

SBS SUBMISSION TO IP AUSTRALIA ON THE INTERIM REPORT: SCOPING STUDY ON STAND-ALONE LEGISLATION TO PROTECT AND COMMERCIALISE INDIGENOUS KNOWLEDGE (IK)

Key Points

- The Special Broadcasting Service Corporation (**SBS**) is an Australian public broadcaster, with the principal function of providing multilingual and multicultural radio, television and digital media services that inform, educate and entertain all Australians and, in doing so, reflecting Australia's multicultural society.
- National Indigenous Television (**NITV**) is a national free-to-air channel on SBS made by, for and about Aboriginal and Torres Strait Islander peoples,¹ providing content across broadcast television, radio and digital platforms.
- Indigenous peoples' right to their cultural heritage, referred to as traditional cultural expression (**TCE**) and traditional knowledge (**TK**) in the Interim Report, incorporated as language, stories, dance, song and culture are key components of SBS and NITV's content. This is important because screen content for Aboriginal and Torres Strait Islander peoples contributes to a positive sense of identity, cultural continuity and ultimately social and emotional wellbeing.
- SBS has developed and promotes industry leading cultural protocols in the media sector based on respect for Indigenous peoples and consent for use of TCE and TK.
- In May 2022, SBS published its Elevate RAP, under which it committed to demonstrate best practice in the protection of Indigenous Cultural and Intellectual Property (**ICIP**) rights of Aboriginal and Torres Strait Islander peoples. IK, ICIP, TCE and TK are interchangeable terms that all refer to the rights of Aboriginal and Torres Strait Islander peoples to their cultural heritage.
- SBS supports the Interim Report and its findings, which have examined models to create enforceable rights for Indigenous peoples and communities.
- SBS strongly supports **Element 1**, the recommendation to establish a new form of intellectual Property (**IP**) right for TCE and TK in the form of sui generis legislation. SBS suggests that this be given prominence of focus for legislative reform given the longstanding identified gap in the rights of Indigenous people.
- SBS strongly supports **Element 3**, the establishment of a National Indigenous knowledge authority to help administer the new TCE and TK right.



Introduction

SBS appreciates the opportunity to submit to IP Australia on the Interim Report on stand-alone legislation to protect and commercialise Indigenous Knowledge (**Interim Report**).

As Australia's multilingual and multicultural public broadcaster and the home of Australia's national Indigenous broadcaster, NITV, SBS is needed now more than ever to build understanding and cohesion in our society. SBS reaches almost 100 per cent of the population across Australia through its free-to-air TV channels (SBS, SBS VICELAND, SBS World Movies, SBS Food, NITV, and SBS WorldWatch) and seven radio stations (SBS Radio 1, 2, 3, SBS Arabic24, SBS PopDesi, SBS Chill, and SBS PopAsia). SBS also provides extensive digital services, including:

- the SBS On Demand platform, which provides Australians with a distinctive streaming destination that connects audiences to premium content from Australia and around the world; and
- the SBS Radio App, which provides access to content from SBS's more than 60 language services which includes NITV radio, plus live streaming of four 24/7 digital radio stations (SBS Arabic24, SBS PopAsia, SBS PopDesi, and SBS Chill).

NITV, proudly part of SBS since 2012, is Australia's only national free-to-air channel made by, for and about Aboriginal and Torres Strait Islander peoples. NITV delivers Australia's only national Aboriginal and Torres Strait Islander television news service *Nula*, current affairs program *The Point* and *Living Black*, award winning children's animation *Little J & Big Cuz*, as well as a diverse range of programs including entertainment and factual.

SBS has a proud and rich history of supporting and developing cultural protocols for the respect and recognition of ICIP, first releasing *The Greater Perspective: Protocol and Guidelines for the Production of Film and Television Aboriginal and Torres Strait Islander Communities*¹ (**The Greater Perspective**) in 1990.

In 2022, SBS released its ground-breaking fifth *SBS Reconciliation Action Plan*², SBS's first at the Elevate level, the highest level within Reconciliation Australia's RAP framework, which included, amongst other obligations:

- a commitment to demonstrate best practice in the protection of ICIP; and
- a priority to invest in Indigenous enterprises through procurement, which includes the development of an SBS Indigenous Procurement Strategy.

¹ The Greater Perspective, and the 2018 Supplementary Guidelines, are available on SBS's website: <https://www.sbs.com.au/aboutus/the-greater-perspective-indigenous-protocols>

² https://www.sbs.com.au/aboutus/sites/sbs.com.au/aboutus/files/sbs_elevate_reconciliation_action_plan_june_2022_-_june_2026.pdf



Element 1 – Create a new IK right

The Interim Report proposes exploration of stand-alone legislation to recognise collective rights to TCE and TK to recognise the oldest continuing and evolving culture of Aboriginal and Torres Strait Islander peoples.

SBS feedback on Element 1 can be summarised as follows:

- SBS strongly supports this proposal.
- The proposal is consistent with SBS's historical and ongoing recognition of ICIP rights through the establishment of the Greater Perspective, its business practices and its new commitments under the SBS Elevate RAP.
- This proposal reflects the longstanding view of experts³ and community who have identified the gap in current IP laws to enforce TK and TCE.

At present, when publishing ICIP within its programming and content, SBS and NITV rely on the Greater Perspective, relationships and engagement with communities to secure cultural authority, cooperation, and consents. We do not anticipate that this process would fundamentally change with the introduction of a new stand-alone law.

In fact, an enforceable regime may give some groups the confidence to share knowledge with SBS, NITV and our audiences if the system is designed effectively to protect their interests.

- SBS welcomes the opportunity to provide feedback on further proposals, including draft legislation.

Element 2 – Measures Aimed at Inauthentic Product

As proposed in the Interim Report, we note that these measures are targeted most directly at inauthentic products, labelling and visual arts, which are not directly relevant to SBS.

Element 3 – National Indigenous Knowledge Authority

IP Australia is seeking feedback on a proposal to introduce a legislative body to support the introduction of Element 1 and 2, in particular to work in partnership with Aboriginal and Torres Strait Islander peoples to assert, protect and enforce their IK rights.

SBS agrees that if Element 1 is to be introduced, it must be adequately resourced and supported to be effective, particularly given the considerations SBS has outlined in the Annexure under its answers to the Part A questions.

³ Janke, Terri 'Our Culture, Our Future', 1998



SBS notes that significant work has already been undertaken on this concept by Terri Janke, as noted in the Interim Report, but that it strongly agrees with the recommendation, and has the following further notes:

- Having a national centralised organisation available as a contact point for questions regarding consultation and consent for the use of ICIP will be a vital asset for all stakeholders, including SBS and NITV, but in order to be effective and responsive given the scale, the authority must be resourced effectively.

For example, NITV and SBS receive a significant number of queries relating to matters of protocol on a daily basis, such as in relation to use of images of deceased people, use of appropriate warning boards prior to programs and queries relating to filming on Country or particular culturally significant ceremonies. The timelines and resource investment in these queries can differ from query to query.

See our further comments in Part A in the Annexure for considerations in resourcing.

- The model proposed under Element 3 has the 'look and feel' of a copyright collecting society, or an organisation established to administer a royalty on behalf of members. Many other copyright collecting societies in Australia undertake the other types of activities listed in the proposal under Element 3 and could be examined as comparable models.

Element 4 – Measures to Support Competitiveness of Indigenous Business

As stated in the Interim Report, this element involves the development and implementation, in consultation with Aboriginal and Torres Strait Islander peoples, specialised government programs and capacity building strategies to complement the previous measures and may include targeted funding of particular sectors, and a review of the government's Indigenous procurement policy.

SBS welcomes contributing to these reviews in the future as a stakeholder on these matters.



Annexure

Consultation Questions:

Part A questions

1. *What other issues affect the capacity of Aboriginal and Torres Strait Islander peoples to protect and benefit from their IK*

In the experience of SBS and NITV, these are common issues:

- a. Lack of a legal framework
- b. Lack of financial resources to get access to a lawyer or service to provide advice
- c. Lack of knowledge about how to protect rights
- d. Lack of resources about rights
- e. "Legalese" or legal jargon can be a barrier to understanding legal concepts
- f. Formality of legal requirements/written documentation (e.g. copyright assignment) can be a barrier for people with literacy limitations
- g. Location – legal services and advice may not be convenient to the location of the person seeking advice
- h. Disenchantment with and distrust of the legal system – less likely to engage with the legal system

All of these considerations could be taken up in the design of a National Indigenous Knowledge Authority.

Part B questions

1. *Should each of these four elements be part of a stand-alone legislation model for the protection of IK? Why or why not?*

- a. **Element 1** appears particularly clearly suited to stand-alone legislative reform as it is a new legal right unsuited to be included in existing legislation because of issues of communal ownership, age of the TK and TCE and legal standing amongst other concerns.
- b. Some **Element 2** measures appear to be legislative, but it is not clear based on the Interim Report whether a single (or multiple) stand-alone framework would be appropriate or whether some existing laws may be suited depending on what key areas are being targeted. This proposal is less relevant to SBS except to the extent that we broadly support the overall project.
- c. SBS does not express a particular view about whether the National Indigenous Knowledge Authority proposed under **Element 3** should be established under a stand-alone legislation.
- d. The proposals in **Element 4** do not appear to require stand-alone legislative reform, but rather a review and a refresh of funding and procurement policies.

2. *Is there anything missing from these elements?*

SBS does not express a view.



Part C questions

1. *Which element (1 to 4) and combination of elements would deliver the most benefit to you?*

SBS and NITV and our audiences would most benefit from Elements **1, 3** and potentially **4**.

2. *What broader benefits, costs or risks would stand alone legislation like this deliver to Aboriginal and Torres Strait Islander peoples?*

Refer to substantive submission.