
Protecting participants in TV and radio programmes

[Protecting participants in TV and radio programmes](#) – Welsh overview

STATEMENT:

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1. Overview

- 1.1 In recent years, Ofcom has seen a steady rise in complaints about the mental health and wellbeing of programme participants, reflecting society’s growing openness and concern about these issues. In 2019, we launched a review of our protections for programme participants with the following objectives:
- to make sure the welfare of people who take part in television and radio programmes is protected; and
 - to make sure audiences are protected from uncontextualised offence that can arise from seeing or hearing vulnerable participants in programmes whose welfare they think might not have been protected.
- 1.2 As part of this review, we proposed to amend the Broadcasting Code (“the Code”) to introduce new provisions targeted at achieving these objectives in a flexible and proportionate way. This document sets out our decision following our consultations of 29 July 2019 (“the first consultation”)¹ and 13 March 2020 (“the second consultation”)².
- 1.3 We received broad support from stakeholders for our intention to introduce protections for participants in programmes. After carefully considering all the responses to both consultations we have decided to amend Section Seven of the Code to introduce two new *Practices to Follow* to ensure that broadcasters take due care of people who may be at risk of significant harm due to their participation in programmes.
- 1.4 We have also amended Rule 2.3 in Section Two (Harm and Offence) of the Code to make clear that the rule also protects audiences from any potential offence arising from viewing the treatment of people who appear to be put at risk of significant harm as a result of their taking part in programmes where there is insufficient context.
- 1.5 Following the responses we received to our first consultation, we have also made minor amendments to the wording of Rules 1.28 and 1.29, relating to the due care of under-eighteens.

¹ [Protecting participants in TV and radio programmes](#) (published 29 July 2019)

² [Ofcom’s second consultation on Protecting Participants in TV and Radio Programmes](#) (published 13 March 2020)

What we have decided – new provisions in brief

Section Seven

The following measure has been added to Practice 7.3 of the Code on informed consent:

“Where a person is invited to make a contribution to a programme (except where the subject matter is trivial or their participation is minor) they should normally, along with the other measures as already set out in Practice 7.3, at the appropriate stage:

...

- be informed about potential risks arising from their participation in the programme which may affect their welfare (insofar as these can be reasonably anticipated at the time) and any steps the broadcaster and/or programme maker intends to take to mitigate these.”

...

Practice to be followed 7.15 has been added:

“Broadcasters should take due care over the welfare of a contributor who might be at risk of significant harm as a result of taking part in a programme, except where the subject matter is trivial or their participation minor.

A contributor might be regarded as being at risk of significant harm as a result of taking part in a programme for reasons including (but not limited to) the following:

- they are considered a vulnerable person;
- they are not used to being in the public eye;
- the programme involves being filmed in an artificial or constructed environment;
- the programme is likely to attract a high level of press, media and social media interest;
- key editorial elements of the programme include potential confrontation, conflict, emotionally challenging situations; or
- the programme requires them to discuss, reveal, or engage with sensitive, life changing or private aspects of their lives.

Meaning of “a vulnerable person”: For the meaning of “vulnerable” see Practices 8.21 and 8.22 in respect of “vulnerable people”.

Broadcasters should conduct a risk assessment to identify any risk of significant harm to the contributor, unless it is justified in the public interest not to do so.

The level of care due to the contributor will be proportionate to the level of risk associated with their participation in the programme.

(See “practices to be followed” 7.3, 8.21 and 8.22)”

Section Two

Rule 2.3 has been amended to include the wording underlined and highlighted yellow, as follows:

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“In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context (see meaning of “context” below). Such material may include, but is not limited to, offensive language, violence, sex, sexual violence, humiliation, distress, violation of human dignity, discriminatory treatment or language (for example on the grounds of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation, and marriage and civil partnership), and treatment of people who appear to be put at risk of significant harm as a result of their taking part in a programme. Appropriate information should also be broadcast where it would assist in avoiding or minimising offence.”

Section One

Rules 1.28 and 1.29 have been amended to include the wording underlined and highlighted and remove the wording in strike-through, as follows:

Rule 1.28: “Due care must be taken over the physical and emotional welfare and the dignity of people under eighteen who take part or are otherwise involved in programmes. This is irrespective of any consent given by the participant or by a parent, guardian or other person over the age of eighteen in loco parentis.”

Rule 1.29: “People under eighteen must not be caused unnecessary unjustified distress or anxiety by their involvement in programmes or by the broadcast of those programmes”.

2. Background

What have we proposed and why?

2.1 Having considered the responses to the first consultation, Ofcom reconsidered its approach and invited further views on new proposals to protect participants in programmes in a second consultation. In the second consultation, we proposed in Section Seven (Fairness) of the Code, a revision to practice to be followed 7.3 and a new practice to be followed 7.15. We are implementing these proposals with some amendments. In Section Two (Harm and Offence) of the Code, we proposed to add a new Rule 2.17. We will no longer be introducing a new Rule 2.17 and instead will be amending the existing Rule 2.3.

Proposed amendments to Section Seven

2.2 Section Seven of the Code already provides a clear regulatory framework for participants who wish to raise concerns about their treatment in programmes. Most broadcasters and programme makers have a comprehensive understanding of what it means to treat programme participants fairly, including obtaining informed consent.

2.3 We proposed to extend the practices to follow so as to introduce:

- an additional measure to Practice 7.3, which sets out the step's broadcasters should take in obtaining 'informed consent'. Our proposal sought to clarify that obtaining informed consent should include informing programme participants about potential harms or negative impacts (insofar as these can be reasonably anticipated at the time), and any steps that broadcasters and/or programme makers intend to take to mitigate these. Practice 7.3 already makes clear that informed consent is not normally required when the subject matter is trivial or a person's participation minor, or it is warranted for the broadcaster to proceed without obtaining it and our proposals did not set out to alter this; and
- a new Practice 7.15 requiring broadcasters to ensure due care is provided to "vulnerable people" and those who are at risk of harm as a result of taking part in a programme. Ensuring due care would require broadcasters to take into account: the person's circumstances; the nature of their contribution; and the nature and genre of the programme.

2.4 The process for making a complaint and the consideration and adjudication of that complaint would follow Ofcom's *Procedures for the consideration and adjudication of Fairness and Privacy complaints*³. Where Ofcom entertains a Fairness and/or Privacy complaint, Ofcom acts as the adjudicator of the complaint between the individual and the broadcaster, where both are given equal standing.

³ [*Procedures for the consideration and adjudication of Fairness and Privacy complaints*](#)

As with the rest of Section Seven of the Code, only “the person affected”, or someone with authorisation to complain on their behalf, would be able to make a complaint of unfair treatment relating to the proposed additional measure in Practice 7.3 and the new Practice 7.15.

Proposed amendment to Section Two

2.5 In the second consultation, we also proposed a new additional rule (Rule 2.17) in Section Two of the Code. Ofcom considered there was a need to protect audiences from potential harm and/or offence resulting from a lack (or perceived lack) of due care to vulnerable people, and those who might be put at risk of harm, as a result of their participation in a programme. The proposed new requirement was aimed at enabling viewers or listeners wishing to complain about a lack of proper care being provided to programme participants. Any complaints arising under Rule 2.17 would be dealt with under Ofcom’s *Procedures for investigating breaches of content standards for television and radio*⁴.

What have we decided?

2.6 We received 15 stakeholder responses to the second consultation from: the BBC; the British Psychological Society; Channel 4; Directors UK; Endemol Shine; Global; ITN; ITV; PACT; Autonomous Non-Profit Organisation (ANO) TV Novosti (“TV Novosti”); Sky News; the Society of Authors; ViacomCBS Networks (Channel 5); Wireless Group; and Leigh Day solicitors on behalf of the family of Steve Dymond⁵.

2.7 Having carefully considered all of the comments received from stakeholders, we have reached the following decisions:

- We have amended Practice 7.3 and added Practice 7.15 to the Code, as proposed in the second consultation, with some minor changes to the wording to address points raised by stakeholders. We explain the final wording in further detail in Section 3 of this document.
- We have decided not to introduce a new Rule 2.17 to Section Two of the Code. Instead, and in light of comments from stakeholders, we have amended Rule 2.3⁶ that deals with offence, to make clear that the rule applies to potential offence arising from the treatment of those who appear to be put at risk of significant harm as a result of their participation in a programme.
- Given the support expressed by those stakeholders who expressed a view in response to the proposals we made in the first consultation, we have made the minor amendments we proposed to the wording of the child protection provisions (Rules 1.28 and 1.29).
- As explained below, the new provisions in the Code will come into force on Monday 5 April 2021. By that date we will be publishing supporting Guidance which draws on points

⁴[*Procedures for investigating breaches of content standards for television and radio*](#)

⁵ Steve Dymond was a participant on an episode of *The Jeremy Kyle Show* who died in May 2019. The episode featuring Mr Dymond was not broadcast.

⁶ Rule 2.3 states: “In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context...”.

raised in responses to both the first and second consultations, and the various meetings we have held with stakeholders during the consultation process.

- 2.8 Ofcom has carefully considered the views of broadcasters and other interested parties. In particular, we recognise the importance of ensuring our proposals are proportionate and appropriately framed to avoid any potential negative impacts on programme makers, such as impeding news and current affairs or deterring programme makers from casting people who may require more care (for example, people with complex mental health issues). It is not Ofcom's intention to hamper programme makers or hold broadcasters accountable for events beyond their control. At the same time, Ofcom is also mindful of its statutory duties with regard to securing appropriate and proportionate protection to members of the public from the inclusion of offensive and harmful material, and the vulnerability of those whose circumstances may put them in special need of protection.

What are the next steps?

- 2.9 We will be introducing Guidance to the Code in relation to the new measure in Practice 7.3 and the new Practice 7.15, as part of the existing Guidance to Section Seven of the Code⁷.
- 2.10 In drafting the additional Guidance, we will take into account the suggestions and examples of best practice already provided by respondents to the first and second consultations. We will also be seeking further views from the organisations who responded to our consultations. To allow time for us to draft the Guidance and consult with key stakeholders, it is our intention that the Guidance will be published in the first week of March 2021.
- 2.11 We recognise that programme-makers need time to amend their compliance processes accordingly. Therefore, the amendments to Section Seven and the minor amendment to the wording of Rule 2.3 in Section Two **will come into force on Monday 5 April 2021**.
- 2.12 However, Ofcom also recognises that all productions are different and there may be programmes in production now that will not be broadcast until after the amendments come into force. Therefore, when assessing complaints on a case-by-case basis going forwards, we will consider that the new provisions apply to programmes that begin production on or after Monday 5 April 2021.

⁷ [Guidance Notes Section 7: Fairness](#)

3. Protecting people who participate in programmes – amendments to Section Seven (Fairness)

Introduction

3.1 In this section, we set out:

- the amendments we proposed to make in Section Seven of the Code in respect of informed consent under Practice to Follow 7.3, and adding a new Practice to Follow 7.15 relating to due care of programme participants; and
- the responses we received to our proposals and how we have taken them into account in reaching our final decision.

What changes to Section Seven did we propose?

3.2 In the second consultation we proposed the following amendments to our fairness rules:

Informed consent

We proposed an addition to the informed consent measures set out in Practice 7.3 (see below – underlined and highlighted yellow).

Addition to Practice 7.3 proposed in the second consultation

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

- be told the nature and purpose of the programme, what the programme is about and be given a clear explanation of why they were asked to contribute and when (if known) and where it is likely to be first broadcast;
- be told what kind of contribution they are expected to make, for example live, pre-recorded, interview, discussion, edited, unedited, etc.;
- be informed about the areas of questioning and, wherever possible, the nature of other likely contributions;
- be made aware of any significant changes to the programme as it develops which might reasonably affect their original consent to participate, and which might cause material unfairness;
- be told the nature of their contractual rights and obligations and those of the programme maker and broadcaster in relation to their contribution; and

- be given clear information, if offered an opportunity to preview the programme, about whether they will be able to effect any changes to it; and
- be informed about potential negative consequences arising from their participation in the programme which may affect their welfare (insofar as these can be reasonably anticipated at the time) and any steps the broadcaster and/or programme maker intends to take to mitigate these.

Taking these measures is likely to result in the consent that is given being ‘informed consent’ (referred to in this section and the rest of the Code as “consent”).

It may be fair to withhold all or some of this information where it is justified in the public interest or under other provisions of this section of the Code.

See also Practice to follow 7.15, Section Eight (privacy), Rules 1.28 and 1.29 (due care of under-eighteens); and Rule 2.17 (harm and offence).

- 3.3 Our proposed addition sought to ensure that the process of obtaining informed consent should also include informing programme participants about the potential negative consequences arising from their participation (insofar as these can be reasonably anticipated at the time) and any steps that broadcasters and/or programme makers were taking to mitigate these. In proposing this addition to Practice 7.3 we recognised that the practice already makes clear that informed consent is not normally required when the subject matter is trivial or a person’s participation minor, or when it is justified in the public interest for the broadcaster to proceed without obtaining it.
- 3.4 The second consultation set out how informed consent is a well-established concept. Ofcom’s Code identifies a number of measures to help broadcasters ensure that they have a participant’s informed consent. The measures do not constitute a definitive list of how to obtain informed consent and the measures broadcasters should take may differ depending on the programme being made and any other relevant circumstances.
- 3.5 We also set out that, in many cases, people who are invited to take part in programmes are already being fully informed about reasonably foreseeable negative impacts to their welfare that could arise from their participation. However, the introduction of a new measure under Practice 7.3 would emphasise the importance of the broadcaster or programme maker providing the participant with information about potential negative impacts, where these can be reasonably anticipated, as part of ensuring they have obtained a contributor’s informed consent.
- 3.6 We accepted that people are likely to still want to take part in programmes even where this carries a risk of potential harm to them. Therefore, we considered that the proposed changes to Section Seven should not hinder people from taking part in programmes that present a potential risk to those participants. Programme participants should, however, be made aware of potential harm to their welfare (insofar as can be reasonably anticipated at the time) before they agree to take part and understand appropriate mitigations that the broadcaster or programme maker is proposing to put in place in order to minimise such risks.

Due care

- 3.7 We also proposed a new Practice 7.15 (see below) aimed to ensure that fair treatment also includes a provision for broadcasters to provide due care over the welfare of “vulnerable people” who take part and those who might be put at risk of harm as a result of taking part in a programme.

New Practice 7.15 proposed in the second consultation

7.15

In addition to obtaining a contributor’s informed consent (as outlined in Practice 7.3), broadcasters should 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: the nature and degree of their contribution in terms of any potential risks; and the nature and genre of the programme.

See Practices 8.21 and 8.22 for the meaning of “vulnerable people”. 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

Someone might be 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;
- the programme involves being filmed in an artificial or constructed environment;
- the programme is likely to attract a high level of press, media and social media interest;
- key editorial elements of the programme include potential confrontation, conflict, emotionally challenging situations; or
- the programme requires them to discuss, reveal, or engage with sensitive, life changing or private aspects of their lives.

To determine the appropriate level of due care broadcasters and programme makers should:

- (a) identify the potential risks associated with a programme format;
- (b) if potential risks exist, assess the level of risk in each case; and
- (c) identify how to manage these potential risks at each stage of the production process.

Where there is a low level of risk, the level of care due may be minimal, if any. In such cases broadcasters would not be expected to put in place measures to manage the risks.

Where there is a higher level of risk, a greater level of care is likely to be required and broadcasters should put in place measures to mitigate such risks.

Ofcom’s accompanying Guidance provides more details on how to approach the risk assessment.

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- 3.8 The use of “due” is important as it means that the level of care required by a broadcaster should be proportionate to an evaluation of the potential risks associated with the person involved, the programme, and the nature of how they will be taking part in it.
- 3.9 We proposed that the existing non-exhaustive definition of “vulnerable people” set out in relation to Practices 8.21 and 8.22 in Section Eight of the Code would apply to the new Practice 7.15:
- “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”.*
- 3.10 In addition, we proposed that new Practice 7.15 would apply to “someone who might be at risk of harm as a result of taking part in a programme”. The Practice added that this might be determined by taking into account the nature and degree of their contribution in terms of any potential risks; and the nature and genre of the programme. We expected that when applying this Practice, broadcasters would assess whether the programme involved a person who is vulnerable; and/or whether the nature of a person’s contribution to the programme, or the format or genre of the programme, placed that person at risk of harm. This initial assessment process would enable broadcasters to determine whether a more detailed risk assessment was necessary and whether they needed to take any particular steps to protect those at risk.
- 3.11 Practice 7.15 was drafted to be proportionate and flexible. We recognised that a need to provide due care could potentially arise in many different situations. Therefore, we did not propose the level of due care required in different cases be set by reference to any particular genres. Rather, we expected the focus to be on the person taking part and an assessment of the potential risk, taking into account all the relevant factors in each case. Where there was a low level of risk to the participant as a result of their contribution, we considered that the level of care may be minimal, or even negligible. Conversely, where their contribution could expose them to more risk, the expected level of protection would be higher.
- 3.12 In Annex A1 of the second consultation, we stated that when considering the level of risk associated with a person’s participation in a programme, broadcasters may find it helpful to use a risk matrix. We therefore set out an example risk matrix to be included in Ofcom’s Guidance in conjunction with Practices 7.3 and 7.15. We made clear that the risk matrix we had laid out was not prescriptive and broadcasters may want to develop their own methods for determining risk.
- 3.13 We invited views in the second consultation on Ofcom’s approach to introducing amendments to Section Seven in terms of Practices 7.3 and 7.15 and the wording of these Practices.

What respondents said about Ofcom's approach to introducing the new amendments to Section Seven in relation to the due care of participants

- 3.14 There was broad consensus from respondents that broadcasters should introduce protections for participants in programmes and that Section Seven was the appropriate part of the Code in which to incorporate these provisions. In addition, there was broad agreement with Ofcom's approach to achieve this, namely extending Practice 7.3 and introducing a new Practice 7.15. For example, the BBC, PACT and ViacomCBS all expressed their general support for Ofcom's approach. Channel 4 and Directors UK agreed with Ofcom's approach as Section Seven already provides a framework for dealing fairly with contributors. Wireless Group said Ofcom had considered the points made by respondents during the first consultation and the revised amendments addressed the concerns raised.
- 3.15 TV Novosti said "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".
- 3.16 By contrast, Global questioned the appropriateness of introducing the amendments to the Code for radio broadcasters. It said that radio was "very different to television" and without recognition of this there was a risk that the new amendments would be "overly onerous to radio broadcasters". Global said therefore that radio should be exempt from the new Code amendments and instead a separate code of conduct specific to radio should be developed.

Ofcom's response

- 3.17 Given the broad support for our overall approach set out in the second consultation, Ofcom's Decision is that new Code provisions requiring broadcasters to take due care of programme participants will be introduced to Section Seven of the Code.
- 3.18 We have reviewed the responses fully and made some changes to the wording of the amendments to Section Seven to provide some additional clarifications in response to various issues raised by stakeholders and discussed below. Further clarifications will also be included in the Guidance, which we will be publishing when the new provisions that we have set out come into force. The new amendments to the Code will also apply to radio content, as Section Seven of the Code already applies to both radio and television broadcasters to ensure there is a clear regulatory framework and understanding of what it means to treat all programme participants fairly.
- 3.19 Further clarification about some of the anticipated differences for programming that is typically broadcast on radio is given below.
- 3.20 What respondents said about whether news and current affairs is in scope of the proposed amendments to Section Seven
- 3.21 Given the fast-paced nature of newsgathering, some respondents raised concerns about how proportionate and workable the amendments to Practice 7.3 and the new Practice

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- 7.15 would be for news programmes. These respondents said that news (and, in some respondents' views, current affairs) should be exempt from the amendments so as to protect freedom of expression, to take into account the public interest in such programming, and to ensure the fast-paced nature of newsgathering was not impeded by regulation. Respondents asked Ofcom to further clarify how the amendments would apply to news and current affairs in terms of both the public interest considerations and the nature of the production of news.
- 3.22 ITN said it was disappointed that there was no exemption for news and requested that clear wording was added to Practice 7.3 and the new Practice 7.15, specifically stating that it would be "highly unlikely" that the new measures would apply to news and current affairs programming. It said it was "dangerous territory for news programmes to be given extra regulatory burdens" when there was no evidence of a problem and news providers already applied their own "established and sound practices". ITN explained that news was "fundamentally" different to other forms of programmes in terms of the inherent public interest and the importance of editorial freedom and discretion. The methodology for making news programmes was also different to other programmes and working at speed meant that it was often not possible to undertake an assessment of the interviewee. In ITN's view, any extra controls would have a chilling effect by slowing down the newsgathering process, discouraging coverage of sensitive subject matter and narrowing the range and diversity of contributors.
- 3.23 Sky News said it could not see how the additional measure set out in Practice 7.3 and new Practice 7.15 could "practically and proportionately apply to news and current affairs" and both should be "explicitly excluded". It added that the duty to consider the welfare of participants "should not extend to those who are subject to legitimate journalistic investigation", and that the fast paced and reactive nature of newsgathering meant engagement with contributors was brief. In those circumstances Sky News questioned whether it was possible or even appropriate to assess the risk of harm as envisaged by Practice 7.15. It also highlighted that if the proposed Practices applied to news and current affairs then broadcasters might avoid featuring voices that may be problematic from a welfare perspective in news programmes. In this respondent's view, this would negatively impact on the diversity of voices provided to the wider public. Sky News said that given Ofcom had said in the second consultation that it would be "highly unlikely" that news and current affairs would need to put in place specific measures, this should be clearly reflected in the Guidance. Sky News also said that the proposed Code amendments as drafted risked creating a disadvantage for broadcast news providers compared to competitors not regulated by Ofcom.
- 3.24 TV Novosti said that it agreed with ITN's view that news and current affairs should be exempt from the amendments. TV Novosti said that it also agreed with Sky News' concerns about the impact of the amendments on the representation of adults with vulnerabilities in news and current affairs broadcasting. This respondent said it did not consider that the amendments provided sufficient protection for free speech.
- 3.25 The Society of Authors also commented that there would be "a real risk to media freedom and the public's right to know" if the amendments were extended to news and current

affairs programming. It said warning interviewees of any potential negative consequences would have “a deadening effect on journalism” and the due care measures were “not practical when covering news and current affairs”.

- 3.26 The BBC said it would be “problematic” for programme genres such as news and current affairs to be included in the scope of the proposed amendments to Section Seven. It added that given the fast turnaround and generally low level risk involved in news and current affairs production “it would not be practicable or proportionate in many circumstances” to apply the comprehensive checklist as proposed in Practice 7.15 or accompanying risk matrix that was included by Ofcom in Annex A1 of the second consultation. It added that it would not be practical to conduct such detailed assessments, and this could have a “detrimental effect” on the provision of high-quality news. In addition, it said there was “a consequential risk” that it could restrict the diversity to those taking part in programmes as broadcasters may “err on the side of caution and exclude them”. The BBC concluded that if there was not a “carve out” for news and current affairs, then a clear expression in the Guidance outlining that the welfare considerations are likely to be the lowest or unlikely to be required at all for news would be necessary.
- 3.27 Endemol Shine commented that including programming such as news and current affairs in the amended Practices “may have a stifling effect on the inclusion within them of participants with more complex needs or backgrounds”. PACT also said that there should be certain exemptions from the two amendments for news and current affairs because the turnaround of these programmes negates the ability “to carry out an effective risk assessment of the individual participants duty of care needs”.
- 3.28 ITV said that when people are interviewed for a news report or current affairs programme, the nature of the programming does not allow, and should not require, the same degree of consideration of the welfare of the participant as other programming. It said it would be “wholly impractical” to have to assess the risks of each individual, provide warnings of those risks, and seek consent, especially where the broadcast of footage is of the highest public interest.
- 3.29 Channel 4 said that Ofcom could add an element of proportionality in respect to news and current affairs (and documentary programming) by amending the beginning of the additional measure in Practice 7.3 to read [Channel 4 changes in bold]: “Where a person is invited to make a contribution to a programme (**except when the public interest outweighs it, the subject matter is trivial or their participation minor**) they should normally, at an appropriate stage...”.

Ofcom’s response

- 3.30 Ofcom acknowledges the strength of concern that has been raised by stakeholders in relation to the new provisions in Section Seven of the Code and their application to news and current affairs programming. In Ofcom’s view any new requirements of programme makers should be proportionate, flexible and practical. Given the fast-paced nature of newsgathering and current affairs production, Ofcom acknowledges that it may not be practical or possible to inform a participant of the possible risks to them from appearing in

a news and current affairs programme. We also accept that the risk to a person of appearing in a news programme is likely to be very low.

- 3.31 Section Seven does not make any distinction for different programme genres. This reflects the detailed statutory framework for Ofcom’s consideration of complaints about unfair treatment in programmes under the Broadcasting Act 1996, which applies to all genres, including news and current affairs programmes⁸. We therefore do not consider it appropriate to exempt these from the amendments to Section Seven. However, Practice 7.3 is clear that broadcasters are not expected to obtain informed consent where the subject matter is trivial, participation minor or it is justified in the public interest not to do so. Further, the existing Section Seven Guidance states, in relation to Practice 7.3, that “...there may be times when it is unnecessary to follow each and every point, for instance in the production of a news item” and that “[t]here are other occasions, for instance in the interest of a legitimate investigation when the broadcaster may withhold certain information”. Such exceptions will continue to apply to Practice 7.3 and the new measure included in that Practice.
- 3.32 Also, as is set out in Section Seven of the Code: “...failure to follow these practises will only constitute a breach where it results in unfairness to an individual or organisation in the programme. Importantly, the Code does not and cannot seek to set out all the ‘practices to be followed’ in order to avoid unfair treatment”.
- 3.33 In terms of new Practice 7.15, Ofcom accepts that for most news programming and some current affairs programming, depending on the subject matter and nature of the programme, the level of care required of the broadcaster may be minimal or non-existent. We considered that this was evident in the proposal that “due care” be provided to programme participants, i.e. care that is appropriate in the circumstances.
- 3.34 However, in considering the range of responses received on this issue, we have amended the wording of Practice 7.15 to include the exemption in Practice 7.3, so that it is clear that broadcasters will not be expected to provide due care to participants where the subject matter is trivial, or their participation is minor. Further, we have also made it explicit that broadcasters will not need to conduct a risk assessment to identify or mitigate any potential harm to the participant where it is justified in the public interest not to do so.
- 3.35 While Practice 7.15 may still be applicable to some current affairs programming, we do not envisage it applying to news programmes other than in exceptional circumstances, where a specific need for additional care or support is identified for a particular participant. This will be a matter for broadcasters to determine and manage as appropriate.
- 3.36 The accompanying Guidance will provide further information about the application of Practices 7.3 and 7.15.

⁸ See s.107, and in particular subsection (5), which sets out that fairness and privacy requirements, and Ofcom’s duties in this area, apply in respect of any programme broadcast by the BBC, any programme broadcast by the Welsh Authority or included in any public service of the Welsh Authority, and any programme included in a licensed service.

What respondents said about the inclusion of other genres in the amendments to Section Seven

- 3.37 As well as news and current affairs, some respondents suggested that other types of programme genre (such as live programmes and phone-ins) should also be excluded from the amendments we proposed to Section Seven. In addition, some respondents questioned how Practice 7.3 would be applied to acquired or archived programmes.
- 3.38 Endemol Shine said that it was concerned that including programming such as “audience phone-ins and other programmes involving questions from members of the public, live reporting and vox-pops within the regime covered by the Practices may have a stifling effect on the inclusion within them of participants with more complex needs or backgrounds”. PACT shared these concerns and suggested that these programme formats should be exempted. It also considered that Practice 7.3 and 7.15 would not be sufficiently flexible or effective in protecting participants because the turnaround for programmes in these genres can be a matter of hours, with little time to carry out an effective risk assessment.
- 3.39 Global highlighted the example of LBC where thousands of listeners phoned in each week. It said its radio producers were already trained to handle calls sensitivity and were given guidance on the appropriate aftercare to be given to listeners who take part in phone-ins.
- 3.40 ITV also cited the example of phone-in programmes. It said if there were fairness, privacy or welfare concerns relating to a caller, broadcasters may already apply certain limited steps to protect them. However, in the timeframe of a phone-in it would be difficult to assess the circumstances of such individuals sufficiently to enable the provision of information about potential risks. This respondent added that if phone-in contributors are to be included in the new amendments, Ofcom should ensure guidance is given on how the new Practices could be applied with proportionality in the area of phone-ins.
- 3.41 On the issue of acquired programmes, the BBC said that Practice 7.3 was directed at the agreement of informed consent at the point at which a contribution would be solicited for a new programme or item and the same process could not be pursued for acquired content or some archived programmes. It added that for acquired content broadcasters are forced to rely on the assurances of the original broadcaster or content maker and it would be impossible to obtain renewed consent from participants to reflect the new Practices. The BBC requested that this be clarified in guidance to help broadcasters implement Practice 7.3. Similarly, ViacomCBS questioned the “practical application” of the Practices in relation to acquired content and repeat broadcasts.
- 3.42 The British Psychological Society suggested that where there is a likelihood of broadcast repeats and sales of programmes to other distributors this should be made clear to potential participants as part of the consent seeking process during the original production.

Ofcom's response

- 3.43 As we have explained above, Section Seven applies to all programming and this reflects the statutory framework in this area. In accordance with that framework, all programme contributors are entitled to fair treatment and all programming should comply with Rule 7.1, regardless of genre or programme format. Most broadcasters and programme makers have a comprehensive understanding of what it means to treat programme participants fairly, including obtaining informed consent, and what is required to ensure that the fairness rule is met will be dependent on a variety of factors including the type of programme and the nature of the contribution. As explained above, Practices 7.3 and 7.15 may not require a broadcaster to take any steps in relation to the contributor where the subject matter of the programme is trivial, their participation is minor, or not doing so is justified in the public interest. It is therefore Ofcom's view that these practices will not generally be applicable to the programme genres identified by stakeholders above. For example, it is likely that many phone-ins will be about trivial matters or will only involve minor participation. In such circumstances, broadcasters would not be expected to do any more than they currently do to obtain informed consent under Practice 7.3 or take further steps in relation to due care considerations under Practice 7.15.
- 3.44 It is possible that participants of any programme genre or format could face some level of risk dependent on their circumstances, the nature of the programme and their participation. An example of this might be a phone-in where, prior to going on-air, the participant indicates to the broadcaster that they intend to discuss in detail a subject matter which is not trivial such as a traumatic past experience. In such circumstances, Practices 7.3 and 7.15 might need to be taken into account to avoid unjust or unfair treatment. It is likely that, in such circumstances, the level of care due may still be very low such that only limited steps need be taken by the broadcaster. We understand from the consultation responses that such steps are already being taken by many programme makers in such formats as a phone-in.
- 3.45 Ofcom acknowledges that in the case of acquired and archive programmes it may not be practical or possible to inform a person about the potential risks associated with their participation, particularly where the programme was made a long time ago. This is also the case in relation to the other measures for obtaining informed consent under Practice 7.3. Ofcom has drafted the additional measure to include the condition "*insofar as these can be reasonably anticipated at the time*" to make it clear that we do not expect broadcasters to identify all possible harms arising from the participation, no matter how remote. Equally, and as with all measures in Practice 7.3, there is an expectation that "normally" these measures will apply, but we accept there may be specific cases where this simply may be neither practical nor feasible.
- 3.46 Our intention is not for broadcasters to be accountable for events beyond their control or comprehension, but to demonstrate a reasonable approach on the issue of repeated archived programmes. For example, as highlighted by The British Psychological Society, we agree that it may be preferable to inform participants at the earliest stage that the programme may be repeated over a duration of time on other services, or for a

broadcaster to make reasonable efforts to inform a former participant that a programme they appeared in previously will be broadcast again. This may be particularly relevant where the participant was under eighteen when the programme was first made.

What respondents said about the inclusion of different types of participant in the amendments to Section Seven

- 3.47 The BBC said that in the first consultation Ofcom had specifically excluded presenters and reporters in its definition of a participant and this exclusion should remain. It said that the proposals should be much more targeted towards contributors who are “of real concern” (i.e. vulnerable people), or those who may become vulnerable as a result of their participation.
- 3.48 Endemol Shine said it agreed with PACT that the proposed Practices should not apply to “paid professionals and other on-air staff including presenters, reporters, panelists, actors, performers, comedians, musicians, dancers...celebrities and other public figures.” It said that the welfare interests of this group would not only be covered by contractual arrangements but also through trade unions, agents or representatives as well as health and safety legislation.
- 3.49 ITV said that the Guidance should make clear that the proposed amendments to Practice 7.3 and 7.15 should not apply to anyone who does not agree to take part as a filmed contributor. This could include “passers-by” who are filmed “openly but incidentally” or participants who are the subject of non-news programmes for example programmes about celebrities and entertainers profiling their lives and careers.
- 3.50 ViacomCBS said that professional paid contributors such as reporters, professional panellists and actors should be excluded from the definition of programme participants because their welfare is already protected by existing contractual and other health and safety safeguards. It added that it did not believe that the inclusion of these genres is proportionate or targeted at the specific concerns identified around this type of programming.

Ofcom’s response

- 3.51 Our proposals focus on those who might appear to be put at risk of harm as a result of their participation in a programme, for instance, due to their circumstances (e.g. they are a vulnerable person) or because of the nature of the programme or their participation.
- 3.52 As we have explained above, Section Seven reflects the detailed statutory framework for Ofcom’s consideration of complaints about unfair treatment in programmes which is set out in the Broadcasting Act 1996. Ofcom’s role, which includes setting principles to be observed and practices to be followed by broadcasters and adjudicating on fairness complaints, is tightly defined under this framework, which also defines exactly who can bring a fairness complaint (the “person affected”) and when. Importantly, the statute does

not restrict the meaning of the “person affected” to exclude any categories of person from being able to make a complaint to Ofcom⁹ and Ofcom has no power to depart from this.

- 3.53 Our amendments to Section Seven similarly reflect, and are made in accordance with, the same statutory framework and therefore apply to the same broad category of persons as the existing provisions. However, it is likely that what is required to ensure a participant is treated fairly will differ significantly between, for example, paid actors or presenters and members of the public. For this reason, in practice we know that this area of the Code is rarely applicable to many of the types of professional contributors described above and Ofcom has received very few complaints from professional contributors. If a complaint were to be made to Ofcom under the new provisions by any of the types of contributors given above, we would take into account a number of factors when determining the level of due care, if any, that might be required on a case-by-case basis. For example, whether or not a contributor is a professional or paid contributor or someone who is used to being in the public eye will be relevant, along with a number of other considerations particular to the case.
- 3.54 Further, where a contributor’s participation is minor, the subject of their participation is trivial or where the public interest test is met, Practices 7.3 and 7.15 would not apply – this would include “passers-by” for example.

What respondents said about Ofcom’s wording of the additional measure in Practice 7.3

- 3.55 Some respondents considered that the wording of the proposed additional measure in Practice 7.3 (namely, that as part of obtaining informed consent broadcasters should inform participants about “potential negative consequences arising from their participation in the programme which may affect their welfare”) was too broad.
- 3.56 ViacomCBS said that it would be “impractical” and unduly “onerous” to impose an obligation on broadcasters and programme makers to inform every potential participant about every conceivable negative consequence that may affect their welfare arising from their participation in a programme. This respondent added that Ofcom had already recognised in its second consultation that participants are capable of making their own independent decisions about their participation, and that they should not therefore be treated in an “overly protective manner”. To do so would impose a disproportionate additional burden on broadcasters and programme makers. It added that it would place an almost impossible task on broadcasters and programme makers to have to inform potential participants of all ‘potential’ negative consequences which ‘may affect’ their welfare (in so far as these can be reasonably anticipated at the time). It proposed that the

⁹ See section 111 of the Broadcasting Act 1996, which allows for a fairness complaint to be made by an individual or by a body of persons, whether incorporated or not. Ofcom may only refuse to entertain a complaint based on the identity of the complainant where that person (a) was not the subject of the treatment complained of and does not have a sufficiently direct interest; or (b) was not the person affected and does not appear to have a sufficiently close connection to that person to justify the making of the complaint.

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new measure be limited only to potential participants who are either vulnerable people or who might be at risk of harm as a result of their participation in the programme.

- 3.57 Channel 4 said it was concerned that the reference to “potential negative consequences” was too broad and unduly burdensome. In its view this risked covering relatively trivial matters such as someone being mocked for making a fool of themselves on a quiz show, even if the show did not make fun of them. It considered that the original wording proposed by Ofcom in its first consultation, i.e. “potential risks or harms”, would be more proportionate.
- 3.58 The BBC also considered the measure was potentially very onerous and was concerned that, in practice, it may not be possible to imagine all possible negative consequences arising from a person’s participation in a programme.

Ofcom’s response

- 3.59 In framing our proposals, it was not Ofcom’s intention that broadcasters should be held accountable for events or consequences beyond their control or reasonable foresight. This was why we proposed limiting the new measure to informing participants about potentially negative consequences to their welfare *insofar as these can be reasonably anticipated at the time*. We were also mindful that Practice 7.3 clearly states that broadcasters should take the appropriate measures for obtaining informed consent “except when the subject matter is trivial or the participation minor”.
- 3.60 However, we recognise that some concerns remain and have concluded that the term “negative consequences” is potentially unhelpful and could be interpreted to encompass an unduly wide range of possible impacts, including negative consequences which could be categorised as trivial. Our intention remains unchanged that broadcasters should take steps to inform participants where there are foreseeable risks which may affect their welfare in a harmful way. However, this new measure should not be unduly onerous and we do not expect it to apply where there is either no risk or minimal risk of harm to a participant, or where there are circumstances where it may be fair to withhold some or all of the information from participants about the consequences of taking part in a programme.
- 3.61 Taking all this into account, we have decided to adopt the wording we proposed in the second consultation, with the following change shown in highlight and underlined or strikethrough:
- “be informed about the potential risks negative consequences arising from their participation in the programme which may affect their welfare (insofar as these can be reasonably anticipated at the time) and any steps the broadcaster and/or programme maker intends to take to mitigate these”
- 3.62 The Guidance that Ofcom intends to publish in early 2021 will provide further clarification on this issue.

Ofcom's Decision

New wording of addition to Practice 7.3

3.63 Therefore, in response to all the feedback we have received to this consultation, we have amended the wording of the addition to Practice 7.3 as follows:

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

- be told the nature and purpose of the programme, what the programme is about and be given a clear explanation of why they were asked to contribute and when (if known) and where it is likely to be first broadcast;
- be told what kind of contribution they are expected to make, for example live, pre-recorded, interview, discussion, edited, unedited, etc.;
- be informed about the areas of questioning and, wherever possible, the nature of other likely contributions;
- be made aware of any significant changes to the programme as it develops which might reasonably affect their original consent to participate, and which might cause material unfairness;
- be told the nature of their contractual rights and obligations and those of the programme maker and broadcaster in relation to their contribution; and
- be given clear information, if offered an opportunity to preview the programme, about whether they will be able to effect any changes to it; and
- be informed about potential risks arising from their participation in the programme which may affect their welfare (insofar as these can be reasonably anticipated at the time) and any steps the broadcaster and/or programme maker intends to take to mitigate these.

Taking these measures is likely to result in the consent that is given being 'informed consent' (referred to in this section and the rest of the Code as "consent").

It may be fair to withhold all or some of this information where it is justified in the public interest or under other provisions of this section of the Code."

What respondents said about Ofcom's approach to, and wording of, Practice 7.15 – "at risk of harm"

3.64 Some respondents raised concerns about the proposed scope of Practice 7.15, namely that "broadcasters should take due care over the welfare of...someone who might be at risk of harm as a result of taking part in a programme". These respondents stated that the Practice's application to those who are "at risk of harm" was too broad and risked capturing all participants, particularly as anyone could be at risk of minor or inconsequential harm. TV Novosti was concerned that this would place a disproportionate burden on broadcasters. It said that the Practice needed to reflect an element of

proportionality, rather than relying on guidance to explain this. Channel 4 cautioned that such a broad approach went beyond Ofcom's powers and suggested the wording should be changed from "risk of harm" to "significant risk of serious harm".

Ofcom's response

3.65 The proposed wording for Practice 7.15 was only intended to apply to participants who are at a real risk of non-trivial harm. Having considered the concerns that have been raised, we acknowledge that the Practice, as proposed, risked being too broad. Therefore, we have decided to amend the wording to ensure the Practice is clear that it should only apply where a participant is at risk of significant harm. The word "significant" has been used elsewhere in Section Seven and Section Eight of the Code and will ensure that the application of Practice 7.15 is both proportionate and consistent with other practices to be followed.

What respondents said about the definition of "vulnerable people" in proposed Practice 7.15

3.66 Most respondents agreed that the scope of Practice 7.15 should focus on the definition of "vulnerable people" as set out in Section Eight of the Code¹⁰. For example: Directors UK agreed it was appropriate to use the same definition as used elsewhere in the Code; and ITV said it was right that Ofcom retained the meaning of "vulnerable people" already in the Code.

3.67 However, some respondents expressed the belief that Ofcom was proposing to widen the definition of a vulnerable participant in a way that was too broad. For example, ViacomCBS said that the current definition of "vulnerable people" in Section Eight of the Code is "well established by reference to the physical and mental health of an individual". This respondent questioned Ofcom's proposal to "broaden" the definition to include a participant's "past or current personal circumstances or experiences". ViacomCBS said this would be open to abuse from programme participants who are not vulnerable but seek to exert editorial control, secure their withdrawal from the programme or to prevent the programme from being broadcast.

3.68 ITV also said the meaning of "vulnerable people" already in Section Eight of the Code was sufficient and it did not consider that it should be extended to include the other factors set out in the proposed Practice 7.15. The BBC said the new Practice 7.15 was very detailed and questioned whether its requirements were proportionate to the range of contributors and participants to whom it was intended to apply.

¹⁰ The meaning of "vulnerable people" in Section 8.21 and 8.22 of the Broadcasting Code: "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".

Ofcom's response

- 3.69 We believe that the definition of “vulnerable people”, as set out in Section Eight of the Code, should be adopted for the purposes of Practice 7.15. A contributor who is unable to give informed consent to participate because, for example, they have learning difficulties, mental health problems, brain damage or forms of dementia, or have been traumatised, are bereaved, sick or terminally ill, will, inherently, be vulnerable and mean that the measures in Practice 7.15 to ensure due care is taken over their welfare should apply.
- 3.70 However, there are other factors not captured in the existing definition that might make a contributor at risk of significant harm and which may be relevant for programme makers and broadcasters to consider in applying Practice 7.15. For example, a contributor's age, past or current personal circumstances or experiences, or physical health may be relevant in considering whether that contributor is at risk of significant harm as a result of taking part in a programme. We consider it is important that such factors are considered by broadcasters in addition to those set out in the existing definition in Section Eight. Nevertheless, we accept that the definitions used in the Code need to be clear and consistent. Therefore, taking into account that the definition of “vulnerable people” in Section Eight does not limit the examples given as factors which may be relevant within the context of the Practices in Section Eight, we have decided to apply the existing definition unchanged to Practice 7.15 and to address any additional factors that broadcasters should also take into account in our Guidance on the new Practice.

What respondents said about the potential effect of Practice 7.15 on the diversity of contributors

- 3.71 We proposed that, in addition to obtaining a contributor's informed consent (as outlined in Practice 7.3), broadcasters should take due care over the welfare of vulnerable people who take part in a programme. Channel 4 was concerned that this could have an impact on freedom of expression and have a chilling effect on broadcasters as it risked unduly restricting the diversity of those that take part in programmes. The broadcaster considered that Practice 7.15 should make clear that the factors that may be relevant should only be considered where these have been disclosed by the participant. It suggested including additional wording to cover this point (“...if these factors are disclosed to the broadcaster”).

Ofcom's response

- 3.72 Ofcom's intention is that any new measures should be proportionate and flexible and not unduly hamper freedom of expression or otherwise have a chilling effect on broadcasters and programme makers. We recognise the importance of freedom of expression to both broadcasters and potential programme participants, and that there may well be significant public interest in exploring such vulnerabilities in programmes. We have considered the issue raised by Channel 4 and other respondents very carefully. It was certainly not Ofcom's intention that Practice 7.15 should have the effect of discouraging broadcasters and programme makers from featuring people with vulnerabilities in their programmes.

- 3.73 Due care considerations under Practice 7.15 should focus on the welfare of any contributor wherever there is a risk of significant harm arising from their participation in a programme and appropriate mitigations that should be put in place where this is the case. The facts and circumstances of each case will differ. In some circumstances this may include contributors with inherent vulnerabilities, especially where they take part in high-risk programme formats, but it does not automatically mean that such contributors will always be at risk of significant harm. Therefore, to better reflect this we have amended the wording of Practice 7.15 to make it clear that a person's existing vulnerability is one of many considerations that might need to be taken into account when determining whether or not a programme participant is at risk of significant harm.

What respondents said about Ofcom's approach to, and wording of, Practice 7.15 – how to identify, assess and manage risks

- 3.74 ITV considered that the following wording included within the proposed Practice 7.15 would be better placed in the explanatory Guidance:
- “To determine the appropriate level of due care broadcasters and programme makers should:
- (a) identify the potential risks associated with a programme format;
 - (b) if potential risks exist, assess the level of risk in each case; and
 - (c) identify how to manage these potential risks at each stage of the production process”.
- The BBC made a similar point, saying it was unclear why this further detail, which was essentially “a form of check list”, would be required in every case and questioned the proportionality and flexibility of this approach.
- 3.75 ITV also said that Ofcom should make it clear in guidance that the proposed new Practice 7.15 will not apply to any contributors who, for whatever reason, do not feature in a final broadcast programme, even “those who may apply to take part, and may even be filmed during production”, for example.
- 3.76 As set out above, many respondents also expressed concerns with the prospective process of having to conduct a lengthy risk assessment, which would be impractical in many situations, particularly for news and/or current affairs programming.

Ofcom's response

- 3.77 It has always been Ofcom's view that it will not be necessary in every case for the broadcaster to take additional steps to ensure a contributor receives the right level of care. Much will depend on the circumstances, and it may be that the level of participation is so minor or trivial that no such measures are needed. The wording in this practice was intended to suggest a potential framework to broadcasters as to how they might identify and manage risks, rather than to prescribe a mandatory approach or checklist. However, we acknowledge that the inclusion of these detailed steps within the Practice itself may be unhelpful if it suggests that Ofcom expects broadcasters to conduct this assessment for

every programme or contributor. In order to clarify this position, therefore, we are moving these suggested steps to the Guidance.

- 3.78 We still expect broadcasters to undertake some form of risk assessment where a contributor could be at risk of harm as a result of their participation. In some cases, this may be a very limited and brief exercise. There may also be cases where it is not necessary or appropriate to undertake a risk assessment at all. For example, where the subject matter of the programme is trivial, the contribution is minor, or where not conducting the risk assessment is in the public interest. Indeed, we recognise that in news and in some current affairs programmes, the need to obtain quick and timely interviews with members of the public in response to fast-moving events could be undermined by broadcasters having to undertake a risk assessment.
- 3.79 Ofcom is a post-broadcast regulator and any provisions under Section 7 of the Code do not apply to content that has not been broadcast.

Ofcom's Decision

New wording of Practice 7.15

- 3.80 Therefore, in response to all the feedback we have received to this consultation, we have amended the wording of Practice 7.15 as follows:

7.15 Broadcasters should take due care over the welfare of a contributor who might be at risk of significant harm as a result of taking part in a programme, except where the subject matter is trivial or their participation minor.

A contributor might be regarded as being at risk of significant harm as a result of taking part in a programme for reasons including (but not limited to) the following:

- they are considered a vulnerable person;
- they are not used to being in the public eye;
- the programme involves being filmed in an artificial or constructed environment;
- the programme is likely to attract a high level of press, media and social media interest;
- key editorial elements of the programme include potential confrontation, conflict, emotionally challenging situations; or
- the programme requires them to discuss, reveal, or engage with sensitive, life changing or private aspects of their lives.

Meaning of "vulnerable": For the meaning of "a vulnerable person" see Practices 8.21 and 8.22 in respect of "vulnerable people".

Broadcasters should conduct a risk assessment to identify any risk of significant harm to the contributor, unless it is justified in the public interest not to do so.

The level of care due to the contributor will be proportionate to the level of risk associated with their participation in the programme.

(See "practices to be followed" 7.3, 8.21 and 8.22.)

4. Protecting audiences – Changes to Section Two (Harm and Offence)

Introduction

4.1 In this section, we set out:

- a) the amendments we proposed in the second consultation to the harm and offence rules in Section Two of the Code. This was in the form of a new Rule 2.17 which required 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; and
- b) the responses we received and our responses and decisions on the various issues raised.

What changes to Section Two did we propose?

In the second consultation we proposed the following new Rule 2.17:

New Rule 2.17 proposed in the second consultation

2.17 In applying generally accepted standards to the contents of television and radio services, broadcasters must provide adequate protection for members of the public from potential harm and/or offence arising from the treatment of vulnerable people in programmes, and those who appear to be put at risk of harm as a result of their participation in a programme.

See Practices 8.21 and 8.22 for the meaning of “vulnerable people”. In addition to the examples in this meaning, other factors that may be relevant in the context of Rule 2.17 could include a person’s age, past or current personal circumstances or experiences, or their physical or mental health.

Broadcasters need to make judgements on how they provide sufficient context and/or appropriate information to audiences to minimise the potential for harm and/or offence in these circumstances. See also Practices 7.3 and 7.15, Section Eight (privacy), and Rules 1.28 and 1.29 (due care of under eighteens)

4.2 Ofcom’s rationale for proposing the new rule in Section Two was the potential for both harm and offence to be caused to audiences as a result of participants appearing to be treated in a way that puts them at risk of harm. In the provisional view we set out in the second consultation, we considered that this could have the potential to cause audiences offence as well as the potential to cause harm because it could trigger emotional distress or other harms to audiences. For example, if viewers experiencing a mental health condition were to be negatively affected by seeing how a participant with a similar condition was treated in a programme. We therefore proposed that rather than relying on

the general harm and offence requirements set out in Rule 2.1 and Rule 2.3, audiences would be able to raise such concerns under new Rule 2.17.

What respondents said

- 4.3 The majority of respondents who expressed a view on Rule 2.17 said that they disagreed strongly with the proposed approach to the new rule in Section Two as it was “too wide ranging” and “disproportionate”, and considered that Rule 2.1 and 2.3 already provided adequate protection to the public from harm and offence. However, a small number of respondents expressed their support for new Rule 2.17. For example, The British Psychological Society said it “strongly” endorsed the wording and intention of the proposed new Rule 2.17. It said it advocated for “a shared collective duty” for the welfare of participants. The Wireless Group said that it agreed to the proposed wording of this new rule (and the amendments in Section Seven).
- 4.4 Those respondents who did not support the addition of a new rule included the BBC, Channel 4, ITV and ViacomCBS. Each of these proposed alternative amendments to Rule 2.3.
- 4.5 The BBC suggested that the concern Ofcom had identified would be more appropriately addressed by amending Rule 2.3 to make it clear that the requirement extends to vulnerable people or those put at risk as a result of their contribution to a programme. It suggested the following addition to Rule 2.3 [Proposed amendment in bold]:
- 4.6 “In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context...Such material may include, but is not limited to... **and treatment in programmes of vulnerable people and those who may be at risk of vulnerability as a result of their participation in a programme.** Appropriate information should also be broadcast where it would assist in avoiding or minimising offence”.
- 4.7 Channel 4 said that the Code in its current form already provided adequate protection for vulnerable people and there was no evidence that Ofcom had experienced an increase in complaints that would justify introducing the proposed new rule. It proposed the following amendment to Rule 2.3 [Proposed amendment in bold]:
- “In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context...Such material may include, but is not limited to... **and treatment in programmes of vulnerable people and those who appear to be put at significant-risk of serious harm as a result of their participation in a programme.** Appropriate information should also be broadcast where it would assist in avoiding or minimising offence”.
- 4.8 ITV said the proposed new Rule 2.17 would be “disproportionate and potentially damaging to the editorial of programmes”. It suggested making the change to Rule 2.3 [Proposed amendment in bold]:
- “In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context...Such material may include, but is not limited to... **and the treatment of participants who are vulnerable and/or might be at risk of**

harm; Appropriate information to provide context should also be broadcast where it would assist in avoiding or minimising offence”.

- 4.9 ViacomCBS said that the proposed new Rule 2.17 was “unnecessary” as the audience was already protected by Rules 2.1 and 2.3. It also suggested amending Rule 2.3 [Proposed amendment in bold]:

“In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context...Such material may include, but is not limited to... **and treatment in programmes of vulnerable people and those who appear to be put at risk of harm as a result of their participation in a programme.** Appropriate information should also be broadcast where it would assist in avoiding or minimising offence”.

Ofcom’s response and decision

- 4.10 Ofcom notes the majority of responses expressed concern that adding a rule to Section Two was disproportionate and there was a lack of evidence for a standalone new rule concerned with the potential for harm or offence to the audience arising from the lack of (or perceived lack of) care of a vulnerable participant in a programme.
- 4.11 We took into account the argument put forward by some respondents that Rule 2.3 already provides the necessary regulatory scope to ensure viewers and listeners are protected from potential offence and the suggestion put forward by various respondents that a further category be added to the non-exhaustive examples of grounds for potential offence listed in Rule 2.3, which may require the application of generally accepted standards.
- 4.12 Ofcom has considered the responses and acknowledges that we have already applied Rule 2.3 in similar precedent cases¹¹ which have dealt with the effect on audiences in terms of offence, arising from how participants have been treated in programmes. After careful consideration, we have decided not to introduce the proposed Rule 2.17. Instead, Ofcom will continue to apply Rule 2.3 in cases where complainants raise concerns that they have been caused offence due to the lack of (or perceived lack of) care of about a participant in a programme. To make this clear, we are introducing some additional wording to Rule 2.3, as indicated below [amendment shown underlined and highlighted yellow]:

¹¹ *The Jeremy Kyle Show*, breach of Rule 2.3 ([Broadcast Bulletin 258](#)), *I’m A Celebrity Get Me Out of Here* breach of Rule 2.3 ([Broadcast Bulletin 227](#)) and *Celebrity Big Brother* not in breach of Rule 2.3 ([Broadcast Bulletin 373](#))

Rule 2.3:

2.3 “In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context (see meaning of “context” below). Such material may include, but is not limited to, offensive language, violence, sex, sexual violence, humiliation, distress, violation of human dignity, discriminatory treatment or language (for example on the grounds of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation, and marriage and civil partnership), **and treatment of people who appear to be put at risk of significant harm as a result of their taking part in a programme**. Appropriate information should also be broadcast where it would assist in avoiding or minimising offence.”

Other matters

- 4.13 Stakeholders raised two other matters in response to the first and second consultations, which we deal with below.

Cross-referencing the amendments to Section Seven and Section Two

- 4.14 Channel 4 said that it had concerns regarding Ofcom’s approach of cross-referencing the rules in Sections One and Two with the Practices in Section Seven. It said that the matters these rules and Practices required Ofcom to protect against, and the tests applied, were different, and to conflate and connect the two issues was wrong. For example, it was possible that great harm may be caused to a participant without anything offensive being broadcast. Conversely, the audience may be highly offended by the inclusion of material in a programme, but the contributor is completely content with their participation. Channel 4 said these examples demonstrated why Section Two and Section Seven should not be linked or cross-referenced in relation to contributor care.

Ofcom’s response and decision

- 4.15 There is a convention in the Code that Ofcom signposts any other provisions associated with a particular rule elsewhere in the Code. This is done in a number of sections of the Code and is intended to assist broadcasters in identifying all relevant rules when they are complying material for broadcast. It also assists members of the public to understand what Ofcom may or may not consider as part of a complaint.
- 4.16 When we set out our proposals in the second consultation, Ofcom considered it could be helpful for these reasons to include certain cross-references. In particular, we were mindful of the potential relationship between the amendments in Practices 7.3 and 7.15; the protection of people who are under eighteen; and offence to audiences arising from potential or perceived harm to a participant. However, we are mindful that there is currently no cross-referencing between the fairness and privacy rules and practices in Sections Seven and Eight and the rules in other sections of the Code. We also recognise that Sections Seven and Eight are governed by a different legislative regime and regulatory approach to other sections of the Code. We have therefore decided to remove the cross

references between Section Seven and Sections One and Two of the Code although the new Practice 7.15 does need to include a cross-reference to the definition of “vulnerable person” in Practices 8.21 and 8.22 as it adopts the existing definition from those practices.

Protecting children – updating the wording to Section One due care of children rules (Rules 1.28 and 1.29)

- 4.17 In Ofcom’s first consultation, we proposed updating the wording of Rules 1.28 and 1.29 of the Code. The wording of Rule 1.28 and its requirement for due care over the “physical and emotional welfare and dignity” of under-eighteens who take part in programmes was first introduced almost 15 years ago. In line with the changing awareness in society about mental health issues, we considered this wording should be updated. We proposed replacing the terms “physical and emotional welfare and dignity” with the words “welfare, wellbeing and dignity”.
- 4.18 Rule 1.29 requires that people aged under 18 who participate in programmes are not caused “unnecessary” distress or anxiety by their involvement in programmes or by the broadcast of those programmes. We recognise that there may be occasions where, taking into account the context, there may be editorial justification for broadcasters to show programme participants in a state of distress or anxiety. Therefore, we considered a more appropriate test when considering distress or anxiety would be whether it was “justified” in the specific context.
- 4.19 In the second consultation, we said that we would not be proceeding with the two new rules in Section Two that we had proposed in the first consultation. However, we also said that we had received responses on our proposed amendments to Rules 1.28 and 1.29 and that we would set out our response and decision on these issues in our final Statement. These are now set out below.
- 4.20 A number of respondents suggested that the term “wellbeing” in Rule 1.28 was not a clearly defined regulatory term and that “welfare” was sufficient. Respondents welcomed the inclusion of the word “unjustified” in place of “unnecessary” in Rule 1.29.
- 4.21 Channel 4 said that, in relation to Rule 1.28, it did not believe that the Code should use the term “wellbeing” as it was not a suitable regulatory term against which to judge broadcasters. This respondent was content for the phrase “physical and emotional” to be removed as both elements are, in its view, captured by the term “welfare”. Channel 4 agreed to the proposed change to Rule 1.29.
- 4.22 ITV said that it did not see the necessity of the term “wellbeing” in the revised Rule 1.28 and agreed that “unjustified was a “more appropriate test” than “unnecessary” when assessing distress and anxiety in relation to Rule 1.29.
- 4.23 In relation to Rule 1.28, the BBC said it was not clear what the word “wellbeing” meant in this context but welcomed the proposed use of the term “unjustified” to replace “unnecessary” in Rule 1.29.

Ofcom's response and decision

- 4.24 Ofcom agrees with the consensus of views expressed on the use of the word “wellbeing” in Rule 1.28 and the inclusion of the term “unjustified” in Rule 1.29, and has decided to update the wording of the rules as follows [Changes to the wording we proposed in the first consultation is shown underlined and highlighted yellow or strikethrough]:

Rule 1.28: “Due care must be taken over the welfare, wellbeing and dignity of people under eighteen who take part or are otherwise involved in programmes. This is irrespective of any consent given by the participant or by a parent, guardian or other person over the age of eighteen in loco parentis.”

Rule 1.29: “People under eighteen must not be caused unjustified distress or anxiety by their involvement in programmes or by the broadcast of those programmes”.

A1. Legal Framework

Ofcom's legal framework and existing Code rules

A1.1 This section sets out the statutory duties to which Ofcom has had regard in reaching our final decisions on the consultation proposals.

Legal Framework

A1.2 In carrying out our functions, Ofcom's principal duty under section 3(1) of the 2003 Act is to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition. In carrying out this duty, Ofcom must have regard, among other things, to the vulnerability of children, and "of others whose circumstances appear to Ofcom to put them in need of special protection".

A1.3 Under section 107 of the Broadcasting Act 1996, Ofcom is required to set principles to be observed, and practices to be followed, in connection with the avoidance of unjust or unfair treatment in programmes, and in connection with the unwarranted infringement of privacy in programmes or in connection with the obtaining of material included in programmes. We have done this in Sections Seven (Fairness) and Eight (Privacy) of the Code.

- a) Before drawing up or revising Sections Seven and Eight of the Code, Ofcom must consult:
- b) the BBC and the Welsh Authority, and
- c) such other persons as appear to Ofcom to be appropriate.

A1.4 Section 319 of the 2003 Act requires Ofcom to set, and from time to time review and revise, standards for the content of programmes included in television and radio programmes. The rules set out in the Code have been designed to secure those standards and include the rules in Sections One (Protecting the under 18s) and Two (Harm and Offence).

A1.5 In setting, or revising, broadcasting standards Ofcom must have regard to the following matters under section 319(4) of the 2003 Act:

- a) the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes generally, or in programmes of a particular description;
- b) the likely size and composition of the potential audience for programmes included in television services generally, or in television services of a particular description;
- c) the likely expectation of the audience as to the nature of a programme's content and the extent to which the nature of a programme's content can be brought to the attention of potential members of the audience;

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- d) the likelihood of persons who are unaware of the nature of a programme's content being unintentionally exposed, by their own actions, to that content;
- e) the desirability of securing that the content of services identifies when there is a change affecting the nature of a service that is being watched or listened to and, in particular, a change that is relevant to the application of the standards set under this section; and
- f) the desirability of maintaining the independence of editorial control over programme content.

A1.6 Before setting new standards, Ofcom must consult:

- a) every person who holds a relevant licence
- b) the Welsh Authority
- c) the BBC;
- d) anybody representing the interests of a number of relevant licence holders; and
- e) such of the following as they think fit:
 - i) persons appearing to OFCOM to represent the interests of those who watch television programmes;
 - ii) persons appearing to OFCOM to represent the interests of those who make use of teletext services; and
 - iii) persons appearing to OFCOM to represent the interests of those who listen to sound programmes.

Human Rights Act 1998

A1.7 As a public body Ofcom has a duty under the Human Rights Act 1998 to ensure that we act in a way which is compatible with the European Convention of Human Rights ("the Convention").

A1.8 Article 10 of the Convention provides for the right to freedom of expression. It encompasses the broadcaster's right to impart information and ideas as well as the audience's right to receive them, without interference by a public authority. In addition, Article 8 provides for the right to a private and family life, home and correspondence. The exercise of these freedoms may be restricted, for example, where it is prescribed by law and necessary in a democratic society; where it is in the interests of public safety; for the prevention of disorder or crime; for the protection of health and morals; for the protection of the reputation or rights of others; and in order to prevent the disclosure of information received in confidence.

A1.9 Ofcom must take such rights into account both when introducing new rules into the Code, and when enforcing those rules. Ofcom also has a public law duty to ensure that our decisions are fair and proportionate to achieving our objectives, including our statutory objectives.

A2. Impact Assessment

Impact Assessment and Equality Impact Assessment

- A2.1 The analysis presented in this document as a whole constitutes an impact assessment, as defined in section 7 of the 2003 Act. Some specific points to note are provided below.
- A2.2 Ofcom is required by statute to have due regard to any potential impacts on particular equality groups, i.e. people sharing a protected characteristic, such as: sex, disability or race as defined by the Equality Act 2010. In addition, our equality duties in Northern Ireland, under section 75 of the Northern Ireland Act 1998, require us to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.
- A2.3 In relation to equality issues (whether in Northern Ireland or the rest of the UK), we consider that the amendments we are putting in place are consistent with our equality duties and would not have any particular adverse effect on programme participants. Specifically, we consider amendments to the Code will put better safeguards in place for participants with protected characteristics including those who might be considered vulnerable people participating in a programme.
- A2.4 It is for broadcasters to judge on a case-by-case basis what type and level of care is appropriate and what steps they should take to secure the necessary protections according to the particular circumstances.
- A2.5 We recognise that these proposals may require some programme makers/broadcasters to review and enhance their risk management systems. Further, in circumstances where they have identified risks to an individual, these companies may have to take more comprehensive steps to mitigate those risks and protect participants and audiences. Some programme makers/broadcasters may therefore face some increases in costs and that could have a greater financial impact on smaller companies. However, Ofcom is aware that many broadcasters who produce programmes that are likely to require a significant amount of due care will already have these functions in place, and, for many, this change will not have a significant impact. We also consider that it is right that broadcasters are responsible for ensuring that individuals and audiences are protected.
- A2.6 We recognise that this may affect the risks of provision of more contentious programming but consider that the regulations, in allowing broadcasters/programme makers to take account of the public interest, should ensure that they do not prevent news investigations or current affairs/public interest programming.
- A2.7 It has also been suggested that the proposals could deter broadcasters from including or casting apparently vulnerable people in their programmes. However, we consider it important that people who participate in programmes and are potentially at risk of serious harm as a result of their participation, are appropriately informed about those risks, and that the broadcaster/programme maker takes due care in relation to their welfare. Further, we note that it is possible that the greater protections available to participants

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might encourage participation, if individuals are confident that they will be treated with respect and care. We also note that the widely held desire for greater diversity in representation by broadcasters, should help mitigate any detrimental effects in this regard.

A2.8 We therefore consider that the new approach would be beneficial to:

- a) people who take part in programming – who would be more likely to receive a consistent, best practice approach to their due care;
- b) broadcasters – who would be able to follow, or direct programme makers to follow, the expected standard of due care and accompanying Ofcom Guidance;
- c) viewers and listeners – who, when watching or listening to programming, would be reassured that regulated broadcasters meet a clear standard of care for programme participants; and
- d) society – who will see broadcast regulation being updated in line with changing societal perceptions about mental health and wellbeing.

A3. Code Amendments

Section Seven

Practice 7.3

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

- be told the nature and purpose of the programme, what the programme is about and be given a clear explanation of why they were asked to contribute and when (if known) and where it is likely to be first broadcast;
- be told what kind of contribution they are expected to make, for example live, pre-recorded, interview, discussion, edited, unedited, etc.;
- be informed about the areas of questioning and, wherever possible, the nature of other likely contributions;
- be made aware of any significant changes to the programme as it develops which might reasonably affect their original consent to participate, and which might cause material unfairness;
- be told the nature of their contractual rights and obligations and those of the programme maker and broadcaster in relation to their contribution; and
- be given clear information, if offered an opportunity to preview the programme, about whether they will be able to effect any changes to it; and
- be informed about the potential risks arising from their participation in the programme which may affect their welfare (insofar as these can be reasonably anticipated at the time) and any steps the broadcaster and/or programme maker intends to take to mitigate these.

Taking these measures is likely to result in the consent that is given being ‘informed consent’ (referred to in this section and the rest of the Code as “consent”).

It may be fair to withhold all or some of this information where it is justified in the public interest or under other provisions of this section of the Code.

Practice 7.15

Broadcasters should take due care over the welfare of a contributor who might be at risk of significant harm as a result of taking part in a programme, except where the subject matter is trivial or their participation minor.

A contributor might be regarded as being at risk of significant harm as a result of taking part in a programme for reasons including (but not limited to) the following:

- they are considered a vulnerable person;
- they are not used to being in the public eye;
- the programme involves being filmed in an artificial or constructed environment;
- the programme is likely to attract a high level of press, media and social media interest;

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- key editorial elements of the programme include potential confrontation, conflict, emotionally challenging situations; or
- the programme requires them to discuss, reveal, or engage with sensitive, life changing or private aspects of their lives.

Meaning of “vulnerable”:

For the meaning of “a vulnerable person” see Practices 8.21 and 8.22 in respect of “vulnerable people”.

Broadcasters should conduct a risk assessment to identify any risk of significant harm to the contributor, unless it is justified in the public interest not to do so.

The level of care due to the contributor will be proportionate to the level of risk associated with their participation in the programme.

(See “practices to be followed” 7.3, 8.21 and 8.22)

Section Two

2.3: “In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context (see meaning of “context” below). Such material may include, but is not limited to, offensive language, violence, sex, sexual violence, humiliation, distress, violation of human dignity, discriminatory treatment or language (for example on the grounds of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation, and marriage and civil partnership), and treatment of people who appear to be put at risk of significant harm as a result of their participation in a programme. Appropriate information should also be broadcast where it would assist in avoiding or minimising offence.”

Section One

1.28: “Due care must be taken over the welfare and dignity of people under eighteen who take part or are otherwise involved in programmes. This is irrespective of any consent given by the participant or by a parent, guardian or other person over the age of eighteen in loco parentis.”

1.29: “People under eighteen must not be caused unjustified distress or anxiety by their involvement in programmes or by the broadcast of those programmes”.

The overview section in this document is a simplified high-level summary only. The decisions we have taken, and our reasoning are set out in the full document.