

OFCOM CONSULTATION ON PROTECTING PARTICIPANTS IN TV AND RADIO PROGRAMMES

BBC Response

September 2019

Introduction

The BBC welcomes the opportunity to respond to Ofcom's proposals on protecting participants in radio and television programmes. The BBC is committed to treating contributors to our programmes honestly and with respect. The care and consideration given to those taking part in our programmes is of critical importance. Our recently revised Editorial Guidelines include a commitment to due care to adult contributors, emphasising further our commitment to the health and welfare of our contributors or potential contributors. The introduction to section 6 of the BBC's Editorial Guidelines 2019, Fairness Contributors and Consent states, inter alia, that:

"We owe due care to our contributors or potential contributors, as well as to our sources, who may be caused harm or distress as a result of their contribution. Due care is the level of care that is appropriate to the individual and particular circumstances. We must judge this taking into account the editorial content, the nature and degree of the individual's involvement and their public position, along with other relevant factors such as safety risks or whether the individual is vulnerable."

For some time the BBC has issued Guidance on "Working with vulnerable contributors or contributors at risk of vulnerability":

<https://www.bbc.com/editorialguidelines/guidance/vulnerable-contributors>. The Guidance reflects the BBC's view that it has been clear in recent times, as media scrutiny of some contributors has increased and in particular since the advent of social media, that some adults appearing in programmes could need support to help deal with the consequences of their appearance. Both the Editorial Guidelines and the Guidance acknowledge that the due care required should be proportionate to the programme and the circumstances of the appearance.

We therefore have no objection to Ofcom's proposals to include a requirement of due care to adult participants in the Broadcasting Code.

But the consultation indicates that “Ofcom does not intend for the proposed rules to place a disproportionate and unjustified additional burden on broadcasters”. In the BBC’s view there is a danger that this will happen not just because of the extensive application of the proposed new rules but also because of their requirements. We will return to this concern later in this submission.

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

Question 3 – Do you agree with the proposed scope of these rules?

That some adults may be rendered vulnerable through their contribution to or participation in programmes is apparent. There is a clear argument for due care Rules to achieve a consistency of approach and treatment across the industry provided there is not a detrimental effect on creative freedom and freedom of expression and that the Rules are proportionate given the nature of the issues that have arisen. The consultation acknowledges that many broadcasters already have comprehensive duty of care processes in place. So it is important that Ofcom’s requirements should be proportionate to the issue faced; the current proposals carry a real danger of impracticality and overkill.

It is less clear that the Harm and Offence provisions of the Ofcom Code, section 2, offer the right way to address this issue or that the legal underpinning exists to allow Ofcom to do so. Section 2 of the Ofcom Code deals with harm and offence caused to audiences by their consumption of programming. It is not clear that any change to it needs to be made to deal with offence caused to audiences by the treatment of participants in programmes. Section 2, Rule 2.3 of the Code already includes the following which would seem to allow complaints about the treatment of participants which cause offence to be dealt with:

“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).”

Whilst we appreciate Ofcom has said it will take a flexible approach in the interpretation of these new Rules, we are concerned about possible unforeseen consequences of these being added to the Harm and Offence Section, as opposed to Fairness, where they would seem to fit more obviously.

Section Two, Harm and Offence, is about protecting the viewer/listener from harm and not about care for contributors or participants. The Code sections on fairness and privacy are

clear. They both state *“This section and the following section on privacy are different from other sections of the Code. They apply to how broadcasters treat the individuals or organisations directly affected by programmes, rather than to what the general public sees and/or hears as viewers and listeners.”* It is the prerogative of the participant to raise a complaint about due care, should they so wish. Often a viewer/listener is unable to ascertain the level or appropriateness of care given to a contributor to a programme from what they see or hear.

Scope

Though Ofcom has said it will take a flexible approach to assessing the level of care required, by allowing complaints to be made about due care by the viewer/listener, and not by the individual affected, the BBC believes this could result in a disproportionate requirements of some programmes: as envisaged the level of compliance required will be the same whether the programme is a daily news programme or a factual entertainment programme though the process through which each genre selects its participants is very different. As the consultation makes clear, Ofcom intends that all programmes, regardless of their genre, will have an obligation to fill in and keep records so they can provide evidence of the duty of care provided, should they be required to do so. This will place onerous additional requirements on programme teams, particularly fast turnaround programmes like News programme and live phone-ins, where it will be very difficult to make an assessment of each individual featured, eg in vox pops and contributors to phone-ins. But Ofcom has given no indication that participants in news programmes will require less proof of the duty of care delivered though the consultation does suggest that the duty of care may vary. This risks being impractical in the circumstances in which much news and many phone-ins are produced. Given the apparent level of risk it is difficult to regard this as proportionate.

There must be a consequential risk that the extent of the requirement will also make broadcasters less inclusive: if there is any doubt about a contributor, broadcasters will be likely to err on the side of caution and not include them. Ofcom suggests it is not its intention to have this effect but it is hard to see how it will be avoided by the current proposals despite Ofcom’s declared commitment to freedom of expression.

Ofcom should offer clear Guidance about the appropriate level of care due in different genres and to make clear that the requirement of news and current affairs will necessarily be less than in eg reality TV. Broadcasters also need to be assured that the evidence base require by Ofcom is less, tending to minimal, for eg news and current affairs and phone-ins.

Alternatively news and current affairs could be omitted from the scope of new Rules altogether.

GDPR

The BBC has a further concern about the viewer/listener rather than the individual raising an issue about due care is in relation to compliance with GDPR requirements. Broadcasters may be required to include private information about the level of care given to an individual according to their specific circumstances, but this may be difficult to comply with without the consent of the individual involved. If the individual did not raise a complaint, and/or does not want their participation in a programme to be investigated, broadcasters may struggle to comply with evidence requests without being in breach of GDPR legislation.

The Legislative Underpinning

The BBC considers that the inclusion of the proposed new Rules in Section 2 is difficult to reconcile with the legislative framework. Section 319 of the Communications Act 2003 (“2003 Act”) imposes a duty on Ofcom to set, and from time to time to review and revise, standards for the *“content of programmes to be included in television and radio services as appear to them best calculated to secure the standards objectives”* (s.319(1)). Section 319(2) sets out an exhaustive list of the *“standards objectives”*. The subject matter of the proposed Rules 2.17 and 2.18 does not fall within any of the *“standards objectives”* set out under s.319(2). This provision cannot therefore be relied upon as providing a legislative basis for proposed Rules 2.17 and 2.18.

The fact that the *“standards objectives”* do not cover the subject of matter of proposed Rules 2.17 and 2.18 is unsurprising, given that the subject matter is expressly covered by s.107(1) of the Broadcasting Act 1996 (“1996 Act”), which provides that *“[i]t shall be the duty of Ofcom to draw up, and from time to time review; a code giving guidance as to principles to be observed, and practices to be followed, in connection with the avoidance of ... (a) unjust or unfair treatment in programmes to which this section applies”*. Section 107(1) provides the legislative basis for Section 7 of the Broadcasting Code, and any new proposed ‘practices to be followed’ or ‘principles to be observed’ that relate to unjust or unfair treatment within programmes should similarly be made pursuant to s.107(1) of the 1996 Act.

This is not simply a technical point. It has important implications, including that s.111 of the 1996 Act applies to any guidance made subject to s.107(1). This provides that any complaint regarding unjust or unfair treatment in programmes *“shall not be entertained by Ofcom unless made by the person affected or by a person authorised by him to make the complaint for him”* (see s.111(1), read with ss.107 and 110 of the 1996 Act). Although the Consultation Paper cites s.107 of the 1996 Act (at paragraph A.1.4), it contains no reference at all to ss.110-111. This is an important omission.

In the BBC’s view, the clear statutory framework provided for under ss.107, 110 and 111 of the 1996 Act, and the absence of legislative basis for the new proposed rules in s.319 of the 2003 Act, provides a further reason why proposed Rules 2.17 and 2.18 should be included under Section 7 of the Code.

“Trust”

It is worth noting too that “Trust” is not a standards objective or a duty to which Ofcom has any legal obligation. And the term does not appear in the Broadcasting Code. Nonetheless the consultation refers to “Trust” a number of times as if it is a regulatory duty e.g. the rules “...would serve to protect against potential harm . . . caused to audience trust in broadcasting, so that viewers and listeners can trust that broadcasters are fulfilling their duty of care to programme participants, where required”. Ofcom does not have a legislative obligation to foster trust in broadcasting but appears to be creating one.

Question 2 – Do you agree with the proposed meaning of ‘participant’ for the purpose of these rules?

We are supportive of new Rules on due care to adults being included in the Broadcasting Code, but we believe the definition of ‘participant’ risks confusion and is too wide. It is not clear why Ofcom wishes to define a participant or contributor more widely than those who are required to give informed consent and to extend the definition of a participant to “an adult who has agreed to take part in a programme in any way, except presenters and reporters”.

There is no distinction between adults, like politicians, who are being interviewed on a news programme in the public interest, and those adults appearing in eg competitive and immersive formats, or in reality TV programmes, where this issue seems to have arisen. It is acknowledged that the duty of care will vary and that the requirement should be flexible and proportionate but it is not spelled out how that will affect the many to whom it is currently proposed the duty of care will apply: it is the broadcasters’ “responsibility to make judgements on what care is appropriate in each case taking account of the person involved, the nature of the participation and the type of programme”. That will mean that programme makers will have to proceed on the basis that the widely defined requirement could apply to them in ill-defined circumstances: too many judgements about too many people in too many circumstances. It is questionable whether this is proportionate (or even workable) as proposed.

It also leaves the Rules open to abuse. The duty of care applicable to some interviewees will become a matter of contention. Recent interviews with former IS members or IS brides are a case in point. Whilst Ofcom may be determined that interviews of this nature should not be susceptible to challenge on these grounds, journalists will be concerned that they could be and will have to bear in mind a formal process which goes beyond “informed consent” but in ways which have yet to be defined. The degree of due care required has to be

appropriate to the nature of the programme, the public interest, and the level of participation. We believe this should be made clear in the wording of the Rules.

We would ask for greater clarity on what “agreed to take part” means. Does this mean for example that a person who, while being door stepped, answers questions has therefore agreed to take part and is therefore owed due care? And what is the level of due care for audience members to programmes like *Question Time*, regardless of whether they ask a question? Audience members have consented to participate but if they ask a question or are featured in shot, will we now have to apply due care considerations under these new Rules?

We would argue that the wording as it currently stands is too ambiguous and could be subject to misuse and will lead to more complaints, whether or not they can be successful.

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

We consider that the new Rules should be in Section 7 of the Code. We also have concerns about the use of the word wellbeing in Rule 2.17. We detail our concerns below in relation to rule 1.28. Also, if the definition of ‘participant’ accompanies the Rules, as mentioned above, would welcome greater clarity on the definition of this term to avoid any ambiguity.

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

The existing Rule 1.28 is clear as it stands but the BBC appreciates the desire to bring this in line with the due care requirements for adults. However it is not clear what the word wellbeing means in this context and how it is defined. Indeed the word wellbeing is still developing a stable meaning having only recently entered the lexicon in this context. As it stands the word seems to encompass a large number of measures of personal happiness, contentment and welfare and its meaning is still developing. It is unclear why “wellbeing” should replace “welfare and dignity” in the current Rule. If it is to survive as part of the Rule we would request detailed guidance on what the term “wellbeing” means in Ofcom’s view and an explanation as to why Ofcom proposes replacing the existing wording.

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

We welcome the inclusion of the word “unjustified” in place of “unnecessary”. Editorial justification is the requirement used elsewhere in the Code as well as in the BBC Editorial Guidelines.

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? Please share details if possible.

We attach a copy of the BBC’s evidence to the DCMS Select Committee which set out the BBC’s approach to duty of care in detail and the best practice to which we aspire.

We also attach a link to [a recent Daily Mail article](#) which referred to the way in which our duty of care was exercised in the recent series of *Heartbreak Hotel*.