No Bars Ltd T/A DRIFT

Question	Your response
Question 1: Do you agree with our overall approach to Section One?	Yes
Question 2: Do you have any comments on our approach to reflecting relevant protections for under-eighteens in the online environment?	Confidentil Y/N Blank
Question 3: Do you have any comments on relevant factors we may wish to consider when developing our guidance to applying these rules?	Confidentil Y/N Blank
Question 4: Do you have any further comments on the proposed content of Section One?	Confidentil Y/N Blank
Question 5: Do you agree with Ofcom's overall approach to Section Two?	Confidentil Y/N Blank
Question 6: Do you have any comments on the proposed list of non-exhaustive contextual factors listed under the "meaning of context" in Section Two?	Confidential N I support Ofcom's proposed recognition that the online environment requires a broader understanding of context, particularly the inclusion of the **age of material, the length of time for which it has been available, and the way in which content is presented and encountered.** Ofcom's observations at paragraphs 3.24–3.25 are particularly important. Online material may remain indefinitely accessible and may be encountered through search, social sharing, external linking, feeds, headlines and fragments, rather than in the context in which it was originally published. I would invite Ofcom to consider the wider significance of this principle elsewhere in the proposed Code. If the age, duration of availability and manner in which material is encountered can alter its regulatory context for

Question	Your response
	the purposes of harm and offence, there is a legitimate question as to whether those same characteristics may also be relevant when **considering fairness to individuals who are the subjects of online material.** This is particularly important where material was accurate and fair when originally published but remains highly accessible many years later, after the individual's circumstances have materially changed. I return to this issue in my response to Question 21 on fairness.
Question 7: Do you have any further comments on the proposed content of Section Two?	Confidential? – Y / N Blank
Question 8: Do you agree with Ofcom's overall approach to Section Three?	Confidential? – Y / N Blank
Question 9: Do you have any comments on our proposal to use guidance to help clarify how contextual factors relating to Rules 3.1, 3.2 and 3.3 might apply to online material? Are there any other areas in Section Three which you think it may be particularly helpful to supplement with guidance?	Confidential? – Y / N Blank
Question 10: Do you have any further comments on the proposed content of Section Three?	Confidential? – Y / N Blank
Question 11: Do you agree with Ofcom's overall approach to Section Four?	Confidential? – Y / N Blank
Question 12: Do you have any further comments on the proposed content of Section Four?	Confidential? – Y / N Blank

Question	Your response
Question 13: Do you agree with Ofcom's overall approach to Section Five?	Confidential? – Y / N Blank
Question 14: Do you agree with the proposal to replace "programme" with "online item" in these rules? If not, explain why.	Confidential? – Y / N Blank
Question 15: Do you agree with Ofcom's proposed approach to preserving due impartiality across a series of editorially linked online items taken as a whole? If not, explain why.	Confidential? – Y / N Blank
Question 16: Are there any areas in Section 5 which you think it may be particularly helpful to supplement with guidance?	Confidential? – Y / N Blank
Question 17: Do you have any further comments on the proposed content of Section Five?	Confidential? – Y / N Blank
Question 18: Do you agree with Ofcom's overall approach to Section Six?	Confidential? – Y / N Blank
Question 19: Are there any areas in Section Six which you think it may be particularly helpful to supplement with guidance?	Confidential? – Y / N Blank
Question 20: Do you have any further comments on the proposed content of Section Six?	Confidential? – Y / N Blank
Question 21: Do you have any comments on Ofcom's proposed application of the Fairness Code set out un-	Confidential? – N I support Ofcom's proposed application of the Fairness Code to BBC online material. However, I invite Ofcom to

Question	Your response
der Sections 7 and 8 of the Broadcasting Code, in relation to BBC online material?	consider whether its application to the online environment should expressly recognise that **fairness may have a temporal dimension.** The proposed adaptation of Section Seven is important because online material differs fundamentally from a broadcast. A broadcast is ordinarily encountered at a particular moment. Online material may remain publicly accessible for many years and may subsequently be encountered through search engines, links, social media, recommendation systems and, increasingly, generative AI systems which aggregate and narrate information from multiple sources. This raises a question which I do not believe is fully addressed by the proposed adaptation: **Can material which was accurate, proportionate and fair when originally published nevertheless create unfairness through its later presentation or re-use where the person, circumstances and wider informational environment have materially changed?** I am not suggesting that accurate historic journalism should routinely be deleted, anonymised or rewritten, nor that the continued existence of an archive should itself amount to unfair treatment. The preservation of journalistic archives, open justice, freedom of expression and the public interest are important and should remain strongly protected. Rather, I suggest that Ofcom should recognise a narrower principle of **temporal fairness** when applying Rule 7.1 to online material. There are already foundations for this within the proposed Fairness Code. Practice 7.8 provides that the reuse of content originally obtained for one purpose and subsequently used for another purpose, or in a later or different publication of online material, should not create unfairness. Practice 7.9 further requires reasonable care to ensure that, in factual online material including material examining past events, material facts are not presented, disregarded or omitted in a way which is unfair to an individual or organisation.

Question	Your response
	In the online environment, the relevant "material facts" may sometimes include significant developments occurring after the original event. For example, reporting concerning a criminal conviction may have been wholly accurate and justified when published. Many years later, however, the same material may continue to be highly prominent while the readily accessible digital record contains little or nothing about the individual's subsequent rehabilitation, changed circumstances or other material developments. The historical article has not become false. Nevertheless, the contemporary picture created when that article dominates what can readily be discovered about the individual may become materially incomplete. This is particularly relevant to the policy objectives underlying the Rehabilitation of Offenders Act 1974. The fact that a conviction becomes spent does not make truthful historic reporting unlawful and should not automatically require alteration of an archive. Nevertheless, Parliament has expressly recognised through rehabilitation legislation that, for many purposes, the significance attached to a conviction should diminish with time. There is a potential tension where the legal system treats a conviction as spent while the digital information environment continues indefinitely to foreground it. The European Court of Human Rights has also recognised that continued online accessibility raises issues which are distinct from initial publication. In **Hurbain v Belgium [GC] (2023),** while emphasising the importance of freedom of expression and the integrity of press archives, the Court identified relevant considerations including the time elapsed since publication, the contemporary interest of the information, the conduct and circumstances of the person concerned, the negative consequences of continued availability and the degree of accessibility of archived material. I do not suggest that Ofcom should import a general "right to be forgotten" into the Fairness Code. Hurbain is useful for the more limited proposition that the **passage of time and degree of contemporary accessibility can legitimately form part of a proportionality assessment without treating the original journalism as wrongful.**

Question	Your response
	I therefore invite Ofcom to clarify, either within its application of Section Seven or in subsequent guidance, that where appropriate an assessment of fairness in online material may have regard to factors including: • the length of time since the events and original publication; • whether there remains a significant contemporary public interest in identifying the individual; • material subsequent developments which substantially alter the picture presented; • the individual's circumstances and conduct since the events concerned; • the degree of accessibility, prominence or renewed presentation of the material; • whether the material, although individually accurate, is liable in its contemporary presentation to create a materially incomplete or disproportionate impression; and • whether any unfairness could be addressed through a proportionate measure which preserves the integrity of the original journalism. The last point is particularly important. Temporal fairness need not imply deletion. Depending upon the circumstances, proportionate responses might include contextual updating, linking to significant subsequent developments, clearer identification of material as archival, annotation, or other measures which provide contemporary context while leaving the historical record intact. Search engines and generative AI make this issue increasingly important, although I do not suggest that the BBC or Ofcom can be responsible for the operation of independent search engines or AI systems. Their significance is that historic online material is no longer encountered solely as an archive deliberately visited by a reader. It may be surfaced, aggregated and incorporated into contemporary representations of an individual far removed from the circumstances of the original publication. This is the area in which my work on **DRIFT: Digital Rehabilitation Infrastructure, Framework and Training** has identified an emerging problem. The press may have created the first public digital account of an individual,

Question	Your response
	search engines may preserve and prioritise it, and AI systems may increasingly use that surviving record to construct a contemporary narrative. The regulatory question is therefore not simply whether the original publication was fair, but whether the Fairness Code is sufficiently equipped for an information environment in which publication can have an exceptionally long and changing digital afterlife. I would therefore encourage Ofcom to recognise expressly that **fairness online can, in appropriate circumstances, be assessed over time,** while preserving strong protections for legitimate journalism, freedom of expression, open justice and the integrity of archives. This would not create a presumption that old material is unfair. It would instead ensure that the concept of fairness remains capable of responding to the distinctive characteristics of online publication which Ofcom itself has identified elsewhere in this consultation.
Question 22: Do you have any comments on the proposal to align the proposed Procedures for investigating breaches of content standards in BBC online material with the equivalent procedures for breaches of the Broadcasting Code?	Confidential? – Y / N Blank
Question 23: Do you have any comments on our proposed interpretation of when BBC online material is "first posted"?	Confidential? – N I support Ofcom's proposed interpretation of when BBC online material is "first posted", particularly its recognition that online publication cannot always be treated as a single, static event. As Ofcom observes at paragraphs 4.14–4.17, online material can be continuously amended, updated and reshared in different contexts. I therefore welcome the proposal that, where there has been a significant editorial intervention affecting either the content or prominence of material, Ofcom may treat the date of that intervention as the date on which the material was "first posted". This is an important distinction between an online archive simply continuing to exist and a publisher taking an

Question	Your response
	active editorial decision which gives existing material a new contemporary presentation or prominence. I would, however, encourage Ofcom to clarify the meaning of **"significant editorial intervention"** and **"material changes to prominence"** so that these concepts are sufficiently capable of responding to the ways in which online material is now presented and discovered. The proposed procedures already identify changing the position of material to a more visible location and reposting it on a BBC social media account as examples of changes to prominence. In my view, Ofcom should also consider whether other deliberate BBC actions may amount to a material change in prominence or presentation, depending upon their effect. These might include, for example: • deliberately linking an historic article from newly published BBC material; • substantially changing a headline, summary or description in a way which affects the contemporary presentation of the material; • changing metadata, tagging or other publisher-controlled information where this materially alters the discoverability or presentation of the material; • deliberately returning archived material to a prominent position within a BBC website, app or other interface; • incorporating historic material into a new collection, feature or package which gives it renewed contemporary relevance; or • reposting, recommending or otherwise actively recirculating historic material through a BBC-controlled account or interface. The principle I suggest is not that every occasion on which an old article is encountered should constitute a new posting. Ofcom is right to distinguish between an **editorial intervention** by the BBC and material which simply becomes more visible because of external events, reader interest or the independent operation of a third-party search engine.

Question	Your response
	That distinction is important for freedom of expression, legal certainty and the preservation of legitimate archives. However, the concept should also recognise that editorial decisions concerning online material are not confined to altering the words or images contained within an article. Decisions about **where, how and in what contemporary context existing material is deliberately presented** can materially alter its impact. This is particularly significant for historic material about identifiable individuals. An article concerning a criminal conviction, for example, may quite properly remain within the BBC archive. The continued existence of that article should not itself constitute a new publication. If, however, the BBC subsequently makes a significant editorial decision which deliberately returns that material to contemporary prominence, there is a stronger case for treating that intervention as a new act of presentation for regulatory purposes. This distinction would complement the principle of **temporal fairness** discussed in my response to Question 21. It would also be particularly important in relation to material originally posted before the commencement of the new Code. I do not suggest that the new regime should retrospectively apply to the entire BBC archive. However, where historic material is subject to a significant post-commencement editorial intervention, it would be appropriate for Ofcom to consider whether that intervention amounts to a new "first posting" for the purposes of the relevant procedures. This provides a proportionate boundary. **Passive preservation of an archive would remain distinct from active contemporary republication, promotion or re-presentation.** I therefore support Ofcom's proposed approach but recommend further guidance making clear that a material change in prominence can arise from the full range of deliberate editorial decisions through which BBC online material is made newly or significantly more visible, accessible or contextually prominent, rather than only through changes to the underlying article itself.

Question	Your response
Question 24: Do you have any comments on the proposal to align the proposed Procedures for investigating breaches of the Fairness Code in relation to BBC online material with the equivalent procedures for breaches of the Fairness Code under sections 7 and 8 of the Broadcasting Code?	Confidential? – N I support Ofcom's aim of maintaining a consistent, accessible and proportionate procedure for Fairness and/or Privacy complaints. However, I would encourage Ofcom to ensure that procedural alignment with the existing broadcasting regime does not inadvertently prevent the Fairness Code from responding appropriately to the distinctive characteristics of online material. In particular, I note Ofcom's proposal that complainants should ordinarily submit a Fairness and/or Privacy complaint within 30 working days of the date on which the BBC online material was "first posted". That approach is understandable as a means of ensuring legal certainty and timely complaints. However, unlike a broadcast, online material may remain continuously accessible and may later be subject to a significant editorial intervention which changes its content, prominence or contemporary context. As discussed in my responses to Questions 21 and 23, there may therefore be circumstances in which the potential unfairness complained of does not arise, or does not become apparent, at the time of the original publication. For example, historic material may remain passively within an archive for many years without giving rise to a complaint, but subsequently be deliberately relinked, repackaged, promoted or otherwise returned to contemporary prominence by the BBC. In such circumstances, it would be important that the procedural time limit runs from the relevant later editorial intervention where Ofcom considers that intervention sufficient to constitute a new "first posting". I therefore welcome the link Ofcom draws between the proposed complaints procedure and its interpretation of when online material is "first posted". I would encourage Ofcom to make clear in guidance that the 30-workingday expectation should not prevent consideration of a complaint where the alleged unfairness arises from a significant subsequent editorial intervention rather than from the original publication alone.

Question	Your response
	There is also a wider issue concerning the proposed treatment of material posted before commencement of the new regime. I recognise the legal constraints on Ofcom and do not suggest that the new Fairness Code should simply be applied retrospectively to the BBC's historic archive. However, where pre-commencement material is subject to a sufficiently significant post-commencement editorial intervention, including a material change in prominence or presentation, it should be clear whether and in what circumstances that later intervention may bring the material within the new complaints regime. This distinction would preserve legal certainty and the integrity of historic archives while ensuring that the complaints process remains capable of addressing genuinely new acts of online presentation. More generally, the online complaints procedure should distinguish between: • a complaint concerning the original publication of historic material; and • a complaint concerning a subsequent editorial act which materially changes the way in which that historic material is presented, promoted or encountered. That distinction would help ensure that procedural rules designed for time-limited broadcasting do not unintentionally restrict the substantive fairness protections Ofcom is seeking to extend to an environment in which material can remain available, amendable and capable of renewed prominence indefinitely.
Question 25: Do you have any comments on the proposal to apply the same sanctions procedures to breaches of the Code as breaches of the Broadcasting Code by amending the existing sanctions procedures?	Confidential? – Y / N Blank
Question 26: Do you have any comments on the proposed amendments to the types of sanctions which may be available to Ofcom following a	Confidential? – N I support Ofcom's proposed amendments to the range of sanctions available in relation to BBC online material.

Question	Your response
breach by the BBC of content standards, or the Fairness Code in relation to BBC online material?	In particular, I welcome the fact that the proposed framework does not treat removal as the only possible response to a breach. Ofcom proposes that it may, depending upon the circumstances, direct the BBC to amend material, restrict access, provide additional information to users, include a correction or statement of Ofcom's findings, or provide a link to Ofcom's decision. That flexibility is particularly important in the online environment. In the context of the temporal fairness issues raised in my response to Question 21, I would encourage Ofcom to make clear that remedies for unfairness involving historic material should be **proportionate to the nature of the contemporary unfairness identified.** There may be cases in which the continued existence of the original journalism is not itself the problem. The unfairness may instead arise because important subsequent developments are absent, because historic material has been presented in a new context, or because a later editorial intervention has given it renewed prominence. In such circumstances, removal of the underlying material may be neither necessary nor proportionate. Depending upon the particular breach, an appropriate remedy might instead involve: • amendment or contextual annotation; • providing additional information about significant subsequent developments; • linking historic material to a later relevant report or outcome; • making clearer that material is archival and identifying its original date and context; • correcting a contemporary presentation of historic material while preserving the original historical record; or • restricting access or prominence where a more limited intervention is sufficient to remedy the identified unfairness. I would therefore encourage Ofcom, in applying the proposed sanctions framework, to recognise explicitly the value of **contextual and restorative remedies** alongside removal.

Question	Your response
	This would be consistent with the principle of proportionality and would help preserve the integrity of legitimate journalism while allowing genuine contemporary unfairness to be remedied. It would also reinforce an important distinction underlying my response to this consultation: recognising that online fairness can change over time does not require history to be rewritten. In many cases, the appropriate response may simply be to ensure that the historical record is accompanied by sufficient contemporary context to prevent it from presenting a materially incomplete or unfair picture.
Question 27: Do you have any comments on our impact assessment, rights assessment, or equality impact assessment? Please provide any information or evidence in support of your views.	Confidential? – N I broadly support Ofcom's rights-based approach and agree that regulation of BBC online material requires a careful balance between the Article 10 rights of the BBC and audiences to receive and impart information and the Article 8 rights of individuals directly affected by that material. However, I invite Ofcom to consider whether its rights assessment sufficiently addresses one distinctive feature of online publication: **the potentially indefinite duration, accessibility and changing contemporary impact of material concerning identifiable individuals.** At paragraphs A5.24–A5.25, Ofcom concludes that its proposals do not give rise to a need for further detailed assessment in relation to privacy, noting both that the information collected from complainants is not changing and that the BBC Editorial Guidelines already apply to BBC online material. Those are relevant considerations. However, the Article 8 issue raised by the proposed Code is potentially wider than the handling of complainants' information or the existence of established Editorial Guidelines. The move from the existing oversight arrangements to an enforceable Online Material Code creates an opportunity to consider how the Article 8/Article 10 balance operates in an environment in which material can remain accessible, searchable and capable of renewed prominence for many years after its initial publication.

Question	Your response
	As set out in my response to Question 21, this does not mean that Article 8 should routinely override Article 10, or that accurate historic journalism should ordinarily be removed. The integrity of journalistic archives and the public's ability to access historical information are themselves important aspects of freedom of expression. Nevertheless, European human-rights jurisprudence, including **Hurbain v Belgium [GC] (2023)**, demonstrates that the continued online accessibility of historic reporting can require a contextual balancing exercise distinct from the question of whether the original publication was justified. Relevant considerations can include the passage of time, contemporary public interest, subsequent circumstances and the degree of accessibility of the material. I therefore suggest that Ofcom's rights assessment should expressly recognise that the Article 8/Article 10 balance may itself have a temporal dimension in the online environment. This is particularly relevant to historic reporting about criminal convictions. The Rehabilitation of Offenders Act 1974 reflects a public policy objective that, subject to important exceptions, the significance attached to many convictions should diminish following a specified period. That does not create a right to erase truthful journalism. It does, however, demonstrate that rehabilitation and the passage of time are legitimate societal interests which may form part of the wider proportionality context. There may consequently be circumstances in which the original publication of material remains entirely defensible under Article 10, while a later question arises about its renewed presentation, prominence or the completeness of the contemporary picture it creates. I would encourage Ofcom to reflect this explicitly in its final rights assessment. I also note Ofcom's statement at paragraph A5.29 that, when considering equality, it examines potential impacts more broadly than the protected characteristics identified in equality legislation. I do not suggest that having a criminal record is itself a protected characteristic under the Equality Act 2010. However, this broader approach

Question	Your response
	provides an opportunity for Ofcom to consider whether the operation of the new regime may have particular implications for groups whose opportunities to participate fully in society can be affected by persistent historic online information, including people seeking to rebuild their lives following criminal convictions. The issue is therefore not whether such individuals should receive preferential treatment. It is whether an assessment of the effects of regulating permanently accessible online material should recognise **rehabilitation, changed circumstances and the passage of time as potentially relevant factors within an appropriately balanced rights framework.** I would therefore encourage Ofcom to supplement its rights assessment by expressly considering the temporal characteristics of online publication and their potential effect on the Article 8/Article 10 balance.
Question 28: Do you agree that the proposed Code and procedures are likely to have positive effects on opportunities to use Welsh and treating Welsh no less favourably than English? If you disagree, please explain why, including how you consider they could be revised to have positive effects or more positive effects, or no adverse effects or fewer adverse effects on opportunities to use Welsh and treating Welsh no less favourably than English.	Confidential? – Y / N Blank