

Question 1: Do you agree with the proposed amendments to the Code?:

The BBC welcomes the intention of the Review of Section Three ("to ensure that it is as clear as possible for broadcasters to understand"), but we doubt whether this intention would be best served by the introduction of the proposed Rules 3.2 and 3.3 as they stand.

The Ofcom Code has always been arranged broadly according to the distinct standards objectives set out in section 319 of the Communications Act 2003, and we believe this approach has contributed to regulatory clarity. This is the first occasion we are aware of in which Ofcom has proposed to introduce rules reflecting one standards objective (in this case, the application of generally-accepted standards) into a Section reflecting another. The proposed Guidance emphasises (rightly, in our view) the seriousness of Rule 3.1, and there is surely a case for confining Section Three to matters of comparable gravity. By treating "hate speech" as a single, undifferentiated category, Rule 3.2 will draw cases where there is no realistic link to crime or disorder together under the same rubric as cases involving the most clear and direct incitement to crime, while Rule 3.3, with its reference to "abusive or derogatory treatment of individuals, groups, religions or communities" will tend to encompass material - particularly, we anticipate, from genres such as comedy and reality programmes - which lies squarely within the ambit of Section Two.

In our view, the purpose of the Review and the interests of regulatory clarity might be better served by noting in Section Two that certain sources of offence may rise to the level of crime, and by prescribing in Section Three for such cases. Failing that, and in the event that Ofcom prefers to introduce Rules 3.2 and 3.3 broadly as proposed, we believe it would aid clarity if it were specified that the rules apply to matters which could give rise to prosecution.

Question 2: Do you agree with the proposed Code guidance?:

Our response to Question 1 also applies to paragraphs 6.7.3 and A6.26-28 of the proposed guidance.

A6.5 and A.6.6.

We welcome paragraphs A6.5 and A6.6 as safeguarding the scope for broadcasters' freedom of expression in this important and often difficult area, though we wonder whether the wording of the final sentence of A.6.6 ("However, where people or organisations are given the chance to articulate their views on television or radio, broadcasters must always ensure that they comply with the Code by challenging and placing in context those views as appropriate") may permit a more restrictive interpretation than intended. A requirement that certain views should ALWAYS be challenged AND placed in context may not be appropriate for all cases in the wide range of possible scenarios, and we hope the guidance will allow for exceptions where particular circumstances or public interest considerations justify them. One such scenario might be when a particular extremist utterance, in a pre-recorded form, had become a news story. Ofcom will recollect that extracts of recordings by the speaker then known as Jihadi John were included in news broadcasts at a time when there was a question as to whether he could be identified by his voice. There was clear editorial justification for broadcasting them, but the circumstances precluded challenge to the speaker (though Ofcom would rightly have expected them to be placed in context). At the least, a small change to read "challenged and/or placed in context" would introduce a degree of flexibility. (This also applies to A6.32.)

A6.51

We note with concern that paragraph A.6.51 introduces a requirement to declare on air if a payment has been made to a criminal for a contribution relating to their crimes. Existing Guidance says "There may be occasions where a broadcaster takes the view that it is appropriate to inform the audience that a payment (and how much) has been made to a contributor to a programme. Ofcom believes that there may be benefits to the audience, in terms of transparency, of declaring on-air when a payment has been made to a convicted or confessed criminal about his or her crime for a contribution to a programme". We believe this is preferable for a number of reasons.

- There may be circumstances where mandatory declaration would restrict broadcaster's ability to include contributions which would be in the public interest (for instance, where the potential contributor objected to such a declaration being made).
 - There may be circumstances where the current standing of a former convict is such that a declaration would be otiose at best, or might cast unwarranted doubt upon the credibility of the contribution (Jonathan Aitken or Conrad Black advancing views on penal policy with reference to their own experience of conviction and imprisonment might be examples).
 - In the case of spent convictions, there may be cases where declaration is contrary to the spirit and intention of the Rehabilitation of Offenders Act, subjecting the person concerned to an ongoing stigma which the law effaces in other spheres..
 - The phrase "relating to" is imprecise, and thus likely to be a source of unpredictability.
- The existing guidance also seems to us more consistent with the scope for broadcasters' freedom of expression envisaged in A.6.5 and A.6.6.