances or experiences, or their physical or mental health.

Someone might *reasonably be regarded as being* at risk of harm as a result of taking part in a programme for reasons including (but not limited to):

- they are not used to being in the public eye; ... etc".

If, as we hope, Ofcom does not introduce the new Rule 2.17, the reference to this Rule should be omitted at the end of the current drafting.

New Rule 2.17

For the reasons explained above, we believe this proposed new Rule is not needed and should not be introduced.

Guidance

RT welcome Guidance to accompany the new planned Practices in Section 7. Being quite detailed, the presently proposed Guidance is likely to be of assistance to broadcasters, especially those producing the sort of programmes referred to in the risk matrix as high risk, such as high-profile immersive reality shows. It is such programmes that generated the concerns which led to Ofcom's present proposals.

RT remains worried that, although news and current affairs programmes may fall within the “LOW RISK” example on page 23, the current wording of the risk matrix is both onerous and vague, and would create a disproportionate burden, for broadcasters and makers of this immensely important genre of programming, obliging them to carry out detailed risk assessments when it is not appropriate. Often news reporters and producers are out in the field creating reports against the clock about distressing subjects and under difficult conditions - for example the coronavirus emergency, or natural disasters or violent conflicts in Less Developed Countries. In these circumstances it is disproportionate to require the broadcaster to provide participants with “information about potential risks”. How can the broadcaster know all the relevant risks, especially those which the participant should know better, such as risks that arise from personal circumstances of the participant unknown to the broadcaster? This we consider necessitates more flexibility in the proposed wording of the Guidance in A1.2, which we suggest should be amended as follows:

"However, where potential risks can be reasonably anticipated at the time of the making of the programme and it is appropriate and practical to do so in the circumstances, a more detailed assessment, such as, for example, is set out in table b) and in table c), should normally be conducted."