



## OFCOM CONSULTATION RESPONSE: PROTECTING PARTICIPANTS

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### **Question 1: Do you agree with our rationale for proposed new Rules 2.17 and 2.18?**

We agree that if an individual is to participate in the making of a television programme as a featured contributor, appropriate care and attention should be given by the producer of the programme, based upon information readily available, to that individual's suitability to take part, and any significant negative impact that taking part in the programme might have upon the individual. To the extent that it is reasonable or indeed possible in the circumstances, for the producer to make such a judgement.

### **Question 2: Do you agree with the proposed meaning of 'participant' for the purpose of these rules?**

Yes, though we would ask Ofcom to be clear as to whether actors (professional or amateur) taking part in documentary reconstructions were excluded from scope as well as full drama productions, and how Ofcom saw the status of individuals who were tricked into appearing in "surprise" entertainment shows?

### **Question 3: Do you agree with the proposed scope of these rules?**

We question whether it is appropriate for these proposed new code rules to extend to documentaries, news, and current affairs genres in which the producers do not attempt to control or manipulate, circumstances and events, or the unfolding narrative, but rather report current and past events. We also seek clarity on how the proposed new codes will be applied to broadcasters in relation to acquired content. That is content that a broadcaster has not directly produced, or commissioned from a production company, and has possibly been produced outside the UK under a different legal and regulatory regime?

### **Question 4: Do you agree with the proposed wording for the new Rules 2.17 and 2.18?**

We are concerned that the terms such as "welfare", "wellbeing", and "anxiety" are open to a broad range of interpretations, and would be interested to understand better how Ofcom planned to set meaningful limits on the scope of such possible interpretations? Further we would wish to understand how Ofcom intends to assess any degree of proximity and causation between a purported breach of Rules 2.17 and 2.18 and any alleged harm? We are concerned that, for example, an unforeseen – and highly unwelcome - negative outcome for a participant, either during or after a production, may - taking

Ofcom's proposed approach - lead to a presumption that a higher level of care procedure should have been in place during the production, even if the nature of the programme and the participant's circumstances did not merit such a level at the time.

Further we would like Ofcom to acknowledge that with regard to commissions in particular, even with the most robust producer guidelines, contractual requirements, and ongoing monitoring in place, broadcasters are limited by the arm's length nature of their relationship with production companies, in their ability to micromanage the producer's moment-by-moment engagement with participants. Although of course, some of the 'harm' covered by the proposed new rules, may become apparent at the post-delivery compliance stage.

We are also concerned that a 'broad' approach to interpretation and causation in Ofcom adjudications might lead to a proliferation of subsequent legal claims, based on Ofcom's findings.

**Question 5: Do you agree that Rule 1.28 should be amended in this way?**

Please see our answer to Question 4.

**Question 6: Do you agree that Rule 1.29 should be amended in this way?**

We support the substitution of the word "unjustified" for "unnecessary" in Rule 1.29.

**Question 7: Do you agree with the proposed approach to the Code guidance?**

We agree that the suggestions in the draft guidance on page 17 of the consultation, such as background checks on participants, and the engagement of experts to assess the suitability of participants, represent a sensible approach for programmes in which participants – by nature of the format of the show – are placed under stress and/or exposed to press or social media exposure. We would wish to avoid a situation however, in which the absence of such measures created a presumption of negligence on the part of the producer and broadcaster. In documentaries in particular, the trust of contributors, and access to their lives and stories, is often gained gradually by the programme maker, and as Ofcom acknowledges in its consultation, many issues covered by the important UK tradition of documentary making, by their very nature, involve participants who are inherently vulnerable. We think it is important that producers in this genre should be able to exercise their duty of care to their participants in a manner best suited to those participants and the nature of the films making process.

**Question 8: Can you provide examples of best practice in the due care of programme participants which you think should be included in the guidance?**

Regarding documentary film making, it is important that any processes put in place ensure that participant care does not, on the one hand, become a tick box exercise, or on the other become so cumbersome that potential contributors are discouraged from participating in, or sharing, important stories, and producers are discouraged from seeking them out.

Production agreements between broadcasters and production companies should be explicit about a producer's initial and on-going duty of care to participants, including the requirement to inform participants of the possible consequences of taking part, and assess any vulnerabilities a participant may exhibit. It should also be clear, who should be responsible for any on-going participant relationship, after production, during the promotion and press stages, and then follow TX. Whether or not additional processes are required should be assessed in relation to the likely impact of a production upon a participant, and importantly, the degree to which the format requires the producer to manipulate the narrative and/or put participants under pressure.

In circumstances where itinerary or archive factual content, which has been produced or commissioned by a broadcaster, is to be rescheduled after a significant period off-air, a reassessment should be made of the likely impact of this on participants and appropriate steps taken.