

**SBS SUBMISSION TO THE DEPARTMENT OF INFRASTRUCTURE, TRANSPORT, REGIONAL  
DEVELOPMENT AND COMMUNICATIONS  
CONSULTATION ON A BILL FOR A NEW ONLINE SAFETY ACT  
FEBRUARY 2021**

**Key Points**

- The Special Broadcasting Service Corporation (**SBS**) supports proper controls that mitigate online risks and ensure Australians can confidently take advantage of the benefits of the digital environment.
- It is appropriate that the new online safety scheme focus on illegal and inappropriate content, such as image-based abuse, cyberbullying and abhorrent violent material— noting particularly risks that can be associated with user-generated, non-professionally produced content. SBS strongly supports measures that will make the online environment a safer place.
- In updating Australia's Online Content Scheme to better reflect the modern digital environment, it is also appropriate to recognise existing effective co-regulatory approaches for certain content. These have proven successful and adaptable in providing safeguards for professionally produced content delivered across platforms by trusted media organisations like SBS and other broadcasters.
- SBS is a regulated public media service that is already subject to a number of oversight and accountability mechanisms. SBS provides professionally produced material and content in line with its Charter and in the public interest, as an independent and trusted public institution. All of SBS's digital platforms are subject to multiple control mechanisms which are all publicly available, including the robust and overarching SBS Codes of Practice (the **SBS Codes**), the SBS Terms of Service, User-Generated Content Guidelines, Social Media Protocol, and Privacy Policy; as well as relevant laws.
- Given these existing regulatory and accountability mechanisms are working effectively, SBS should not be subject to further regulation by the new *Online Safety Act* (the **new Act**). Continuing to regulate SBS's professionally produced content under the SBS Codes will also support SBS's editorial independence as stipulated by the *Special Broadcasting Service Act 1991* (the **SBS Act**), and SBS's effectiveness in fulfilling its Charter obligations. The framework introduced for online safety should recognise and take account of existing regulations that are functioning well.
- However, should an overall exemption not be applied to SBS, SBS recommends that the new Act's public interest exemptions be broadened to cover material published on SBS online services.
- There is a strong international precedent of protections for media freedom, recently demonstrated by the United Kingdom's Government—where material or content published by a news publisher on its own websites, including user comments, and on other platforms is exempted from their plans for a package of measures to keep UK users safe online. SBS supports a similar framework in Australia for recognised publishers which meet appropriate criteria.



- To further support online safety, the new Act should provide for enhanced moderation tools and functionalities on platforms covered by the new Act, particularly major social media platforms. This is particularly critical as such tools are not currently contemplated in the minimum standards in the *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*.
- There should be a provision in the new Act, explaining its relationship with the current *Enhancing Online Safety Act 2015* (the **EOSA**).
- SBS would welcome further consultation on provisions of the Bill.
- SBS has recently partnered with the eSafety Commissioner on digital literacy and eSafety education resources. SBS is well positioned to further promote online safety, particularly to multilingual, multicultural and Indigenous Australian communities. SBS would welcome partnership opportunities in this or relevant areas, including in relation to digital literacy.

## **Part I. Introduction**

SBS appreciates the opportunity to provide feedback on the exposure draft of the Online Safety Bill (the **Bill**), as part of the Department of Infrastructure, Transport, Regional Development and Communication's *Consultation on a Bill for a new Online Safety Act*.

SBS is a trusted, professional and independent public media service with a unique principal function—to provide multicultural, multilingual and Indigenous radio, television and digital media services that inform, educate and entertain all Australians and, in doing so, reflect Australia's multicultural society.<sup>1</sup>

SBS reaches almost 100 per cent of the population. Its broadcasting services include five free to air television channels—SBS, SBS VICELAND, SBS World Movies, SBS Food and National Indigenous Television (NITV), and seven radio stations broadcasting in 63 languages.

SBS On Demand, SBS's video-on-demand service, provides to all Australians free of charge, a large repository of digital content—with more than 9,000 hours of distinctive content across key genres such as news, drama, film and documentary, including SBS commissioned content—stories otherwise untold by other media. SBS's material is also available online via SBS websites and free apps, complemented by SBS's presence on social media.

During COVID-19, SBS has been providing vital digital news and trusted information to all Australians in 63 languages—the only major Australian network to do so. In 2020, more than 11 million unique visitors accessed SBS's online coronavirus content in multiple languages. This content is available via the constantly updated one-stop SBS Multilingual Coronavirus portal, SBS's apps such as the SBS News and SBS Radio apps, and social media accounts.<sup>2</sup>

## **Part II. Existing regulation is effective for SBS content**

### *(II.1) SBS's editorial independence*

SBS operates under the SBS Act, which sets the framework supporting SBS's editorial independence. Under the SBS Act, SBS has sole responsibility for determining its content.

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<sup>1</sup> SBS Charter.

<sup>2</sup> SBS-collected statistics



Under section 10 of the SBS Act, it is the duty of the SBS Board to *inter alia* maintain the integrity and independence of SBS, and to develop the SBS Codes<sup>3</sup> (see further details in **II.3** below).

*(II.2) SBS services are among the most trusted in Australia*

SBS News is among the most trusted news media brands in Australia. The *Reuters Institute Digital News Report 2020*<sup>4</sup>, published in June 2020, demonstrated that the Brand Trust Score for SBS News was eight percentage points higher than that for regional or local newspapers, and nine percentage points higher than that of the most trusted commercial television news brand. The new Act should safeguard the editorial independence that underpins this high level of trust.

*(II.3) Safety mechanisms for online content are already in place, including the SBS Codes of Practice*

Effective safety mechanisms to regulate SBS online content are already in place. The comprehensive and robust SBS Codes apply to all of SBS's digital platforms, including SBS On Demand, SBS's websites, and apps.

The SBS Codes are made by the Board under the SBS Act, and set the parameters for delivering services to the community, in line with the SBS Charter.<sup>5</sup>

Further safeguards include SBS's Social Media Protocol<sup>6</sup>, Terms of Service<sup>7</sup>; User-Generated Content Guidelines<sup>8</sup>—for the participation of end-users with SBS material online such as on social media services; and the comprehensive SBS Privacy Policy<sup>9</sup>—which deals with SBS's obligations under *the Privacy Act 1998* (Cth), including the Australian Privacy Principles (**APPs**); all of which are available to the public

Additionally, online content provided by SBS is subject to a range of laws, including Broadcasting Services (Online Content Service Provider) Rules 2018<sup>10</sup>; the EOSA<sup>11</sup>; the *Criminal Code Act 1995* and the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019*—which regulate abhorrent violent material (**AVM**)).

There is an exemption provision in the Bill for the SBS On Demand service in subclause 18(1)–(4), exempting online content that is identical to SBS's broadcast content. However, not all content made available on SBS online services has been broadcast on SBS terrestrial services.

This exemption should therefore be extended to include content which is provided *only* on SBS On Demand (and which has not separately been broadcast by SBS), noting that *all* content available via SBS On Demand is subject to the SBS Codes and other oversight mechanisms outlined above.

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<sup>3</sup> SBS codes of practice available at <https://www.sbs.com.au/aboutus/sbs-codes-of-practice>

<sup>4</sup> *Reuters Institute Digital News Report 2020* available at [https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2020-06/DNR\\_2020\\_FINAL.pdf](https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2020-06/DNR_2020_FINAL.pdf)

<sup>5</sup> SBS codes of practice available at <https://www.sbs.com.au/aboutus/sbs-codes-of-practice>

<sup>6</sup> SBS Social Media Protocol available at [https://www.sbs.com.au/aboutus/sites/sbs.com.au/aboutus/files/sbs\\_social\\_media\\_protocol\\_2011\\_-\\_external\\_version\\_230420.pdf](https://www.sbs.com.au/aboutus/sites/sbs.com.au/aboutus/files/sbs_social_media_protocol_2011_-_external_version_230420.pdf)

<sup>7</sup> SBS Terms and Conditions available at <https://www.sbs.com.au/aboutus/terms-and-conditions>

<sup>8</sup> SBS User-Generated Content Guidelines available at <https://www.sbs.com.au/aboutus/sbs-user-generated-content-guidelines>

<sup>9</sup> SBS Privacy Policy available at <https://www.sbs.com.au/privacy-policy>

<sup>10</sup> Broadcasting Services (Online Content Service Provider) Rules 2018 available at <https://www.acma.gov.au/Industry/Internet/Internet-content/Gambling-advertising/new-gambling-ad-rules-kick-in-for-online-content-service-providers>

<sup>11</sup> *Enhancing Online Safety Act 2015* available at <https://www.legislation.gov.au/Details/C2018C00356>



(II.4) *The Bill would result in unnecessary duplication and financial and administrative burdens while effective online safety mechanisms are already in place.*

The Bill imposes additional obligations on regulated entities, including around reporting and compliance, in line with the Bill's proposed Basic Online Safety Expectation (**BOSE**, Clauses 44–63). The Bill also subjects SBS to further industry codes and industry standards (Clauses 132–150).

These should be avoided, as effective online safety mechanisms are already in place regarding SBS content.

#### **Recommendation**

- SBS should not be subject to further regulation by the new Online Safety Act.

(II.5) *Proposed exclusion of SBS from the new Act*

As currently drafted, SBS would appear to fall within the Bill's definitions of—a 'designated internet service' (Clause 14); a 'hosting service' (Clause 17) because it hosts its content which it provides as a designated internet service; and 'on-demand program service' (Clause 18). These Clauses should be amended to exclude SBS from the provisions of the Act. A recommendation for amendments to the Act is below.

#### **14 Designated internet service**

- (1) For the purposes of this Act, *designated internet service* means:
- (a) a service that allows end-users to access material using an internet carriage service; or
  - (b) a service that delivers material to persons having equipment appropriate for receiving that material, where the delivery of the service is by means of an internet carriage service;
- but does not include:
- (c) a social media service; or
  - (d) a relevant electronic service; or
  - (e) an on-demand program service; or
  - (f) a service specified under subsection (2); or
  - (g) a designated internet service provided by the Special Broadcasting Service Corporation.

[...]

#### **18 On-demand program service**

- (1) For the purposes of this Act, *on-demand program service* means a service:
- (a) that is provided to end-users using an internet carriage service; and
  - (b) ~~by to the extent to which the service provides material that is identical to a program that has been, or is being, transmitted on:~~
- [...]
- (v) ~~a television broadcasting service provided by the Special Broadcasting Service Corporation.~~



### **Recommendations**

- Addition of an exclusion clause for SBS be added to Clause 17 (1) of the Bill.
- Clause 18 of the Bill should be amended, to exclude SBS On Demand in its entirety.

### **III. The Bill's public interest exemptions should be broadened**

As noted above, the framework introduced should recognise existing effective safeguards which apply to professionally produced content by publishers such as SBS. This would be consistent with regulatory theory which supports the use of co-regulation.<sup>12</sup>

However, should an exclusion not be provided to SBS, this part (**Part III.**) addresses a number of specific concerns and recommendations regarding the Bill.

Subparagraphs 104 (1) (e)–(i) and Subclause (104) (2) provide certain exemptions:

- (e) the material relates to a news report, or a current affairs report, that:
    - (i) is in the public interest; and
    - (ii) is made by a person working in a professional capacity as a journalist; or<sup>13</sup>
- [...]

These exemptions should be broadened to ensure that the new Act will not inadvertently adversely impact the reporting of news and current affairs, freedom of speech, freedom of expression, or a media organisation's ability to cover matters in the public interest.

#### *(III.1) Definition of a journalist should be broadened*

The definition of 'journalist' should be broad enough so that SBS programs, such as SBS's documentaries, which may fall outside the ordinary meaning of journalism or news and current affairs programming are included—the definition should also afford the same protections to management, editorial, legal and other support staff engaged in the journalistic process. Examples of protection relating to journalism and related activity in other Acts, which may assist with the formulation of the exemptions recommended above, include:

- The defence in subsection 122.5(6) of the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018*, which relates to persons who, among other things, communicate, hold or otherwise deal with information in their capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news media—and extends to administrative staff of an entity that was engaged in the business of reporting news. SBS submits that while useful as a guide, if adopted, this defence should be broadened to apply beyond a strict news context so that it applies to content outside the newsroom.
- The exemption in Section 7B(4) of the *Privacy Act 1988* for acts done, or practice engaged in, by a media organisation in the course of journalism.

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<sup>12</sup> For example, in 2014 the Department of Communications (as it then was) published a policy background paper which noted that the telecommunications and broadcasting legislative frameworks both enunciate a preference for co-regulation, and that there is an industry-wide assumption that co-regulation should be the first port of call when new concerns emerge (*Regulating harms in the Australian communications sector*, page 17 – available at <https://www.communications.gov.au/publications/regulating-harms-australian-communications-sector-policy-background-paper-no2>).

<sup>13</sup> The Bill, page 92–93.



*(III.2) Exemptions should cover all SBS's material in the public interest, including material available through non-exempt ('in scope') services, such as social media services*

SBS's public interest content should be subject to exemptions, even where published on platforms not operated by SBS.

As a precedent, recently in December 2020, the Government of the United Kingdom provided its full response to that country's Online Harms White Paper<sup>14</sup>. The response provides that not only should there be an exemption for news publishers where they publish on their own sites, but also where their content is shared on other services that would be regulated. It stated that:

'22. Stakeholders raised concerns during the consultation about how the legislation will impact journalistic content online and the importance of upholding media freedom. Content published by a news publisher on its own site (e.g. on a newspaper or broadcaster's website) will not be in scope of the regulatory framework and user comments on that content will be exempted.

23. In order to protect media freedom, legislation will include robust protections for journalistic content shared on in-scope services. The government is committed to defending the invaluable role of a free media and is clear that online safety measures must do this. The government will continue to engage with a range of stakeholders to develop our proposals.<sup>15</sup>

SBS supports a similar framework in Australia for recognised publishers who meet appropriate criteria.

**Recommendations:**

- The Bill's public interest exemptions should be broadened, including through amendments to the definition of 'journalist'.
- Public interest exemptions should cover all SBS's material in the public interest, including material available through non-exempt ('in scope') services, such as social media services.
- Public interest exemptions should be extended to cover all SBS websites and apps, including any future public comment sections.

**IV. To further support online safety, the new Act should provide enhanced moderation tools**

Unlike social media services (or relevant electronic services), as defined by the Bill, SBS does not currently serve user-generated content, including harmful or potentially harmful content, on any of its online services. SBS is, however, a publisher on social media services, including major digital platforms accessible by Australians.

Whilst not without significant challenges, responsibility for moderating user comments on SBS social media accounts is transparently managed through the abovementioned SBS Terms of Service, User-Generated Content Guidelines, Social Media Protocol, and Privacy Policy, as outlined in **Part II** of this submission. These mechanisms ensure SBS is responsible for online activities and content on all owned and third-party platforms (where technically possible) while, at the same time, maintaining its independence.

As an example, individuals agree to comply with SBS's policies when they contribute to an SBS account on a social media service (e.g. when commenting on an SBS Facebook post or posting

<sup>14</sup> <https://www.gov.uk/government/consultations/online-harms-white-paper/outcome/online-harms-white-paper-full-government-response>

<sup>15</sup> As above



content to an SBS Facebook page). At the same time, they acknowledge that the social media service's terms and policies, among other things—including relevant laws, also apply to the use of such platform.

As submitted to the ACCC as part of its Digital Platforms Inquiry, and in relation to the *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020* (the **Bargaining Code Bill**), the new Act should require social media services to provide publishers such as SBS certain tools or functionalities, such as the ability to turn off the comment section of a particular post on publishers' social media pages. This should be considered as part of a graduated range of responses, including:

- an 'emergency stop' to temporarily de-activate comments (or switch to pre-moderation) in a high-volume, high-risk scenario;
- the ability to switch to pre-moderation, so page owners can go through a queue of unpublished comments and approve what goes live;
- the ability to set a specified timeframe after publication for users' comments, before closing the comments;
- the ability to moderate fragments of posts; and
- the ability to pause live video comments.

This is particularly critical as such tools are not currently contemplated in the minimum standards in the Bargaining Code Bill.

Additionally, in November 2020, the Australian Community Managers (the ACM)—a centre for online community training, resources and career development—proposed a number of other moderation tools, specific to Facebook, which may help publishers manage their legal risk regarding user comments on publisher material posted on social media.<sup>16</sup>

#### **Recommendation**

- To further support online safety, the new Act should provide for enhanced moderation tools or functionalities for social media platforms

#### **Part V. There should be a provision in the new Act, explaining its relationship with the current EOSA**

Guidance on the relationship between the new Act and the EOSA would be beneficial. There should be a provision in the new Act with specific reference to its relationship with the EOSA currently in place (e.g. whether the EOSA would be repealed).

#### **Recommendation**

- There should be a provision in the new Act with specific reference to, and further consultation regarding, its relationship with the EOSA.

#### **Part VI. SBS is well positioned to further promote online safety**

Regarding the broadened role of the eSafety Commissioner, pursuant to the new Act, SBS and the Commissioner may be able to explore further partnership opportunities in relation to education.

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<sup>16</sup> Dylan Voller's court case, 2019 <https://www.sbs.com.au/nitv/article/2019/06/25/court-rules-favour-voller-defamation-case-brought-against-media-outlets>



In 2019, SBS and the eSafety Commission entered into a partnership for educational material supporting SBS's *The Hunting*<sup>17</sup> drama series—SBS's most successful drama to date. Through this program, and related material, SBS and the Commissioner were able to play a key role in educating Australians about the many aspects of cyberbullying and image sharing, while also promoting safe and positive experiences online—through discussion guides and resources, available on SBS Learn<sup>18</sup> educational portal.

SBS's experience in reaching audiences, including children, through the SBS Learn platform, provides a basis for SBS to play a role in future digital literacy initiatives, particularly those which support multilingual, multicultural and Indigenous Australian communities, should funding permit.

### **Part VII. Conclusion**

SBS appreciates the opportunity to provide feedback on the exposure draft of the Online Safety Bill, as part of the Department of Infrastructure, Transport, Regional Development and Communication's *Consultation on a Bill for a new Online Safety Act*.

For professionally produced content, the SBS Codes are the most appropriate regulatory vehicle, regardless of the SBS platform on which the content is provided. Any new framework for online safety should account for effective existing regulatory frameworks and support their continued operation.

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<sup>17</sup> *The Hunting* available on SBS On Demand at <https://www.sbs.com.au/ondemand/program/the-hunting>

<sup>18</sup> <https://www.sbs.com.au/learn/resources/cyber-safety-discussion-guides>