

# **Channel 4 response to Ofcom's consultation on 'Protecting participants in TV and radio programmes'**

## **Executive Summary**

- Channel 4 considers that treating contributors to programmes with due care is of paramount importance, separate to and including our responsibilities under the Ofcom Broadcasting Code ("the Code").<sup>1</sup>
- Contributor care has for many years been, and continues to remain, a central priority for us. Working with our production partners we develop comprehensive, proactive and robust welfare protocols and processes which are regularly reviewed and updated.
- We take a bespoke approach to contributor care, with the type of support given tailored to the individual nature of each situation. In our experience, what constitutes the proper exercise of our duty of care in each programme depends very much on the nature of the programme, and a 'one size fits all' or standard template approach is not appropriate.
- As such, we welcome Ofcom's recognition that *"different types of participation may raise very different risks of harm to participants."* And that any proposed new rules *"need to be flexible enough to work in a range of situations, and to take account of the fact that very different types and levels of care may be necessary."*
- Channel 4 recognises that Ofcom, as the broadcast regulator, has an important role to play in ensuring consistent standards in contributor care across the industry and we believe our current approach is aligned with what Ofcom is seeking to deliver
- Whilst we agree that it is vital that Ofcom should be able to provide guidance to the industry and to deal effectively with complaints by viewers and contributors, it must do so within the parameters of the authority granted to it by Parliament and with due regard to other rights and duties including the right to freedom of expression as expressed in Article 10 of the European Convention on Human Rights. Channel 4 understands and welcomes the intentions behind Ofcom's proposals, but we are concerned that the methodology proposed for implementing those intentions is not supported by statutory authority and risks serious, perhaps unintended, consequences.
- Ofcom proposes to insert new rules regarding a duty of care to contributors into section 2 of the Code. Section 2 deals with harm and offence to viewers, not participants, which therefore permits anyone (including members of the public) to complain about perceived harm or offence caused to a contributor. Section 2 already allows viewers to complain if they are offended by the treatment of participants as portrayed on screen. Encompassing complaints about the actual treatment of participants in this section and allowing those other than the participants themselves to complain about this, in our view exceeds Ofcom's powers and is not the intention of legislation.
- Ofcom can and should legitimately focus on those contributors who are either vulnerable or who become vulnerable because of their inclusion in the programme.

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<sup>1</sup> For the purposes of this response we have used the term "contributors" rather than "participants" as this reflects the informed consent that individuals give to provide their contribution to a programme.

However, Ofcom's current proposals start from the presumption that all participants in programmes are to be treated as vulnerable. This is not the case; Parliament made no such definition. By taking such a broad approach and assuming vulnerability, we believe that the proposals risk unduly restricting the diversity of those that take part in programmes, with the potential for a chilling effect and a restriction on freedom of expression. As a consequence, we are concerned that effect of the proposed new rules and guidance will be disproportionate.

- Ofcom's statutory powers to regulate the treatment of those who appear in programmes has properly been expressed in Sections Seven and Eight of The Code, which we believe are robust enough to deal with the issues under consultation. Ofcom has already investigated a number of complaints from contributors under the fairness and/or privacy provisions of the Code and reached a decision. We welcome Ofcom's proposal to introduce new guidance and believe that this guidance, together with the extensive voluntary arrangements Channel 4 puts in place around duty of care on top of its compliance responsibilities, would achieve Ofcom's desired objectives.
- However, we note Ofcom's desire to provide further assurances in this area, and we believe that this could be achieved by Ofcom considering an alternative approach that can more effectively meet their objectives whilst remaining in line with Ofcom's jurisdiction. The approach which we would recommend would be to amend Section Seven of the Code (see Question 4 below). This would also mean that the statutory protections for broadcasters contained in sections 111 and 130 of the Broadcasting Act 1996 would apply, which provide that complaints could only be entertained from directly affected persons or those authorised by them.
- This would guard against unintended consequences such as a restriction on editorial choices in terms of the types of programmes that can be made or the diversity of contributors on these programmes – which we believe is vital in ensuring we can make programmes which reflect the diversity of the UK, breakdown stigma and promote greater understanding, inclusion and empathy. It would also ensure that any new measures are not disproportionately burdensome for broadcasters, production companies and Ofcom.
- Beyond these specific concerns about Ofcom's jurisdiction, we are also concerned by some of the wording in Ofcom's proposals and the broad range of programmes they would capture. In particular, we believe that including news, current affairs and investigative documentaries within the rules could have a seriously detrimental effect on such programming. There is, for example, no public interest test within the proposed new rules. The result could be a significant chilling effect on free speech if the proposed regulation unduly discourages producers from tackling sensitive subjects or inhibits news programmes from conducting appropriately rigorous interviews.
- Channel 4 remains absolutely committed to providing best practice contributor care in all of our programmes and is supportive of measures to ensure this commitment is shared right across the industry. Whilst we are concerned about the current proposals for the reasons set out above, we are keen to work constructively with Ofcom and with industry to share best practice and to develop proportionate and workable solutions including carefully considered additional guidance.

## **Introduction**

Channel 4 welcomes the opportunity to respond to Ofcom's review of the Broadcasting Code ("the Code") with respect to proposed rules and guidance concerning a 'duty of care' to adults participating in programmes.

Channel 4 is a publicly-owned, commercially-funded public service broadcaster. Its core public service channel, Channel 4, is a free-to-air service funded predominantly by advertising. In recent years, Channel 4 has broadened its portfolio to offer a range of digital services, including the free-to-air digital television channels Channel 4+1, E4, E4+1, 4seven, Film4, More4 and 4Music.

Channel 4 has a remit to deliver high quality news and current affairs, and a proud track record for ground breaking investigative journalism. Our detailed statutory public service remit also includes requirements to support and stimulate well-informed debate on a wide range of issues, to reflect the diversity of the UK, and to challenge established views and promote alternative perspectives. In delivering this remit Channel 4 broadcasts a wide range of programmes involving a huge diversity of contributors, some of whom are more vulnerable. We provide appropriate support for these contributors to enable them to safely tell their story and have a voice.

We welcome the developing societal focus and narrative around mental health, and given the recent concerns that have been raised in this area, it is only right that Ofcom considers whether interventions are needed to better protect those who take part in TV programmes. Whilst we may not agree with the specific mechanic Ofcom is putting forward within the consultation we want to be clear from the outset that we support the intentions behind Ofcom's proposals to see best practice delivered right across the industry. Channel 4 is committed to delivering a high standard of contributor care across our programme output and will continue to work closely with production companies, experts and Ofcom to deliver this. However, we do have concerns relating to the legal principles and mechanisms involved in Ofcom's current proposals, which we believe could potentially lead to unintended and damaging consequences.

### **Channel 4's commitment to duty of care**

The welfare of contributors is of paramount importance to Channel 4 and our responsibility to take due care of all contributors is something we take extremely seriously. Channel 4 and our production partners would never seek to put any participant at unjustified or non-consented risk and we put in place robust protocols and processes wherever necessary. Every programme is different and so Channel 4 takes a bespoke approach to contributor care with the support given tailored to the individual nature of the programme and the needs of the contributors. In our experience, the best way to ensure continued improvement in contributor care policies is to develop bespoke individual procedures on a programme-by-programme basis with input from relevant experts where required. Channel 4's protocols are based on a careful evaluation of the programme contributors, assessed against the nature and severity of risks involved in participating in the programme. Any risks are then managed and mitigated appropriately. Of course, where the production company and Channel 4 believe that any risks cannot be mitigated, or the risk is too high, then the programme simply does not go ahead with the contributor or does not proceed at all. This has occurred on a number of occasions.

Channel 4 welcomes Ofcom's recognition that "*different types of participation may raise very different risks of harm to participants. The steps broadcasters and programme makers should take to ensure due care of programme participants will vary considerably depending on factors such as: the person who is participating; the programme format; the nature of a person's participation in a programme; and the degree of control a broadcaster/programme maker has over someone's experience within a programme (e.g. the difference between an observational documentary programme and a reality TV format in which participants are placed in a constructed environment).*" We also welcome Ofcom's acknowledgement that any proposed new rules "*need to be flexible enough to work in a range of situations, and to take account of the fact that very different types and levels of care may be necessary.*"<sup>2</sup> We are reassured that Ofcom understands the need for a flexible approach that can be applied across the full spectrum of programmes and we agree that this is vital. We are keen to work with Ofcom further to get this right.

As a responsible broadcaster, we always seek to improve our care and share best practice. We learn not only from our own experience but also from the experience of others operating in this field. For instance, we are putting in place some additional measures including new workshops with a range of experts to ensure that the commissioning and legal teams within Channel 4 involved in contributor care are kept abreast of developments in best practice.

Channel 4 makes a number of programmes involving members of the public where we work with our production partners and provide comprehensive and proactive aftercare. These programmes include reality shows such as *Hunted*, *Made in Chelsea* and *The Circle* and constructed popular factual shows like *Bake Off* and *First Dates*. (See response to Question 8 for further examples.) However, as Ofcom is aware, we make a number of other programmes which, under its proposals, would also be captured by the proposed new rules e.g. *Channel 4 News*, *Dispatches*, *Unreported World*, *documentaries*, *entertainment shows*, even programmes such as *Countdown* or *Location, Location, Location*. The all-encompassing reach of the proposed new rules causes Channel 4 concern.

In making programmes, fulfilling our duty of care to our contributors is of paramount importance. There is also a clear public value in programmes giving voice to a wide range of contributors and to ensure that television does not become the preserve of a narrow strata of society. Channel 4 has a statutory remit to be innovative, diverse, distinctive and to create debate and we seek to ensure that producers fully reflect the UK and its population. It is essential that Channel 4 can continue to make challenging content that breaks down stigma and promotes greater understanding, inclusion and empathy. It is therefore critical that any new rules and guidance introduced by Ofcom do not have the unintended consequence of unnecessarily restricting freedom of expression, limiting the range of programmes we broadcast or adversely affecting the diversity of contributors. While contributors' care must always remain the primary concern, Channel 4 believe it would be detrimental to both broadcasters and society if regulations led to an unjustified reduction in editorial freedoms and a narrowing of the range of potential contributors.

We outline in detail examples of Channel 4's best practice in contributor care in our response to Question 8 of the consultation.

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<sup>2</sup> Page 9 of Ofcom's consultation on *Protecting participants in TV and radio programmes*

## **Consultation Questions**

### **Question 1:**

***Do you agree with our rationale for proposed new Rules 2.17 and 2.18? Please give reasons for your answer.***

Channel 4 agrees that it is essential that broadcasters and producers appropriately protect contributors in programmes. Channel 4 and our production partners take this duty of care extremely seriously and the welfare of our contributors is always our top priority.<sup>3</sup> At the very centre of this is ensuring that contributors give 'informed consent' for their contribution to the programme. Channel 4 is experienced in dealing with a wide range of programmes, producing challenging content with a variety of contributors.

Ofcom explains that there has been a rise in complaints in recent years focusing on the welfare of contributors. It also links the issue of audience concerns with creating a risk of undermining trust in broadcasting. However, we would note that there may be many reasons for the increase in complaints. For instance, it may simply be because there are more reality or constructed reality TV formats being produced. It may be because of orchestrated complaint campaigns. It may be because of the increased use of social media – which some types of programmes attract. When dealing with editorial content (as opposed to e.g. mobile service issues), an increase in the number of complaints does not, on its own, create a presumption that there is an issue requiring regulatory intervention. Ofcom also needs to consider (1) whether the Code already makes provision for such complaints to be made and (2) whether there has been an increase in the number of breaches of the Code which provides evidence that there may be issues that need addressing.

What's more, if an increase in complaints is to be a criterion for considering regulatory intervention then the precise nature of those complaints should be central to the assessment of whether new rules are needed and, if so, what their appropriate scope should be.

In the consultation document Ofcom cites three examples where a large number of viewer complaints were received, none of which were deemed to be breaches of the Code. These examples relate to incidents on *Celebrity Big Brother* and *Love Island*, and an incident on *Loose Women* which relates to a previous conflict between two contestants on *Celebrity Big Brother*. Ofcom also states, "*Programmes that focus on conflict between participants or expose a person's vulnerabilities often generate a significant number of complaints from members of the public expressing concern about the welfare of the contributors.*" Given that all of the examples provided relate

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<sup>3</sup> See also evidence to House of Commons Digital, Culture, Media and Sports Select Committee 'Inquiry into Reality TV' at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/digital-culture-media-and-sport-committee/reality-tv/written/103178.html>  
<https://www.parliament.uk/documents/commons-committees/culture-media-and-sport/190723-Alex-Mahon-Channel4-to-Chair-re-evidence-follow-up.pdf>

See also evidence provided by Betty (producer of *The Undateables*) at:

<https://www.parliament.uk/documents/commons-committees/culture-media-and-sport/Evidence/Reality-TV-inquiry/Background-paper-Betty-Undateables.pdf>

and Studio Lambert (producers of *The Circle*) at:

<https://www.parliament.uk/documents/commons-committees/culture-media-and-sport/Evidence/Reality-TV-inquiry/Background-paper-Studio-Lambert-The-Circle.pdf>

to reality TV formats, and programmes centered around conflict -which present particular challenges around duty of care- the wide-ranging nature of the approach proposed by Ofcom, which seeks to include a wider range of genres and programmes, seems disproportionate and difficult to justify by reference to such complaints.

Channel 4 is keen to see best practice in the care provided for contributors in programmes delivered across the industry, but we have a number of concerns about the approach in the consultation paper which could have unintended and detrimental consequences for broadcasters and broadcasting.

Amendments to the Ofcom Broadcasting Code must proceed from the statutory authority provided to Ofcom by Parliament. Ofcom acknowledges in the Broadcasting Code that it was required under the Communications Act 2003 (as amended) and the Broadcasting Act 1996 (as amended) to draw up the code for television and radio, covering standards in programmes, sponsorship, product placement in television programmes, fairness and privacy. Ofcom states that the Code has been “drafted in the light of the Human Rights Act 1998 and the European Convention on Human Rights (“the Convention”). In particular, the right to freedom of expression, as expressed in Article 10 of the Convention, encompasses the audience’s right to receive creative material, information and ideas without interference but subject to restrictions prescribed by law and necessary in a democratic society.” Reference is also made to Article 8 regarding the right to a person’s private and family life, home and correspondence; Article 9, the right to freedom of thought, conscience and religion; and Article 14, the right to enjoyment of human rights without discrimination on grounds such as sex, race and religion.

Any revisions to the Code must conform to the overriding principles under which Ofcom is obliged to perform its duties, namely that its *“regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed”*. (Section 3(3)(a) of the Communications Act 2003 (“the 2003 Act”))

Channel 4’s relationship of trust with our audience is of vital importance, and we remain committed to working with Ofcom to maintain this. However, we would note that Ofcom has no express legislative locus or regulatory remit in maintaining trust in broadcasting other than ensuring that factual matters are not presented in broadcast programmes in a materially misleading way. If Ofcom were to proceed as proposed, we are concerned that it will result in Ofcom acting beyond its powers and set a dangerous precedent as to how regulation should be approached in principle.

In terms of Ofcom’s rationale for drafting these rules in the way proposed, Channel 4 has some serious concerns about Ofcom’s approach. The consequence of the amendments proposed to Section Two of the Code, would be to give Ofcom the power to regulate the treatment of contributors involved in programmes (pre-transmission, during programmes, and post-transmission) through the alleged offence caused to viewers and listeners when they are concerned about the contributors’ welfare. Encompassing complaints about the actual treatment of participants in this section and allowing those other than the participants themselves to complain about this, in our view exceeds Ofcom’s powers and is not permitted by legislation. We believe that implementing them in this way would result in a misuse of Ofcom’s powers to regulate ‘standards’ objectives (aimed at protecting the audience from material it sees or hears) to provide a ‘duty of care’ to contributors (which is, and should be, covered under its ‘fairness and privacy’ duties).

Directly regulating the treatment of contributors through the potential offence to the audience is not only beyond Ofcom's jurisdiction but it is also not practical. The audience is (and would continue to be under the proposed rules) essentially unaware of any care taken by the broadcaster before and after the programme has been transmitted. For example, it is 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, yet the contributor is completely content with their participation. These circumstances illustrate the ineffectiveness of using audience offence as a proxy for potential harm to the participant.

## **Legislative framework**

### *General Duties*

Section 3 of the 2003 Act, requires Ofcom in carrying out its duties to have regard, among other things, to the vulnerability of children, and also *"of others whose circumstances appear to Ofcom to put them in need of special protection"*. Ofcom appears, however, to have interpreted this as meaning that *all* those who participate in programmes require *"special protection"*. We do not accept that this is the correct approach. Channel 4 accepts that, in certain circumstances, there will be some contributors who require such protection, but it should not be the presumption (or the starting point for regulatory intervention) that all programme contributors, in general, need *"special protection"*. In the vast majority of cases, autonomous adult contributors fully understand their participation, the informed consent they have provided and the risks (if any) involved.

In contrast, Ofcom has proposed a wide regulatory regime for contributors in programmes on the presumption that they are all (or are all likely to be) vulnerable. To appropriately fulfil its general duty -in particular, ensuring proportionality, and that regulation is only targeted at cases where action is needed - we believe Ofcom should not presume that all contributors are in need of special protection. Targeting rules and guidance at those cases that need it would result in a more proportionate approach.

In addition, this duty to have regard for contributors who need special protection is function informing, not function making. Therefore, when setting standards in Section Two of the Code (as permitted by section 319(2) of the 2003 Act) Ofcom should have regard to those in *"need of special protection"* in the context of regulating harm and offence to viewers. Any *"special protection"* which might be required for contributors themselves should inform Ofcom's regulation of fairness and privacy through Sections Seven and Eight of the Code as permitted by the Broadcasting Act 1996 (as amended) (*"the 1996 Act"*).

Under the 2003 Act and the 1996 Act (together *"the Acts"*), Ofcom is required (respectively) to draw up and, from time to time, revise a:

- code covering 'standards' for the content of programmes (section 319 of the 2003 Act); and
- 'code giving guidance' as to the principles to be observed, and practices to be followed in connection with the avoidance of unjust or unfair treatment or unwarranted infringement of privacy in, or in the obtaining of material to be included in, television and radio programmes (section 107 of the 1996 Act).

When drafting the standards code, the Acts set out clear objectives that must be achieved.

### *Standards Objectives*

Section 319(1) of the 2003 Act provides that:

*“It shall be the duty of OFCOM to set, and from time to time review and revise, such 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.” (emphasis added)*

Ofcom states in its consultation that it has drafted these proposed rules under its power set out in section 319(2) of the 2003 Act. Specifically, section 319(2)(f) which states:

*“that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material.” (emphasis added)*

The consultation document also states that, *“Viewers and listeners may be offended by what they perceive to be the lack of appropriate care for programme participants shown in challenging, distressing or disturbing circumstances.”<sup>4</sup>*

However, viewers are already adequately protected in this respect by Rule 2.3 of the Code. What Ofcom now appears to seek to do is to regulate the protection of contributors within provisions designed to protect viewers. In our view, this is not permitted by the legislation and including rules to this effect in Section Two of the Code goes beyond Ofcom’s remit to secure standards objectives as set out in Section 319 of the 2003 Act.

The standards objectives set out in section 319(2) of the 2003 Act are unquestionably aimed at the protection of the audience i.e. those watching and listening and concern the *“content of programmes”* (section 319(1) of the 2003 Act) i.e. what is transmitted. It does not and cannot extend to the off-screen activities and the conduct of the broadcaster.

Ofcom itself acknowledges this fact. In the Foreword to Section Seven (Fairness) of the Code it states:

*“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.” (emphasis added)*

It is therefore clear that section 319(2)(f) (and consequently Code Rules 2.1 and 2.3) requires Ofcom to protect adequately audiences from harmful or offensive material being transmitted. Given that the *“generally accepted standards”* objective refers to *“members of the public”* in general and not contributors to programmes, and it is focused on the *“content of services”* and not the making of programmes, it is clear

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<sup>4</sup> Page 21 of Ofcom’s consultation on *Protecting participants in TV and radio programmes*

that protecting individuals participating in programmes from harm falls outside the scope of s319.

(The regulation of those that participate in, or are otherwise affected by programmes, is conducted through Ofcom's fairness and privacy provisions, see below)<sup>5</sup>.

In developing these proposals, Ofcom has, in our view, incorrectly relied on another function or standard objective which is not provided for in legislation. Ofcom is concerned that the:

*"...audience trust in broadcasting could be undermined by significant concerns that a broadcaster has not taken appropriate care of its programme participants"*<sup>6</sup>

*"any significant viewer and listener concerns in this area create a risk of undermining audience trust in broadcasting"*<sup>7</sup>

In its consultation, Ofcom has also relied on the concept of *"applying a generally accepted standard of care to those who take part in their programmes"*<sup>8</sup>. This appears to misconstrue the concept of "generally accepted standards" as set out in section 319(2)(f) of the 2003 Act which requires Ofcom to ensure that broadcasters apply a *"generally accepted standard to the contents of its services so as to provide adequate protection for members of the public from the inclusion in such service of offensive and harmful material"*. (emphasis added) It is not required to apply or create a generally accepted standard of care for programme contributors.

Therefore, we believe that drafting 'standards' rules about the treatment of contributors in programmes is outside Ofcom's statutory remit and ultra vires.

### **Other implications of including these amendments within Section 2**

Beyond our specific concerns about Ofcom's jurisdiction, Channel 4 also has a number of other concerns about how Ofcom is proposing to introduce new 'standards' rules:

- A standards complaint can be made by any member of the public. This is logical when assessing the harm and offence caused to viewers by content included in a programme, and Rule 2.3 of the Code already provides an avenue for viewers to make a complaint if they are offended by what they perceive to be a lack of care towards a participant in a programme as broadcast. However, under the proposed new rules the person affected (i.e. the participant) appears to have no say over whether Ofcom investigates complaints relating to his or her treatment. A participant may, for a number of reasons, not wish Ofcom to investigate the matter but under the proposed rules it appears that Ofcom could override a participant's consent. It is unclear on what basis Ofcom would be entitled to do this, and it could result in significant issues concerning privacy and human rights.
- The relationship between a standards complaint under the proposed rules and

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<sup>5</sup> Parliament's intention is clear since the 1996 Act specifically refers to "the person affected" while the 2003 Act refers to "members of the public" being protected by "standards for the content of programmes included in television and radio services".

<sup>6</sup> Page 3 of Ofcom's consultation on *Protecting participants in TV and radio programmes*

<sup>7</sup> Ibid, page 4

<sup>8</sup> Op cit, *Protecting participants in TV and radio programme* page 5, and repeated on pages 6 and 8

the participant is unclear - would the participant, for example, be compelled to provide a statement? Would Ofcom seek input from them or would it be the responsibility of the broadcaster? Will Ofcom entertain complaints from pressure groups or others who have no connection to or authority from the contributors and whose only knowledge of the contributors' treatment is based on watching the programme?

- As the regulator, Ofcom holds an important and unique position between the broadcasters it regulates and the public. This means it plays an exceptional role in signaling to the public what is and is not a legitimate area for complaint, that should and will be looked at in detail. Given the time and resource involved in dealing with such complaints, Ofcom has a vital role in balancing the expectations of the public, contributors in TV programmes, and broadcasters. It needs to signal clearly what it is empowered to regulate and how, so as to give clear guidance to broadcasters as to the parameters of their responsibilities and not to give people undue encouragement to make complaints. To do otherwise could potentially place a disproportionate burden on both Ofcom and broadcasters and lead to false expectations on the part of the viewing public as to Ofcom's lawful remit in this area.
- With the exception of certain fairness and privacy issues, Ofcom's statutory remit is limited to material that is broadcast and protection of the audience (and not contributors).

#### **Channel 4's recommended alternative approach**

For the reasons stated above, Channel 4 believes that the addition of new rules in Section Two of the Code is not the appropriate way in which to address the care of contributors in programmes.

If Ofcom considers that sections Seven and Eight of the Code do not already adequately cover issues such as "due care" and "unjustified distress" of contributors then Channel 4 strongly believes that the appropriate and legitimate way to address this would be to amend these sections of the Code, and provide accompanying guidance, rather than amend Section Two: Harm and Offence.

The 1996 Act contains Ofcom's duties and powers with respect to those that participate in, or are otherwise affected by, programmes ("fairness and privacy"). As is explained in the introduction to Section Seven of the Code:

*"This section [fairness] 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 therefore evident that the treatment of contributors in programmes (and the associated duty of care) concerns matters dealt with in the 1996 Act. In fact, in Ofcom's first consultation on the Code in 2004, it stated:

*"The regulation of broadcasting regarding fairness is intended to protect those taking part in person in a programme (or who are otherwise directly affected) from being unfairly treated."<sup>9</sup> (emphasis added)*

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<sup>9</sup> Consultation on the proposed Ofcom Broadcasting Code, published 14 July 2004 page 57.

Section 107 of the 1996 Act states:

*"It 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, or*

*(b) unwarranted infringement of privacy in, or in connection with the obtaining of material included in, such programmes".*

The 1996 Act establishes that it is this 'code of guidance' which governs "...principles and practices in connection with programmes, or in the connection with the obtaining of material to be included in programmes".

It is clear from the statutory framework set out in the 1996 and 2003 Acts that Ofcom's powers to regulate this important issue of 'duty of care' is covered by its fairness and privacy duties, not its standards duties. Those affected by programmes (or those authorised on their behalf) are able to make complaints about their treatment in programmes. In particular, broadcasters must ensure that they provide due care to those participating in programmes to avoid any unfair or unjust treatment or unwarranted infringement of privacy. Broadcasters must also ensure that the consent which contributors give to participate in programmes must be informed consent. Whether the participant has given informed consent (e.g. have they been fully prepared for their contribution, are they aware of the potential risks, do they know what the programme fully entails) is at the heart of the duty of care which is the subject of this consultation.

Channel 4 believes that the Fairness and Privacy Sections of the Code are robust enough to deal with the issues under consultation. We do believe there would be merit in Ofcom providing additional guidance under those Sections to clarify the parameters of what is expected of broadcasters and Ofcom's approach regarding best practice. There have been a number of cases where Ofcom has received a complaint from someone participating in a programme who believed they had not been treated well or their dignity had not been respected and Ofcom has entertained the complaint under the fairness and/or privacy provisions of the Code and reached a decision.

Without prejudice to this, if Ofcom considers that sections Seven and Eight of the Code do not adequately cover issues such as "due care" and "unjustified distress" of contributors then Channel 4 strongly believes that the appropriate and legitimate way to address this would be to amend these sections of the Code rather than amending Section Two: Harm and Offence.

Furthermore, Channel 4's firm view, for reasons stated above, is that Ofcom cannot and should not initiate and consider fairness and privacy cases in the absence of a complaint from the person affected (or someone on their behalf). The 1996 Act states that the regulator can only consider fairness and privacy complaints on receipt of a complaint from the person affected (or someone making a complaint on behalf of the person affected). Section 111 of the 1996 Act provides that:

*"A fairness complaint [which is either a fairness or privacy complaint] ... 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."*

The reason is that only those who have been affected by a programme can reasonably judge whether they have been treated unfairly or unjustly or had their privacy unwarrantedly infringed. Otherwise, Ofcom would be able to initiate fairness and privacy cases without the consent of those affected, potentially overriding their consent to take part in a programme and raising serious concerns regarding their human rights.

Ofcom's continued reliance on the general duty set out section 3(2)(f) of the 2003 Act (entirely separate and distinct from its specific statutory obligations under sections 111 and 115 of the 1996 Act) to initiate fairness and privacy cases in the absence of complaint is both wrong in law and misconceived. Section 3 of the 2003 Act is evidently Parliament setting out Ofcom's general duties. If Parliament had intended Ofcom to initiate fairness and privacy investigations as a standard objective it would have included this in section 319(2) of the 2003 Act. The mechanism by which Ofcom's fairness and privacy function is met is under section 111 and 115 of the 1996 Act and flows from section 3 of the 2003 Act. Section 3 of the Act (as explained previously) does not stand alone.

Channel 4 considers that if Ofcom believes the current Code does not adequately cover a duty of care for contributors, then it should add to the Fairness and Privacy sections 'practices to be followed' which is in line with the legal framework (see response to Question 4 below for suggested amendments to the Code). Ofcom may also wish to provide guidance and best practice in this area for broadcasters, and this would be welcomed. However, we would note that any such guidance to the Code cannot of itself enlarge the boundaries of the Code to capture activities which Ofcom is not empowered by statute to regulate. Please see Channel 4's response to Question 7 regarding guidance.

### **Question 2 and Question 3:**

***Do you agree with the proposed meaning of 'participant' for the purpose of these rules? Please give reasons for your answer.***

***Do you agree with the proposed scope of these rules? Please give reasons for your answer.***

Channel 4 believes these questions should be taken together since they are intrinsically linked. Identifying who Ofcom is aiming to protect and in what programmes or circumstances is the key to ensuring that any new regulations are both proportionate and targeted as required by its statutory duties.

Ofcom proposes to define a participant as:

*"an adult who has agreed to take part in a programme in any way, except presenters and reporters."*

Ofcom proposed that the new rules should apply to:

*"programme content including, but not limited to, reality shows (including scripted reality shows), documentaries, news, current affairs, audience phone-ins, audience interaction shows, quiz shows, talent contests and other forms of factual and entertainment programming."*

*“...but not drama content including sitcoms and soaps.”*

As previously stated Channel 4 recognises and appreciates the issues which have led to this consultation and Ofcom’s proposals. However, it is essential that any proposed regulation is appropriately targeted at the issue it is aiming to address. It is of note that Ofcom singles out *“Programmes that focus on conflict between participants or expose a person’s vulnerabilities”* as an area of concern, but proposes to bring within the ambit of any new regulation all programming (with the exception of fictional programmes involving professional actors).

This approach would capture every single person (irrespective of the significance, form or type of contribution) who ‘agrees to appear’ in almost any programme. Given the range and detail of the guidance attached to these rules (see response to Question 7) this is disproportionate and, in fact, impractical.

Channel 4 is concerned that the definition of a ‘participant’ is imprecise and lacks clarity. There is no proper explanation to what constitutes *“agreed to take part”*. For instance, have those people who are ‘doorstepped’ agreed to take part? Are people caught in general view filming in public places deemed to have ‘agreed’ to take part? It seems unreasonable that the broadcaster could be held responsible for a person’s very short contribution on a matter that seemed at the time insignificant (see examples below). It would also be impractical, in such circumstances, for the broadcaster to stay in contact with a participant in order to provide support, where at the time of the contribution it seemed to both participant and broadcaster uncontroversial, trivial and insignificant. As Ofcom will be aware, over a year a broadcaster will feature literally tens of thousands of “participants” (as defined by Ofcom) in thousands of programmes. This gives rise to serious concerns as to how the proposed new rules would work.

The definition of “participant” makes no distinction between a professional media performer on an entertainment show, a vox pop on a news programme, a vulnerable adult being filmed in a social documentary, an expert being interviewed, a contestant on a quiz show or a member of the public chosen to be on a four week immersive constructed reality programme. Whilst we appreciate Ofcom states that the use of the term “due” is important in assessing what care might be appropriate, this is an incredibly complicated area and to create a blanket rule covering essentially all participation in all programmes (bar fictional) is unworkable unless accompanied by clear guidance to enable broadcasters to understand how Ofcom will approach the interpretation of “due” across such a vast spectrum of programming. Channel 4’s and its production partners’ experience and expertise in this area recognises that each category of participant and genre of programme requires different assessments and support, and it is for exactly this reason that Channel 4 takes a bespoke approach to care of contributors in its programmes.

To help illustrate how varied the nature of participation might be, the following are a few examples of what would be caught by Ofcom’s proposed definition of “participant”:

- An actor appearing on a talk show, who has had too much to drink.
- A vox pop on a news programme where the interviewee says something embarrassing and it goes ‘viral’ as a meme.
- A contestant on a quiz programme who gives a thoughtless answer to a simple question and gets ridiculed on social media.

- A caller to a phone-in show who makes a racist remark and is admonished by the presenter with the result that his friends ostracise him.

We trust that Ofcom would agree that the duty of care owed to such contributors beyond what is already provided in Sections Seven and Eight is very different to that owed to in such cases to those participating in *“programmes that focus on conflict between contributors or expose a person’s vulnerabilities”*.

We recognise that, understandably, there are concerns about the welfare of individual contributors in certain genres of programmes. However, we are unclear where the evidence is for extending these protections beyond what is already provided in Sections Seven and Eight of the Code to programmes such as news, current affairs, quiz programme and audience interaction shows. Ofcom has provided no reasons for including such a wide range of programme genres. For instance, including news, current affairs and investigative documentaries within the rules could have a seriously detrimental effect on such programming. There is, for example, no public interest test within the proposed new rules. The result could be a significant chilling effect on free speech if the proposed regulation unduly discourages producers from tackling sensitive subjects or inhibits news programmes from conducting appropriately rigorous interviews.

Intervention in programme genres like news, current affairs and investigative documentaries because contributors (or potentially the audience on their behalf, if Ofcom proceeds with its currently proposed rules) claim to have their “dignity” impinged or allege to have suffered “unjustified...anxiety” could have a serious negative impact on freedom of expression and the provision of high quality news which scrutinizes those in positions of power. This would be highly detrimental for Channel 4’s ability to deliver on our public service remit.

Channel 4 would also argue that news and current affairs programmes are a special case as they are different to other forms of programme in many ways. Their central purpose is to inform the public and enable them to participate in democratic society by making informed decisions on matters of politics and other areas that affect their lives. As such news and current affairs programmes are perhaps the most important form of public interest broadcasting. News is also different to other forms of programmes in terms of statutory and regulatory control. For example, in the requirement of due accuracy and due impartiality in news and the special provisions reporting elections. As such it is a distinct category, separate from other types of programming.

It is Channel 4’s view that any new regulation and definitions should be more clearly focused on targeting the real areas of concern. To this end, we consider that a reasonable and proportionate approach would be:

- The rules should focus on contributors who provide a ‘significant contribution’ (i.e. are not incidental to the programme);
- The rules should emphasise the importance of due care to those participating who appear to be vulnerable or who may become vulnerable through their participation in the programme; and
- The rules should define better what programmes are of main concern to Ofcom.

In conclusion, we would urge Ofcom to better identify what specific genres of

programmes these 'duty of care' rules should apply to as well which contributors are genuinely in need of protection as opposed to the current proposal which essentially covers all programmes (except fiction) and all contributors (except presenters, reporters and professional actors in dramas/sitcoms).

**Question 4:**

***Do you agree with the proposed wording for the new Rules 2.17 and 2.18? Please give reasons for your answer.***

Channel 4 recognises that much has changed since Ofcom's first Code was published in 2005. In particular, who takes part in programmes; evolving programme genres; and the social environment in which contributors make their contribution and are exposed to. As a result, we recognise that the Code must develop and adapt.

As stated above, we have serious concerns about both the meanings and scope of the rules which Ofcom is proposing. However, given the changing broadcast landscape we agree that the industry would benefit from further advice in this area.

As stated above, Channel 4 considers that placing any new rules in Section Two of the Code, in the manner proposed, is impermissible.

However, we are also concerned about the wording of the proposed rules, irrespective of where they are placed, which we believe relies on potentially vague concepts and therefore could be open to misinterpretation. We therefore outline below alternative wording which we believe would ensure the rules are more effective and proportionate.

In our view, the starting point should be that, unlike minors, the vast majority of adults appearing in programmes will have given informed consent and are not vulnerable. They fully understand the nature of their contribution. Currently, through Sections Seven and Eight of the Code, broadcasters are rightly required to ensure all contributors (save in certain specified circumstances) give informed consent. Nevertheless, even after informed consent has been obtained broadcasters must remain responsible pre-broadcast to ensure the welfare of the participant is cared for, that they continue to understand their contribution and how it may (in some circumstances) have effects on their life (positive as well as potentially negative). We also believe that in certain cases broadcasters and their production partners should have a significant role in post-transmission care. This a responsibility which Channel 4 takes extremely seriously. However, we question Ofcom's statutory locus in such activities (see response to Question 7).

*Proposed rule 2.17*

This states:

*Due care must be taken over the welfare, wellbeing and dignity of contributors in programmes.*

Channel 4 has concerns about the use of the terms "wellbeing" and "dignity".

Wellbeing is an amorphous concept that really relates to the mind. Oxford University Press's online dictionary, Lexico, defines wellbeing as "*the state of being*

*comfortable, healthy or happy*".<sup>10</sup> The UK mental health charity the Mental Health Foundation states "*it is important to realise that wellbeing is a much broader concept than moment-to-moment happiness. While it does include happiness, it also includes other things, such as how satisfied people are with their life as a whole, their sense of purpose, and how in control they feel.*"<sup>11</sup>

Channel 4 does not consider that a broadcaster should be responsible for ensuring the overall happiness and life satisfaction of a participant who agrees to take part in a programme. Wellbeing is a state of mind and broadcasters cannot guarantee or even attempt to ensure that its contributors are satisfied with their life. To put such obligations on a broadcaster when looking after a person who simply appears in a television show is not only wholly disproportionate it is unrealistic. We are also not sure how Ofcom, as a broadcast regulator, would be able to assess the "*wellbeing*" of a participant.

The use of the term "*dignity*" is also of concern to Channel 4. Again, Ofcom must appreciate that the informed consent provisions of the Code mean that the vast majority of adults participating in programmes do so with a full appreciation of the programme itself and how they may be treated. Dignity is a subjective concept and what may be considered to be dignified in one person's eye might not be in another's. There may be many people in the audience who consider that a participant has lost his or her dignity in the programme (perhaps because of the format of the show) and complain to Ofcom but the participant is more than content with their involvement. Not only does this highlight why setting any new rules in Section Two is inconsistent and unfeasible (and why the statutory framework is drafted as it is) but also that the term "*dignity*" is troubling in a rule concerning consenting adults. For example, there may be many viewers who consider those that take part in Channel 4's *Naked Attraction* to have lost their "*dignity*". However, so long as full informed consent has been given, it is not for the audience or Ofcom to override the consent of those contributors and assert that their dignity has been compromised. Minors, on the other hand, are unable to provide full consent and are not capable, in the same way as adults, to permit programmes to compromise their dignity. *Proposed rule 2.18*

This states:

*Participants must not be caused unjustified distress or anxiety by taking part in programmes or by the broadcast of those programmes.*

The wide genre of programmes that it is proposed this rule should cover makes the concept of "*unjustified distress or anxiety*" extremely difficult to regulate or understand. Ofcom must recognise the difference between regulating for minors involved in programmes and consenting adults. Constructed reality and reality television programmes frequently use devices that could cause an element of distress within the programmes. Whilst it would be irresponsible and potentially negligent to put children in such situations, adults may have specific reasons for agreeing to put themselves in such programmes. Given that most reality programmes are, in fact, an artificial construct of reality and adult contributors purposely put themselves in these situations, it is arguable that this proposed rule could capture any reality programme which causes distress or upset. Anxiety is a much lower threshold than distress – and

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<sup>10</sup> See <https://www.lexico.com/en/definition/well-being>

<sup>11</sup> See

<https://www.mentalhealth.org.uk/blog/what-wellbeing-how-can-we-measure-it-and-how-can-we-support-people-improve-it>

we consider it to be too low a threshold for regulatory intervention. Just appearing on a television show may cause some anxiety, but that may not prevent an adult wishing to appear on air.

Channel 4 considers that the term “unjustified” is more appropriate than “unnecessary”, since “unjustified” presupposes elements of judgement and balance i.e. a reasoned decision has to be made. In addition, some may argue that many sequences in broadcast shows are “unnecessary”, but Ofcom should not create a regulatory regime which allows others to make what are in fact editorial judgements which belong to the programme makers.

When considering amendments to the Code, we believe that Ofcom should focus on those who are – or may become – vulnerable. These are individuals who are at risk through their particular involvement in programmes. Broadcasters should have in place, as far as practically possible, processes and procedures to identify and support vulnerable contributors. Understandably the more ‘extreme’ the activities or programme may be (e.g. *SAS: Who Dares Wins*), the greater the protections and identification need to be.

#### *Channel 4’s proposals*

As stated in detail above (see response to Question 1), Channel 4 considers that the proposed Rules 2.17 and 2.18 are beyond the scope of Ofcom’s statutory remit and will not effectively ensure due and proportionate care of contributors in programmes. We strongly believe that any new regulation or guidance relating to ‘duty of care’ to contributors should be set in Sections Seven and/or Eight of the Code.

Ofcom will be aware that the Fairness and Privacy Sections of the Code already carve out:

- specific types of programmes or material (e.g. dramas and factually-based dramas; entrainment set-ups; sensitive places; reconstructions); and
- specific types of contributors (e.g. celebrities, those in the public eye, callers to phone-ins shows; people caught up in emergencies etc.)

We therefore believe that these sections provide a proper framework for defining i) the genres of programmes that should be caught and ii) the type of participant that should be subject to these rules.

Once these have been defined, Channel 4 would suggest the following:

Under practice to follow 7.3 concerning informed consent, add a bullet point explaining that a contributor should:

- *be informed about any potential risks or harms the broadcaster perceives may arise from their participation in filming the programme and its broadcast.*

A new 'practice to be followed' 7.4 under 7.3 concerning informed consent should be added:

*7.4 In addition to obtaining a contributor's informed consent (as outlined in 7.3), broadcasters and programme makers should ensure that they provide due care over the welfare of contributors (taking into account the nature and degree of their contribution, the nature and genre of the programme and its subject matter). Contributors should not be caused unjustified distress by taking part in or by the broadcast of the programme.*

It should be noted that currently in 'practice to follow' 7.3 Ofcom states that this applies "except when the subject matter is trivial or the participation is minor". Channel 4 considers this continues to be a useful and relevant qualifier for this issue of 'duty of care'. It would potentially prevent capturing certain contributions which the rules should not be aimed at (as referenced above) e.g. vox pops, a contribution from the audience in an entertainment show, phone-in callers, quiz contestants on local radio stations etc.

It should also be noted that both Fairness and Privacy Sections provide for an important public interest test which is absent in Section Two: Harm and Offence and which we strongly believe is essential. When dealing with contributors, Channel 4 considers this to be an important factor not only for the broadcaster but also the regulator when assessing cases.

**Question 5:**

***Do you agree that Rule 1.28 should be amended in this way? Please give reasons for your answer.***

Channel 4, for the reasons explained above, does not believe that the Code should use the term "wellbeing". It is not suitable as a regulatory term to judge broadcasters against – whether for adults or minors. We are, however, content for Ofcom to remove the phrase "physical and emotional", since we consider both those elements are captured in the general term "welfare". We therefore believe that "physical and emotional" are redundant since "welfare" covers these matters. Channel 4 believes that Rule 1.28 should read as:

*"Due care must be taken over the 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."*

**Question 6:**

***Do you agree that Rule 1.29 should be amended in this way? Please give reasons for your answer.***

For the reasons stated above, we consider that the word "unnecessary" should be replaced with the word "unjustified". Rule 1.29 would read as:

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

**Question 7:**

***Do you agree with the proposed approach to the Code guidance? Please give reasons.***

Channel 4 agrees that guidance to the Code offered by Ofcom could be a helpful mechanism for ensuring consistently high standards of contributor care across the industry. By providing examples of best practice and addressing the complexities around what “due care” means in different contexts, it could help to ensure that broadcasters and production companies are asking the right questions when assessing what is appropriate for a particular programme. It is always beneficial for the industry to share best practice and we welcome Ofcom’s continued practice of reaching out to both the broadcasting industry and experts to ensure that guidance is both practical and fit for purpose.

It is not possible to give a full analysis of the guidance as published in the consultation, since it only currently provides the principles. However, on the whole Channel 4 believes that Ofcom’s approach to the guidance is sensible. We welcome Ofcom’s assurance that the guidance would, *“make clear that the detailed steps and best practice it contains are not provided by Ofcom to indicate all the measures a broadcaster must take in each and every programme.”* As well as their acknowledgement that *“the steps a broadcaster may need to take in a programme where the subject matter is in the public interest, for example, in a news programme, are likely to be very different from the appropriate steps in an entertainment or reality format. It is a matter for the broadcaster to decide whether any or all of the steps, and/or any additional steps, are appropriate in each particular case. The guidance would also make clear that there could be some types of participation where none of the steps set out in the guidance are necessary.”*<sup>12</sup>

We agree with Ofcom that it is vital that neither new rules nor any guidance should be overly-prescriptive, and would emphasise that in our view best practice is about taking a bespoke, programme-by-programme approach, and continually reviewing and updating processes and protocols where necessary. As we have set out, the “due care” that is needed to any participant is dependent on a number of factors and there is a spectrum of programme genres and formats whose contributors require varying degrees of care. Channel 4 is concerned that making the scope of the proposed rules and definition of participant so broad has made it more difficult to talk usefully about best practice. We believe it is important that any guidance recognises the wide spectrum of participation in programmes and gives an indication of what types of participation in programmes are likely to be considered to be at either end of the spectrum. Ofcom should also be clear about how examples of best practice relate to certain types of participation and certain genres and formats of programme, and where they lie on the spectrum.

Ofcom also needs to exercise caution when developing guidance which inherently assumes a causal link between appearing on a programme and harm being caused. As we have previously stated, we are concerned that the starting point should not be to presume that all contributors are vulnerable and that involvement in programmes is

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<sup>12</sup> Page 16 of Ofcom’s consultation on *Protecting participants in TV and radio programmes*

intrinsically harmful. There may be any number of reasons that sometimes after a programme has been broadcast a participant acts in a particular manner. In many cases, it may be impossible to explain. So, as Ofcom acknowledge, broadcasters must not be “accountable for events beyond their control, or which may involve a range of complex causes.” As such we would ask Ofcom to ensure that the guidance does not assume that there is a causative link between all harm that befalls a contributor and their involvement in a broadcast. There may be a risk that detailed guidance in this area (and particularly any advice given post-broadcast) creates the impression that any harm or adverse effects occurring in someone’s life are to be blamed on the production of a television programme.

Ofcom must also appreciate that it is very difficult for anyone to predict the consequences of broadcasting any programme. This is especially so when trying to predict online reaction. Contributors can be generally alerted to social media or other consequences, but certain prediction cannot be guaranteed.

We would also note that the aim of Guidance is to support compliance with the Code rather than enlarging the boundaries of the Code itself, and it cannot empower Ofcom to regulate matters outside its statutory remit. We agree that post-transmission care of certain contributors is extremely important and broadcasters, where appropriate, must ensure they give these people the utmost attention when necessary. However, as discussed in detail in our response to Question 1, we are unclear as to how, unless it forms part of the informed consent process, Ofcom has a statutory remit to regulate the aftercare of contributors in programmes.

As Ofcom further develops the guidance it is important that there is close engagement with broadcasters to ensure an appropriately robust but also proportionate, pragmatic, flexible and holistic approach. We would suggest a joint meeting between Ofcom and the broadcasters to discuss this further before going on to draft and consult on guidance.

In summary, we would like Ofcom to bear the following in mind:

- The due care needed for contributors will vary depending on the genre of programming, the subject matter, the nature of the programme, the environment in which the participant is ‘placed’, the nature of the participation.
- Each participant is different, and the due care needed will vary depending on their character and personality. For instance, it may be extremely difficult to judge how long a programme maker should keep in contact with a participant after the programme has been aired and it would be unrealistic to prescribe a fixed period.
- The guidance must be proportionate. There may be programmes where the nature of the participation simply should not require background checks, engagement with experts and full risk assessments - irrespective of the possible consequences of taking part in a programme. There are some situations which broadcasters cannot foresee and they should not be held responsible for events outside their control which they could not reasonably be able to predict.
- The guidance should emphasise that broadcasters are free to make programmes with a range of contributors (including those who may be vulnerable).
- The guidance (and rules) must do nothing which might diminish the likelihood

of broadcasters making challenging programmes that fully reflect the diversity of the UK. It is important that any new regulations do not create an atmosphere where programme makers only focus on 'safe' contributors because either the potential risk of being found in breach or because the new safeguards imposed are unduly onerous. It would be a regrettable outcome - to say the least - if an unintended consequence of concern regarding 'duty of care' led to producers narrowing the pool of potential contributors.

- The guidance must not result in a 'box-ticking' exercise that leads to broadcasters being found in breach because they decided not to fulfil one specific exercise which they reasonably deemed not to be necessary or appropriate in a particular case.
- It is essential that there is reference to a public interest test in the guidance.
- It should also be recognised that there are occasions when participants do not want to receive support when it is offered. It is extremely difficult for production companies and broadcasters to force contributors to take the support that is provided or offered – particularly post-transmission.
- In setting this guidance (as well as any rules), Ofcom should not overlook the fact that participating in programmes can have a positive impact (and there is a danger of over-emphasising the negatives).

#### **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.***

##### *The importance of a bespoke, programme by programme approach*

As we have set out above, Channel 4's many years of experience delivering high quality contributor care has taught us that the best way to ensure best practice and continued improvement in contributor care policies is to develop bespoke individual protocols and processes on a programme by programme basis with the input of relevant experts where necessary.

As such 'best practice' is not about examples of individual approaches or practices that should be applied across the board, it is about how bespoke processes are developed, with the involvement of relevant experts where appropriate, and based on a careful assessment of the particular needs of contributors involved, the nature of the programme, the nature and severity of any risks involved, and the steps needed to manage those risks. We strive to ensure that such best practice is reflected across all of our programmes, but what that looks like in each case may be very different.

##### *The wide spectrum of programmes*

It is important that Ofcom's guidance properly reflects the wide spectrum of programming and the varying requirements of different, genres, formats and contributors. What best practice looks like at any stage of the process – before, during and post-production - will vary significantly depending on where in the spectrum of programming a programme sits, the precise format of a show, the contributors involved and the nature of their contribution.

At one end of that spectrum are high profile reality programmes like *The Circle*, *SAS: Who Dares Wins* and *The Island*. These types of shows will tend to present the greatest challenges around contributor care as their formats involve contributors being removed from their normal lives and support structures for a significant period of time and may also mean contributors are put in situations which make them more vulnerable. As a result, greater risk to contributors must be managed and more extensive protocols and support systems may be required.

Also at this end of the spectrum are programmes like *The Undateables* or *The Restaurant That Makes Mistakes* which involve more vulnerable contributors, as well as programmes like *24hrs in A&E*, which are purely observational, but deal with contributors at a time of medical crisis, making them more vulnerable. In these cases the increased vulnerability of the contributors mean that greater risks have to be managed and extensive contributor care protocols are required which are rooted in the needs of those contributors. Constructed popular factual programmes like *The Great British Bake Off* or *First Dates*, involve less risk, but are still towards the higher risk end of the spectrum, in part because their profile and subsequent impact that transmission can have on a contributor's life.

Given the higher level of risk that has to be managed in these cases these types of programmes have the most extensive and detailed protocols and as a result these are the areas in which guidance and the sharing of best practice are most likely to be beneficial. With this in mind, the majority of our examples will focus on programmes which we consider to be at the more challenging end of the spectrum.

Even when looking at these higher risk types of programme, they all have very different requirements, and have to overcome particular risks that their formats and the nature of their contributors present. For example, *SAS: Who Dares Wins* has a Trauma Awareness Protocol as well as particularly extensive psychological monitoring we believe this is an example of best practice in a format where the risk to participant welfare is particularly high and need extensive monitoring.

High-profile series like *The Great British Bake Off* or *The Circle*, where contributors are involved for a number of weeks and gain significant public attention, require considerably more focus on press and social media training. The approach taken on these shows will represent best practice in this area, but would not be necessary on a show like *Location, Location, Location*. Even *First Dates* and *First Dates Hotel* require different, bespoke protocols that reflect their different formats and requirements of contributors.

Beyond the format, the needs of contributors are also key, with shows like *First Dates*, *The Restaurant that Makes Mistakes* and *The Undateables* all requiring different approaches to contributor support which are rooted in their contributors' needs. A bespoke approach enables the broadcaster and production company to consider all of these elements in order to make a carefully balanced assessment of the risks involved and create a package of measures designed to manage these risks.

We believe that the following are all examples of best practice, but none is transferable across the board.

*The Circle*

High profile reality TV shows like *The Circle* require more extensive and complex protocols for a number of reasons: They involve contributors leaving their day-to-day lives and support structures to enter a carefully constructed environment involving a degree of artifice, conflict and unpredictability; they involve a live element which means contributors may find out difficult information live on television; and they generate significant attention on both social media and in the press which will impact on the contributors upon leaving the show.

As such, this type of programme will need extensive, wide ranging and detailed protocols to manage all of these elements. Although the exact protocols and packages of support will each be different for each programme, for constructed or reality programmes involving contributors they will routinely include the following:

- Pre-production assessment and screening of contributors
- Transparent communication from the production companies to the contributors about the nature and intent of the show
- Ongoing support in-show contributor support during filming
- Appropriate after-show contributor support

The protocols for *The Circle*, which we believe reflect current best practice for this particular show in the context of this genre, at every stage of the process include: Extensive pre-production checks including a GP letter and an assessment by an accredited psychiatrist; Mental Health First Aid training for members of the production team who have direct contact with and responsibility for the contributors; daily welfare meetings throughout production and welfare logs kept for all contributors detailing their food intake, exercise, sleep and general wellbeing; a structured routine for contributors including off-camera breaks and 'down-time days'; a package of aftercare including social media, PR and career advice; and proactive contact for at least 12 months after the show. A summary of the season two protocols was provided to the DCMS Select Committee<sup>13</sup> and we would encourage Ofcom to consider it as an example of best practice for this type of programme.

### *The Undateables*

*The Undateables* is a programme which deals with many more vulnerable contributors who often have particular support needs. As such they have very detailed protocols in place which are tailored right through the process to manage the unique risks involved in making the programme. *The Undateables* approach illustrates how delivering on contributor care starts right from the beginning of the casting process, from outreach through applications, phone calls, auditions and, of course, psychological assessments, which routinely play a key role. The protocols represent best practice in a range of ways. Perhaps most notably, *The Undateables* crew includes a unique 'Care Bear' role who is an ongoing point of contact and support for all contributors past and present. Given the nature of the show they prioritise continuity, ensuring a lengthy handover between Care Bears and using the same clinical psychologist for every series over seven years.

Again, a summary of the welfare protocols for *The Undateables* was shared with the DCMS Select Committee and is available to Ofcom as an example of best practice<sup>14</sup>,

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<sup>13</sup> Evidence provided by Studio Lambert (producers of *The Circle*) at: <https://www.parliament.uk/documents/commons-committees/culture-media-and-sport/Evidence/Reality-TV-inquiry/Background-paper-Studio-Lambert-The-Circle.pdf>

<sup>14</sup> See evidence provided by Betty, producer of *The Undateables* at:

alongside further detail on staff training which was provided to the Committee in Channel 4's follow up letter.<sup>15</sup>

#### *24hrs in A&E and informed consent*

In order to support their contributors, *24hrs in A&E* not only employs a dedicated six-person patient liaison team whose sole job is to look after patients throughout the process, but also a dedicated staff liaison team whose sole purpose is to look after clinical staff throughout the production, transmission and post-transmission.

As an observational documentary show, robust procedures for ensuring informed consent are central to appropriate contributor care. Ensuring informed consent is more complex when dealing with contributors whose situation means they are more vulnerable and in order to ensure that no one appears in the programmes without their fully informed consent the programme uses strict protocols that have been signed off by the hospital and the broadcaster. Where the most poorly and injured patients are treated, this involves a two-tier consent process for patients – consent to film and a secondary consent to broadcast. Throughout the process the contributors have access to the patient liaison team who are contactable at any time and who will talk through any concerns or potential impact of appearing on the series. Before transmission and where appropriate, 24 hours in A&E offers clinical psychological assessments for vulnerable patients or patients they may have concerns about. If advised that the patient isn't suitable for inclusion, they will not be included. *24 hours in A&E* may feature patients with mental health needs but only provided they have fully informed consent, a third party clinical psychological assessment and assessment of suitability and support from their GP, mental health support workers and family or friends where appropriate. The programme has won a MIND award for the portrayal of mental health on television in 2015.

Channel 4 believes *24hrs in A&E*'s approach constitutes an example of best practice, particularly around informed consent in an observational documentary involving heightened vulnerability, but such protocols are not required in many other cases where obtaining informed consent is more straightforward. However, in all genres of programme which involve contributors, informed consent is also a key part of contributor care and we have worked with production companies and, where necessary, experts to develop mechanisms which are appropriate and sufficiently robust for that particular programme to ensure we get this right. This includes other more complicated or difficult cases – for example when making programmes like *The Undateables* which involves contributors with learning disabilities and neuro-diversity or *Dementiaville* and *The Restaurant That Makes Mistakes* which involve contributors living with dementia.

Across all of our programmes Channel 4 are committed to ensuring that contributors are fully informed of the nature of the programme. We require consistent programme descriptions on release forms and other documents so that the nature of the programme is always clearly and consistently set out. Where documents are long and complex an on-camera explanation and discussion may be required to ensure the contributor fully understands what they are agreeing to. Informed consent must also

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<https://www.parliament.uk/documents/commons-committees/culture-media-and-sport/Evidence/Reality-TV-inquiry/Background-paper-Betty-Undateables.pdf>

<sup>15</sup> See: <https://www.parliament.uk/documents/commons-committees/culture-media-and-sport/190723-Alex-Mahon-Channel4-to-Chair-re-evidence-follow-up.pdf>

be ongoing, throughout the process and in certain albeit rare cases that may include by providing the option to withdraw consent at an appropriate juncture in the production process. For example, on *Naked Attraction* contributors are given the opportunity to withdraw after the audition which involves a dry run where they get naked for the first time. With this show the production company specifically shoot 'spare' rounds meaning that should an issue arise with a contributor post filming they have the option not to air a specific episode if deemed necessary.

However, it is important to emphasise that for programme making to be viable, and a diverse range of contributors to take part in programmes, the threshold for withdrawing consent late in the process must be appropriately high. What that means will vary considerably depending on the programme. It would be extremely detrimental to broadcasters, production companies and the viewing public if changes to the rules created a situation where contributors could withdraw from a programme late in the process without meeting the appropriate seriousness threshold. This would undermine the informed consent process and make programme making much riskier, less financially viable and inevitably more cautious in approach. There are some concerns within Channel 4 that this could be an unintended consequence of Ofcom's proposals.

#### *The use of experts*

When assessing the appropriate level of contributor care in relation to a particular production, Channel 4 not only draws on the prior knowledge and experience of the production company, Commissioning Editor, Programme Lawyer, and the wider Legal & Compliance and Commissioning teams, but we also often utilise other external sources of expertise depending on the nature of the programme. This has included specialist clinicians, psychologists, psychiatrists, experts in the care of the elderly, experts in child care and education, trauma specialists, occupational health specialists and experts in security and health and safety. Expert social media guidance may also be provided to contributors.

We and producers often consult charities and interests groups working in a particular field, and other professionals with relevant expertise in the subject matter of the programme. For example, in the case of *The Undateables*, producers work with independent dating experts who specialise in running agencies for vulnerable and/or disabled single people. Or on *The Restaurant That Makes Mistakes* Channel 4 and the producers worked very closely with the Alzheimer's Society to ensure best practice before, during and after the show with contributors having since spoken publicly about the production's outstanding contributor care.

In some cases, bespoke working groups of professionals are assembled to guide the production company. For example, on *Old People's Home for 4 Year Olds* a group consisting of experts in geriatric care, occupational therapy, and child education and welfare was created.

We, in collaboration with the production companies we commission, decide which type or types of professional are most appropriate for each individual show on a case by case basis and with consideration of the contributors involved, and we use qualified professionals with extensive relevant professional experience. All of our *psychologists* are HCPC accredited and our psychiatrists are GMC-registered and members of the Royal College of Psychiatrists. There is no mandatory accreditation required for psychotherapists, but the vast majority of those we use are accredited

with one of the key bodies associated with the profession, which include the UK Council of Psychotherapists, the British Psychoanalytical Council and the British Association for Behavioural and Cognitive Psychotherapies. We have, on occasion, used a professional who was not registered if they have considerable clinical experience and particular expertise relevant and appropriate for that particular role.

#### *Reporting processes and escalation of issues*

Even with the most thorough risk assessment and the robust, bespoke protocols and processes in place, it is impossible to predict and guard against every possibility, so unexpected issues will inevitably occur. Best practice is also about having the right measures in place to quickly identify and deal with problems when they do arise and where possible improve the protocols based on the learning they provide.

In all areas of contributor care, both before, during and after transmission, a key part of Channel 4's oversight is ensuring suppliers have processes to make sure that any issues are logged and routinely flagged with senior executives and Channel 4 representatives promptly when they arise. Many Channel 4 shows maintain daily "welfare", 'happiness', 'duty of care' or 'cause for concern' logs which document support provided, questions, concerns or other issues. Where necessary productions may also hold regular duty of care meetings where these logs are reviewed. Any issues arising are flagged to senior staff on the production and to Channel 4, and the Channel is kept up to date on how they are being dealt with.

#### *Post-filming and post-transmission aftercare*

Appropriate processes to support contributors both after filming and after transmission are also key. During filming appropriate support is provided by designated individuals and/or teams within the production company, as well as by psychologists and other experts where appropriate. The package of post-filming and post-transmission care is also developed according to the needs of each individual programme. Depending on the nature of the show it may involve processes for enabling contributors to view episodes, briefings on social media, press and PR with allocated specialist contacts to answer queries in these areas, regular contact with a key member/s of the production team, advice on managing their future careers and finding an agent, and access to a psychologist post-filming and post-transmission as needed. At times a certain number of sessions with a psychologist will be mandated as a condition of taking part in the show, for example *The Island* are now introducing this after their latest review of their protocols. Due to the nature of the show, reality programme *SAS: Who Dares Wins* involves particularly extensive psychological debriefing and follow up for all contributors to monitor for any delayed signs of trauma, an Acute Stress Reaction or PTSD.

As long as there has been no cause for concern, at the appropriate point there is usually a gradual winding down of contact with contributors over an extended period. However, some shows including *Made In Chelsea* and *The Undateables* have continued to provide a point of contact on a more ongoing basis. The length of time for which contact continues will naturally vary depending on the nature of the programme and the contributors' role, however for key reality based shows we will now be ensuring that producers maintain proactive contact with key contributors for at least a year following broadcast and offer appropriate professional support to them over this period. This already happens on many shows, but we have identified it as an

example of best practice for reality shows that we can make routine for certain key shows.

### *Repeats*

Typically, production companies will have asked contributors to sign release forms permitting uses of the programme outside the UK (consistent with their ownership of secondary rights). Producers need to accommodate changes in situation and respond where further transmission may adversely affect contributors and to put in place particular steps in relation to repeats of programmes. For Channel 4 repeat broadcasts for example on *The Undateables* contributors are contacted whenever an episode or clip in which they appear is being shown, in order to ensure that they are prepared and comfortable. This is not a legal requirement, as the production company have release forms allowing worldwide distribution in perpetuity, but rather something the company sees as a key element of contributor care. For many programmes across all genres before repeats production companies are asked to advise Channel 4 if there are any contributor issues that may be impacted by the proposed broadcast. We have dealt with situations in other programmes where much further down the line circumstances have changed for a contributor or their family, so we have ceased repeats of a number of episodes of our shows where we felt that the airing of a repeat might cause distress. Normally these requests would come via the contributor's contact at the production company, but should it be at a much later date when the contributor is no longer in touch with their prior contact they are also able to make contact via the Channel 4 Viewer Enquiries number.

### *Ongoing review*

Best practice is also about the ongoing review of protocols and processes in light of new learning and changing expert thinking in particular fields, to ensure that they remain comprehensive and robust. We do not claim perfection and believe that it is important to learn not only from our own experience but from the experience of others operating in this field. To this end, Channel 4 undertook a broad review of contributor support and aftercare earlier this year looking at a range of our programmes.

On the basis of this review we are enhancing our approach by putting in place some additional measures, including the introduction of workshops with a range of relevant experts to build on existing training and ensure that the individuals who oversee our contributor care arrangements are kept abreast of current developments in best practice.

### *Understanding contributors' experience*

The experience of contributors in programmes can be an important source of learning and improvement. For example, after broadcast every contributor in *Naked Attraction* will receive a phone call to see how they feel about their involvement in the series. The production company have used this feedback to improve their approach to contributor care.

In the context of this debate it is important to remember that taking part in a programme can also have a very positive impact on contributors. For example, Sean, one of the contributors on *The Restaurant That Makes Mistakes* who is living with dementia said of the experience, "Working in the restaurant was excellent. It has

changed my whole perception. I thought that, with dementia, working was a closed door. Everyone who did it had a positive outcome. It's changed our mood, our cognition, the way we think." Another recent Channel 4 series which has not only had a real impact with viewers but has also had a demonstrably positive impact on the contributors involved is *Naked Beach*. The show aims to tackle issues regarding body image by testing the theory that spending time with normal naked bodies of all shapes and sizes can help to improve body confidence. As part of the process academics scored contributors body image before, during and after filming. They found that as a result of taking part contributors experienced a considerable, long lasting and statistically significant improvements in their body image, as well as in their self-esteem and life satisfaction. This improvement was still in evidence a year after filming had ended. One contributor said of the experience, "Everything that the show did has really helped me and should be available on the NHS, I am a completely different person - the show kind of saved my life."

These examples also show why it is vital that production companies and broadcasters are empowered to include and support a diverse range of contributors, rather than being encouraged to take a prohibitively cautious approach to including people with vulnerabilities. The best practice examples we have discussed show that the challenges around working with contributors with particular needs are not insurmountable and the public value of tackling challenging issues, promoting inclusion, breaking down stigma, and showcasing a diverse range of contributors each with their own life experiences and, to an extent, vulnerabilities, is of real importance. To unduly restrict the involvement of certain people - for example those who have previously suffered from a mental health condition - from taking part in a TV programme would not only be discriminatory, but by limiting the range of stories and experience shown on television, and the empathy, understanding and conversation those stories have the power to generate, it would be detrimental to both viewers and society as a whole.