

## Protecting participants in TV and radio programmes: Further consultation on new broadcasting rules

ViacomCBS Networks International

### Consultation questions

#### Overview

1. We broadly welcome Ofcom's revised approach to the new rules designed to protect participants which takes into account many, but not all, of the concerns raised in our first submission.
2. The new approach does, in parts, better reflect a more proportionate and targeted approach to the way in which broadcasters and programme makers exercise due care towards vulnerable participants.
3. However, we still have concerns about the scope of the new rules in relation to non-vulnerable participants; the extension of the definition of "*vulnerable people*"; the necessity for new rule 2.17; the inclusion of paid professional participants; the application of the new rules to all programme genres; and the practical application of the rules in relation to acquired content and repeat broadcasts.
4. We believe that it is essential that the new rules and guidance provide an appropriate balance between protecting vulnerable participants and protecting the right to freedom of expression of broadcasters and programme makers; the audiences' right to receive information and ideas; and the right of the participants to impart their story to the audience. At present the new rules still places a disproportionate burden on broadcasters and programme makers.

**Question 1a:** Do you agree with our proposed approach to the additional measure of informed consent set out in Practice 7.3?

1. We agree in principle with Ofcom's proposed approach to add the additional measures to informed consent set out in Practice 7.3. However, we do not believe that Ofcom have achieved a targeted, flexible and proportionate approach in the way the new measures are currently framed.
2. The new approach is consistent with the well-established principles concerning the fair treatment of vulnerable participants and in many cases is already applied as a matter of good practice. In these cases the risk of harm to those individuals is heightened and therefore there is a greater onus on the broadcaster and programme maker to ensure that these potential participants understand the potential negative consequences and any steps the broadcaster and/or programme maker intends to take to mitigate these, to enable the individual to make an informed decision to take part.

3. However, we do not believe that the same heightened considerations apply in relation to potential participants who are neither vulnerable nor at risk of harm as a result of taking part in the programme. It would be impractical and unduly onerous to impose an obligation on broadcasters and programme makers of informing every potential participant about every conceivable negative consequence that may affect their welfare, arising from their participation. As Ofcom recognises these participants are capable of making their own independent decisions about their participation and therefore we do not believe they should be treated in an overly protective manner. To do so would impose a disproportionate additional burden on broadcasters and programme makers.
4. In these cases it would place an almost impossible task on broadcasters and programme makers to have to inform potential participants of all “*potential*” negative consequences which “*may affect*” their welfare (in so far as these can be reasonably anticipated at the time).

Under the proposed new measures a broadcaster and programme maker would have to inform all potential participants of all potential risks, no matter how remote, if it may affect their welfare. Failure to do so would run the risk of the participant withdrawing their consent before broadcast and/or a fairness (duty of care) complaint being upheld post-broadcast.

There is also the danger of causing such participants to be unduly concerned about negative consequences that may well be remote and in doing so deterring them from taking part in programmes.

5. We therefore propose that the new measures are limited only to potential participants who are either vulnerable people or who might be at risk of harm as a result of their participation in the programme. Our proposed wording is set out below in answer to Question 2a.

**Question 1b:** Do you agree with our proposed approach to the new Practice 7.15?

1. We agree in principle with Ofcom’s proposed approach to the new Practice 7.15. However, we are concerned at the proposal to broaden the widely understood definition of “*vulnerable people*”; and the practical problems raised in our first submission about broadcasters and programme makers ability to access a potential participant’s welfare information.
2. The term “*vulnerable people*” is defined under Practice Rule 8.21 and 8.22 and is well-established by reference to the physical and mental health of an individual. Ofcom now propose to broaden this definition to include other factors that may be relevant in the context of Practice 7.15 including an individual’s “*past or current personal circumstances or experiences*”. However, this criteria is in our view too broad and uncertain, and it extends the scope of ‘vulnerable people’ beyond that which is widely understood.
3. We are concerned that this enables the scope of what is a vulnerable person to be open to abuse by participants who are not vulnerable. As we raised in our first submission, in our experience it is not uncommon for a small minority of such participants or their advisors to claim that their client is potentially vulnerable as a means to exert editorial control, to

secure their withdrawal from a programme or to prevent a programme being broadcast. It is therefore important that any factors that may be relevant to determining whether an individual is a vulnerable person are clear and unambiguous.

4. We also believe that this new wording places a disproportionate burden on broadcasters and programme makers to undertake a level of due diligence, which while appropriate in some genres, would be unduly onerous and may inhibit potential participants in other genres. For example such factors are often incorporated within the due diligence procedures of a constructed reality show, but are more difficult and potentially invasive when looking at potential participants in other genres e.g. an access documentary about a national institution or participants in an afternoon quiz show or property programme.
5. Our proposed amendment to Practice 7.15 is set out below in answer to Question 2b.

**Question 1c:** Do you agree with our proposed approach to new Rule 2.17?

1. We do not agree with the proposed approach to new Rule 2.17. We believe that this new addition is unnecessary as the audience is already adequately protected under existing Rules 2.1 and 2.3 in relation to material that may cause offence arising from “...*humiliation, distress, violation of human dignity, discriminatory treatment...*”.
2. However, if Ofcom believes that these general requirements are inadequate we would propose that the proposed new rule 2.17 wording should be incorporated within the existing Rule 2.3 for both completeness and to ensure that broadcasters and programme makers can avail themselves of the context justification requirements within Rule 2.3.
3. Our proposed amendment to Rule 2.3 is set out below in answer to Question 2c.

**Question 2a:** Do you agree with the proposed wording of the additional measure of informed consent set out in Practice 7.3?

1. We have set out above (in answer to Question 1a) our concerns about Ofcom’s approach to the additional measure of informed consent set out in Practice 7.3.
2. We would propose that the current draft wording is amended as follows by the addition of the underlined section below:

**“and in the case of vulnerable people or those who appear to be put at risk of harm as a result of their participation in the programme, they should**

*be informed about potential negative consequences arising from their participation in the programme which may affect their welfare (insofar as these can be reasonably anticipated at the time) and any steps the broadcaster and/or programme maker intends to take to mitigate these.”*

**Question 2b:** Do you agree with the proposed wording of the new Practice 7.15?

1. We have set out above (in answer to Question 1b) our concerns about Ofcom's approach to the new Practice 7.15.
2. We would propose that the current draft wording is amended by the deletion of the words underlined below:

*"See Practices 8.21 and 8.22 for the meaning of "vulnerable people". In addition to the examples in this meaning, other factors that may be relevant in the context of Practice 7.15 include a person's age [, past or current personal circumstances or experiences,] or their physical or mental health."*

3. We have no objection to this wording being incorporated within the accompanying Guidance provided that it was not linked to the definition of "vulnerable people".

**Question 2c:** Do you agree with the proposed wording of the new Rule 2.17?

1. We have set out above (in answer to Question 1c) our concerns about Ofcom's approach to the new Rule 2.17.
2. We would propose that the current proposed wording of Rule 2.3 be amended as follows:

*"In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context (see meaning of "context" below). Such material may include, but is not limited to, offensive language, violence, sex, sexual violence, humiliation, distress, violation of human dignity, discriminatory treatment or language (for example on the grounds of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation, and marriage and civil partnership), **and treatment in programmes of vulnerable people and those who appear to be put at risk of harm as a result of their participation in a programme.** Appropriate information should also be broadcast where it would assist in avoiding or minimising offence."*

**Participants and Programme Genres**

1. We note that Ofcom have reverted to the definition of a "programme participant" as set out in section 103 of the Broadcasting Act 1996 ("a person who appeared, or whose voice was heard, in a programme".) We remain concerned about the very wide scope of this definition and Ofcom's proposal not to exclude certain categories of professional participants.
2. We remain of the view that professional paid contributors such as reporters, professional panellists and actors should be excluded from this definition for the purposes of Practice 7.15. Ofcom acknowledges that they would expect such individual's welfare to be protected contractually. However, Ofcom have stated that such participants would still be entitled to make a complaint under Ofcom's fairness procedures but they would carefully assess any

complaint. We disagree with this approach which is neither proportionate nor targeted at the underlying issue of protecting vulnerable participants. This category of participants is already afforded a greater degree of protection than other participants and therefore their inclusion within the new rules is neither proportionate nor targeted at any existing concerns.

3. In Ofcom's first consultation paper it agreed to exclude presenters and reporters from the definition of participants on the basis that their circumstances are very different from other adults who participate. We agreed with this approach and proposed that this exception should be extended to all professional participants such as experts and those who hold public office, professional panellists and talking heads. For example, an interview in a news programme involving an MP or other public or professional figure discussing current Government policy, or a factual programme interviewing an expert on their professional opinion or a comedy panel show featuring stand-up comics. These are just a few examples of the type of people who are professional participants and who are either paid to appear or whose job involves engaging with the media and who often have their own media/PR advisors or agents or contractual safeguards to protect their interests. Their knowledge and understanding of programme production and these safeguards set them apart from other participants and they should therefore be excluded from the definition of participants in relation to Practice 7.15.
4. Ofcom also acknowledged in the same consultation paper that certain programme genres namely drama including sitcoms and soaps should be excluded from the new rules. We also proposed that feature films and music videos (which are often dramatised and feature professional artists and other participants who are paid to perform) should be excluded. Ofcom have indicated that they do not intend to specifically exclude any programme genres under their new approach. However, we remain of the view that these specific genres should be excluded from the new rules as the participants welfare is already protected by existing contractual and other health & safety safeguards. We do not believe that the inclusion of these genres is proportionate nor are they targeted at addressing specific concerns around these types of programming. We remain of the view that these genres should be excluded from Practice 7.15.

## **Guidance**

1. We still have serious concerns about the applicability of the proposed principles to repeat broadcasts that may take place years after the first transmission, acquired content and programmes which include archive or third party materials which have living individuals in them but where the relationship between broadcasters and participants is very far removed (perhaps also removed from the original production company) and knowledge of their circumstances may well be unknown. In certain circumstances, any duty of care or causal connection is perhaps remote, tenuous or non-existent. We reiterate that due care over the welfare should not be an open-ended requirement and we welcome Ofcom's previous acknowledgement that, in particular, once a programme is broadcast the nature of any duty of care owed to participants fundamentally shifts and reduces. Whilst we anticipate that all broadcasters will already have measures in place to mitigate risks in relation to these matters, we consider that guidance is needed and that the length of the applicability in terms of due care are clarified. We would also propose that the new Practices and Rules are not applied retrospectively and that broadcasters are given adequate time to consult on the new guidance to ensure that their internal procedures reflect the new rules and guidance.

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2. We welcome Ofcom's acknowledgement that the proposed risk matrix is not a tick box list of steps broadcasters must take to ensure due care is provided to participants. We believe this should be made clear in the Guidance that the function of the risk matrix is to provide practical guidance.