

Ofcom's new measures to protect programme participants

Ofcom has updated its guidance on Section Seven (Fairness) of the Broadcasting Code¹ to help broadcasters comply with new measures to protect people who take part in TV and radio programmes. The new measures, which were announced in December 2020 and came into effect on 5 April 2021, are aimed at ensuring that broadcasters take “due care” of people who might be at risk of significant harm as a result of taking part in a programme.

The provisions are designed, in particular, to protect contributors who are not used to being in the public eye, and to bolster existing protections for vulnerable people. In its updated guidance, Ofcom sets out how it envisages that the new fairness practices in Section Seven should be applied. It includes a suggested “risk matrix” to help with assessing and managing the level of care required for participants in different types of programmes.

Background

Under Rule 7.1 of the Code, broadcasters are required to avoid unjust or unfair treatment of individuals or organisations in programmes. Section Seven of the Code goes on to set out a non-exhaustive list of “practices to be followed” by broadcasters to avoid unfair treatment of persons taking part in or otherwise directly affected by programmes. In the introduction to Section Seven, Ofcom makes it clear that following the practices will not necessarily avoid a breach of Rule 7.1, and that failure to follow the practices will only amount to a breach where it results in unfairness to a person in the programme as broadcast. It stresses that the Code does not and cannot seek to set out all the “practices to be followed” to avoid unfair treatment.

Practice 7.3 provides that, where a person is invited to make a contribution to a programme (except when the subject matter is trivial or their participation minor, or it is justified in the public interest not to do so), they should normally, at an appropriate stage, be provided with specific information about the programme, including its nature and purpose, to ensure that their consent to participate is “informed consent”. Ofcom has now added a measure that contributors should “be informed about potential risks 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”.

Ofcom has also introduced a new practice to be followed (at Practice 7.15), stating that broadcasters should take due care over the welfare of contributors who might be at risk of significant harm as a result of taking part in a programme for reasons including that, for example:

- they are considered a vulnerable person;
- they are not used to being in the public eye;
- the programme involves being filmed in an artificial or constructed environment;
- the programme is likely to attract a high level of press, media and social-media interest;
- key editorial elements of the programme include potential confrontation, conflict, or emotionally challenging situations; or
- the programme requires them to discuss, reveal or engage with sensitive, life-changing or private aspects of their lives.

¹ https://www.ofcom.org.uk/_data/assets/pdf_file/0017/24713/section7.pdf.

Practice 7.15 goes on to state that broadcasters should carry out a risk assessment to identify any risk of significant harm to the contributor, unless it is in the public interest not to do so, and that the level of care that is due to the contributor should be proportionate to the level of risk associated with their participation in the programme.

Managing potential risks

In its guidance on the new addition to Practice 7.3, Ofcom explains that, where risks to a programme contributor have been identified, they should be provided with relevant information about those risks and any steps that will be taken to mitigate them. This information should be communicated clearly at the earliest stage of production and may need to be updated during subsequent stages, particularly where the risks may change significantly as the production evolves. Ofcom suggests keeping a written record of such discussions.

Ofcom acknowledges that programme makers will not be able to predict every potential risk that might affect the welfare of a contributor. It also recognises that there may be occasions when it will be unnecessary or impractical to inform the contributor of potential risks, such as in the production of many news and current-affairs programmes and other programmes where it is in the public interest not to do so. Nevertheless, Ofcom is clear that consideration should be given to carrying out a risk assessment at an early stage to identify what steps can be taken to mitigate those risks.

Due care over the welfare of contributors

In relation to new Practice 7.15, Ofcom explains in its guidance that – as in other sections of the Code, e.g. Section Five (due impartiality and due accuracy) – “due” means adequate or appropriate to the subject and nature of the programme. So the level of care will depend on the relevant circumstances, particularly the contributor’s circumstances, the nature of their contribution, and the nature and genre of the programme. Ofcom explains that in applying “due care”, it will be down to programme makers to identify what any harmful risks are to a contributor, and to assess and take any reasonable steps to manage and/or mitigate those risks. Ofcom says that programme makers should not be deterred from including, for example, vulnerable contributors in programmes. Yet it makes it clear that careful consideration should be given to the risk associated with a person’s participation and to ensuring the level of care that they receive is proportionate to that risk.

The updated guidance includes examples of “best practice” for ensuring the due care of contributors. Those include having written guidelines and/or compliance procedures setting out the key considerations for working with contributors in particular programmes, and ensuring that production staff are familiar with and understand those guidelines and procedures throughout the making of the programme. Making and retaining records and contemporaneous notes can also help to demonstrate what information and support have been offered and provided to a contributor. Additionally, specialist advice may need to be sought, depending on the nature of the production. Ofcom notes that, where appropriate, seeking specialist advice before production to inform the process of selecting contributors can help to identify people who may be, or may become, vulnerable so that any reasonably foreseeable risks can be assessed and managed in advance.

The guidance also suggests that there may be circumstances when it is appropriate for contributors to have direct access to specialists, without having to request that through the production team. Ofcom also notes that contributors could be given a nominated single point of contact within the production team, and that, when providing after-care, programme makers should be flexible about the type of support that a contributor might reasonably require and remain responsive to a contributor’s needs for an appropriate period after broadcast.

Using a “risk matrix”

Where a risk assessment is required, Ofcom recommends that this should be considered at the earliest possible stage in the production process. To assist with this, Ofcom has attached to its updated guidance an example of a “risk matrix” that it suggests broadcasters may wish to use to identify, assess and manage potential risks to contributors in programmes.

Following Ofcom’s example, the starting point is to identify potential risks based on: (a) the level of control retained by contributors; (b) the nature of the programme format; (c) the profile of the programme; (d) whether contributors are to be separated from normal life and required to be away from their usual home; and (e) perhaps most fundamentally, the type of contributor.

Ofcom suggests that, at the second stage, broadcasters and programme makers consider categorising each risk as low, medium or high, so that they can be managed accordingly. Risk is likely to be categorised as high, for example, where producers have near total control of the environment being filmed and the contributors’ activities, where key editorial elements include potential confrontation, and where the programme is likely to generate a high level of press and social-media interest. Ofcom also suggests that 24/7 shared accommodation will normally be considered high-risk, as well as requiring contributors to be remote from home, and again, perhaps most fundamentally, where contributors have disclosed mental-health issues or may be considered vulnerable due to their personal circumstances or experiences.

Ofcom indicates that, after identifying and classifying the risks, steps to mitigate them at each stage of production may need be considered (and the greater the risk, the greater the number of steps that may be required). Whatever the level of risk to contributors, Ofcom recommends that consideration be given, before production, to the information to be provided about the nature and purpose of the programme and the nature of the contribution, including information about the potential risks arising from taking part. For productions where there are higher risks to participants, Ofcom suggests in its specimen risk matrix that:

- consideration may need to be given to the need to engage appropriately qualified experts, and whether medical-history background checks and/or psychological assessments are necessary;
- during production, it may be appropriate for psychological advice to be accessible at all times and to consider monitoring participants for any behaviours indicating stress or mental-health issues;
- after-care could range from providing a psychological debrief after filming to devising a tailored programme of after-care to include, for example, counselling and/or assistance in readjusting to life outside production, and that thought should be given to providing support and advice on managing negative social-media and media interest.

Comment

The changes to Section Seven (Fairness) of the Code form part of Ofcom’s response to, as described in its statement² published in December 2020, “a steady rise in complaints about the mental health and wellbeing of programme participants, reflecting society’s growing openness and concern about these issues”. Ofcom has also amended Rule 2.3 of the Code (material which may cause offence must be justified by the context) to make it clear that it protects audiences from potential offence arising from viewing people who appear to be put at risk of significant harm as a result of taking part in programmes,

² <https://www.ofcom.org.uk/consultations-and-statements/category-2/protecting-tv-radio-participants>.

where there is insufficient context. Ofcom has also made minor amendments to Rules 1.28 and 1.29, relating to the due care of under-18s.

Ofcom's proposals to introduce further protections for participants in programmes (on which it consulted in 2019, and again in 2020) were broadly supported by broadcasters. Many of them had already put their own processes in place following several high-profile incidents in which contributors to programmes suffered mentally as a result of taking part in programmes, and in some cases with tragic consequences.

Still, Ofcom's guidance provides welcome clarity on what it expects from its licensees. It is clear that, even where a production is not considered particularly high-risk, programme makers are expected to maintain a watchful eye over contributors. They should check for any signs of stress or anxiety and not cut contributors adrift after production, but provide them with a production contact and consider carefully whether any ongoing support is required.

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