

Producer Handbook for Factual Content



Practical legal, editorial and ethical considerations for Factual Content
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The Producer Handbook (**the Handbook**) outlines SBS's compliance process, production standards and guidance for producers of factual editorial content on all SBS platforms and channels.

SBS regards the integrity of the production process and the protection of audience trust as critical to the success of its content. SBS Commissioning Editors, SBS Executive Producers, communications, marketing, publicity legal and Codes teams work closely and with producers to ensure that all SBS content meets the editorial, legal and ethical expectations of our audiences and stakeholders.

The Handbook will be updated from time to time in accordance with changing legal and editorial standards.

How to use the Handbook

This Handbook contains general and non-exhaustive guidelines in relation to legal, regulatory and ethical issues that can arise in program and content production. They do not cover every situation but are intended to provide helpful and practical guidance to content producers to enable potential issues and risks to be identified and appropriately addressed.

SBS programs and content must always comply with the SBS Code of Practice and the SBS Editorial Guidelines (**Codes**) and any applicable policies.

The Executive Producer of your program or content is responsible for making sure that all production staff read and are familiar with the Handbook and the Codes. The Executive Producer is also responsible for being aware of and complying with all applicable laws and Codes, and for producing the program in accordance with best industry practice according to the genre of program or content.

Where content is being produced externally, the Executive Producer should maintain regular contact with the SBS Commissioning Editor to address issues that may arise, including referring to these guidelines.

This Handbook will be supplemented by plans for managing risk on your production. These may include:

- Production Code of Conduct
- Child Safe Code of Conduct
- Risk Plan



Does the Handbook apply to me or my program?

The Handbook will apply to you if you are:

- an external production company who has been commissioned to create a factual program or content for SBS
- producing in-house factual content or programming for SBS (in any division) regardless of genre, platform or network.

The Handbook will apply to any program/content:

- which includes statements of fact or relies on factual matters as a basis for its content
- if content involves dealing with members of the public as participants in a factual program

The Handbook uses the terms program and content interchangeably throughout.



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1. Communication and where to get advice

Key contacts

The key contacts at SBS for programs and content are :

- the SBS Commissioning Editor (includes NITV)
- SBS Executive Producer (**SBS EP**) responsible for that program or content

External producers can contact the relevant SBS Commissioning Editor with any queries, including:

- editorial matters
- screen industry guidance
- cultural and representation considerations
- legal or Codes issues.

For external production companies producing content for SBS, editorial and legal approvals, processes and editing rights, are dealt with in the SBS commissioning or production services agreement.

Communicating with other teams

An integral part of the program-making and compliance process is timely and effective communication between people working on the program or content. SBS divisions and external production teams will have their own internal approaches for communicating information, but to ensure that issues that arise are addressed in a coordinated and consistent manner, teams should collaborate when necessary.

An example might be when a legal issue arises in a program which attracts questions from the media. The following people are likely to either be involved or aware of the issue: the SBS Commissioning Editor or SBS EP, producer, lawyer, Codes adviser, corporate communications, publicity, online and

marketing teams. It is the SBS Commissioning Editor or SBS EP's responsibility to involve teams as appropriate. To ensure this is streamlined, please ensure that the SBS Commissioning Editor or SBS EP is copied on all correspondence regarding the issue.

The earlier issues are raised and discussed, the more effectively those issues can be addressed. If in doubt regarding when to raise an issue, consult your SBS Commissioning Editor, or the SBS EP.

Legal and Codes advice

An SBS lawyer and Codes adviser are available to provide SBS content producers with advice regarding legal or Codes risks from development, casting, and production through to the marketing, social media or publicity content for the program.

Some examples of legal or Codes issues that require early flagging include:

- defamatory claims about a person who or other entity which may be identifiable in the program;
- when a matter discussed in the program is before the courts or a person identified in the program is facing or may face criminal charges (see below: 'Filming with criminals, illegal activity and people involved in court proceedings');
- the program discusses a protected person (e.g. a sexual assault victim, child involved in court proceedings, adoptee or person who has been involved in a family court matter);
- a person whose personal story is a key part of the program does not wish to be involved, will not sign a release or is hostile to the project;



- the content deals with suicide or other sensitive subject matter such as mental health;
- a release or copyright clearance cannot be obtained as required under your contractual obligations;
- a participant to a program who has previously given consent, says they want to revoke that consent;
- filming of the program may involve potential issues of trespass, contact with prisoners, detainees, alleged terrorists, lawbreakers or fugitives, leaked documents, confidential sources, protected witnesses or filming of illegal activity;
- filming involving secret recording/hidden cameras, or other new or emerging technology to film material, e.g. using drones;
- filming involving hazardous activities or dangerous locations (see below: 'Risk, safety and wellbeing');
- children or vulnerable people are to appear (see below: 'Children as participants' and 'Vulnerable people');
- the full nature of the program is to be withheld from persons filmed, or pranking or a set-up is to occur;
- the content involves brand integration or brand funding;
- comments or statements in the program may negatively describe a person or group on the basis of their religion, race, sexuality or other status protected by law, or may promote prejudice or discrimination;
- the content involves politicians
- the content involves advocacy or lobbying on topical matters;
- personal information about a person is revealed without a person's consent, or filming takes place in a way which a reasonable person may consider a breach of their privacy; or
- legal or other threats have been made

In some cases of high risk, it may be necessary for the SBS Commissioning Editor or SBS EP to upwardly refer an issue as appropriate.

Training or Pre-production meeting

If appropriate, a training session or a meeting with the production team on legal, ethical and Codes issues can be provided. This may be useful for example where a program is going to air live or production timelines are otherwise tight and judgment calls will need to be made quickly, or if the subject matter of the content is particularly ethically or legally sensitive.

The lawyer and Codes adviser will also be available throughout production to answer questions, generally on referral from the SBS Commissioning Editor or SBS EP.



2. Pre-Production

Consider risks early

Considering and anticipating potential legal, Codes and ethical issues at an early stage may allow issues or problems to be resolved more readily.

Where the program or content is likely to have significant legal, Codes or ethical risks, the SBS Commissioning Editor or SBS EP may arrange for an early round table compliance meeting. This allows for Q&A from relevant production personnel and for best practice protocols for filming to be established.

The production team

All SBS content broadcast and published is a sum of many parts. Integral to the production process is the production team and ensuring that the team consists of a mix of experience and skills that best fits the demands of the content being produced.

Generally, it will be the responsibility of the Executive Producer to ensure that the production team are adequately resourced and obtain any training necessary. These matters may need to be considered at the budgeting stage of production.

It is also key to the success of a program or content that the production team are aware of the upward referral process within the team. The earlier an issue or problem is upwardly referred, the better.

Screen industry guidance

All content producers should also consider relevant guidance and codes of practice or conduct that may be issued from time to time by either SBS or Australian screen industry

bodies such as Screen Producers Australia (SPA), Screen Australia and State and Territory screen agencies. Codes of practice in relation to the following matters have been issued previously so it is recommended that checks are made during the pre-production phase for any guidance that may be applicable:

- Indigenous protocols (e.g. Screen Australia's Pathways and Protocols)
- diversity and inclusion
- discrimination
- harassment
- sexual harassment
- bullying
- health and safety matters.

Together with the Handbook, this guidance will assist content producers to establish protocols, guidance and practices for their own particular circumstances and content.

Cultural and representation considerations

If the content subject matter or the production involves culturally or linguistically diverse people or communities, or issues relating to diverse cultures, consideration should be given during the pre-production period to whether additional consultation may be necessary to ensure that treatment, portrayal and representation of the relevant culture and issue is respectful, accurate and appropriate. In particular, additional consultation should be sought when the producer (or other key members of the creative team) does not come from the community which the subject matter seeks to represent. Consultation can be sought from many places or people, including but not limited to a member or members of the community, an expert in the subject matter or organisations who have a role or interest in the issue or community.

When making or producing content relating to Aboriginal and Torres Strait Islander peoples, content producers should refer to 'The Greater



Perspective: Protocol and Guidelines for the Production of Film and Television on Aboriginal and Torres Strait Islander Communities' and 'The Greater Perspective: Supplementary Guidelines' (collectively 'The Greater Perspective').

The Greater Perspective sets out principles which content producers should refer to. These principles include the need to:

- be aware of and challenge their own prejudices, stereotyped beliefs and perceptions about Indigenous Australians;
- be aware that an Indigenous view of Indigenous issues may differ from a non-Indigenous view;
- engage with Indigenous Australians in the making of content about Indigenous Australians, particularly with those who are the subject of the content;
- conduct dealings with Indigenous Australians openly and honestly which includes informing Indigenous people involved of the consequences of any proposed agreements and of their right to seek independent legal advice;
- respect the lands, cultural property and Indigenous Cultural Intellectual Property (ICIP) of Indigenous Australians, as well as the subjects of content; and
- be sensitive to the cultures of Indigenous Australians and engage and negotiate with the people concerned prior to and during the making of content.

Producers should refer to The Greater Perspective as updated from time to time, for more information.



3. Trust in content

SBS is committed to preserving the trust and confidence of its audience, who rely on SBS's editorial independence and integrity. SBS expects content producers to ensure that material presented as fact to our audiences is properly researched, verified and represented accurately in content.

What is 'a fact'?

A fact is capable of being verified and will usually be unequivocal and specific. Facts can be stated in narration, by participants, or implied in the use and presentation of images, data, footage or other material. Facts are to be distinguished from opinions.

It is essential for audience trust (and in some cases, legal and Codes reasons) that facts presented as undisputed, or likely to be true, have been credibly verified as accurate. This is important because it may materially affect the audience's understanding of real events, scientific or other issues of public importance, or where issues of legitimate social debate are concerned.

Verifying facts

What is reasonable due diligence in relation to fact verification will depend on context and industry practice. In long form documentary or investigative programs or pieces, for example, the steps taken to verify facts may be more comprehensive due to the extended timeline available for research than for those of, say, content dealing with topical issues where production deadlines mean that a more streamlined, although reliable approach to fact-checking is necessary.

For external productions, the SBS Commissioning Editor or SBS EP and

compliance team may need to review or discuss accuracy issues with you. For this purpose, and to ensure easy checking during the editing process, factual sources should be footnoted in the program shooting script or otherwise recorded/filed and made available to SBS on request.

Expectation of factual accuracy

The following standards reflect the expectations of SBS in relation to the presentation of facts to our audiences:

- Presentation of facts can take many forms (voiceover, graphics etc). Take care when translating verified facts into a script, graphic or other representation that meaning or context is not lost or otherwise inaccurately portrayed. Double check the representation of the fact with your factual source.
- Where facts are controversial or subject to credible debate, they should be presented with these qualifications rather than as undisputed
- Experts may present facts – however such experts must be credible and well accepted as an authority in their field
- Sources of facts should be well recognised as credible and independent, especially when using and relying on statistical and scientific data, which must be verified and checked
- Where a disputed factual claim cannot be verified via a credible, firsthand independent source, the basis of its inclusion should be made clear and should be justified editorially



- Participants giving eyewitness or personal testimony should be subject to reasonable due diligence to test and corroborate their claims
- Where footage, images or other material is presented as actual real event recordings, they must be of that actual real event
- If a reconstruction or dramatisation is used, this must be indicated expressly onscreen unless the SBS Commissioning Editor or SBS EP agrees that it is obvious from the context

Accuracy of factual elements in comedy/entertainment, constructed reality and docu-drama

SBS accepts that comedy/entertainment sometimes requires that obviously exaggerated or wrong claims be made (if clearly flagged to the audience as such). However, defamation concerns may need to be addressed if real persons are identified, and risks discussed with an SBS lawyer.

Genres such as docu-drama often present facts with some dramatic licence. In these cases, a program disclaimer to make this clear may be necessary, and defamation concerns may need to be reviewed. An SBS lawyer may require research to be provided identifying those parts of the script which are based on real events and which are dramatic licence.

In 'constructed' reality situations, where participants are filmed observationally in a set-up situation, how this is portrayed in the program or in content is important in terms of ensuring audience are aware of the true context and are not being misled or deceived.



4. Participants and contributors

Casting participants and background checks

Finding interesting and engaging participants for programs takes skill, patience and good judgment. Authenticity of participants is integral to the accuracy of a program and in establishing trust from the audience.

There are unlikely to be any problems with most participants. In the unlikely event a participant is not who they purport to be, the credibility of the program, SBS and the producer can be seriously impacted, amongst other adverse consequences.

Where necessary, reasonable and appropriate steps should be taken during production to ensure participants are genuinely who they say they are, and that the information they are telling you is accurate. For example, if a participant's life story is a central part of the program, it would be reasonable to conduct further research to corroborate and verify aspects of that story.

The most effective method of finding participants will vary depending on a number of factors, such as the subject matter of the program; whether you already have contacts; whether you are filming locally, nationally or internationally; the production schedule; and the demographic you are seeking. For example, you may be more successful finding participants for a documentary about treatment of the elderly by posting a notice in the local community centre than soliciting for participants via Twitter.

Other potential avenues for soliciting for participants may include:

- Advertising in newspapers, noticeboards, online and via social media
- Handing out flyers in the street
- Working with local community centres or charities
- Liaising with places of employment;
- Being immersed in the relevant community and talking to people
- Locating and talking to a person mentioned in the media
- Discussing with the SBS Commissioning Editor or SBS EP and other contacts

If you plan to post an advertisement seeking participants, wording must be approved by the SBS Commissioning Editor or SBS EP, corporate communications and publicity, who may also seek the advice of an SBS lawyer especially if the subject matter relates to potentially contentious topics such as racial vilification, crime or children.

Once potential participants have been identified, in addition to any self-disclosure that participants have already provided during the casting process, it may be necessary to conduct your own background checks. The level of checking that may be appropriate will vary, and in most cases, it will be a judgment call as to what aspects of a participant's background warrants further investigation. Conducting a press and online search would be a good and relatively straightforward start.

However, if a participant who is likely to be a major contributor to the program, discloses something (e.g. *“been arrested or convicted”*; *“currently involved in a court matter”* etc.) it may be appropriate to do further investigating such as:

- Speaking further with the participant to gather more detail



- Obtaining consent to access criminal records
- Talking to friends, family or colleagues of the participant
- Conducting more in-depth research of formal records and/or media references to corroborate information

If your research reveals anything about a participant which gives you cause for concern (e.g. something substantive which contradicts what the participant may have told you), then discuss it with the SBS EP or the SBS Commissioning Editor in the first instance.

It is also important that you are clear about a potential participant's motivation to be involved in the program. This will sometimes reveal clues as to the genuineness of a participant and whether there may be issues later in the production.

When using and relying on expert contributors, ensure that you obtain a copy of their curriculum vitae (CV) and make other enquiries as necessary to satisfy yourself that the person is an appropriate contributor to your program.

Fact checking or background checks that reveal credibility issues with expert or lay participants, or material discrepancies in personal testimony, should be notified to the SBS Commissioning Editor or SBS EP as soon as possible.

The SBS Commissioning Editor or SBS EP and compliance team may need to review or discuss accuracy issues with you. For this purpose, and to ensure easy checking during the editing process, factual sources should be footnoted in the program shooting script or otherwise recorded/filed and made available to SBS on request.

Keep a research file

The creation of a research file containing press clippings, relevant searches, life chronologies, correspondence and full interview transcripts should be kept for each participant and may be requested by the SBS Commissioning Editor or SBS EP and an SBS lawyer.

As a research file is likely to contain personal information about the participant, it is important to ensure the participant consents to disclose that information to SBS and other relevant parties, and that this information is stored securely in accordance with applicable privacy policies. (See also: 'Record keeping and legal disclosures').

Consent – participants

As a general rule – the producer of a program or content should obtain the informed consent of a participant prior to them taking part in the program. It is 'best practice' to advise subjects that they can ask for filming to stop at any time, and for that request to be respected.

Informed consent is the agreement of a participant to be filmed or recorded for the content you are producing. The participant should know what the nature and purpose of the content is, and what is expected of them. This includes an understanding of the full scope of how the content will be used – from broadcast, to online and social media, promotion and marketing.

Written consent in the form of a signed and dated release form, including a description of the program or content is considered 'best practice'.

However, it is acknowledged that there may be situations where obtaining a written release form is not practical or possible. In this situation,



reliance on other factors will be required to satisfy SBS that consent or implied consent was given. These factors may include conversations, emails, 'Filming' signs or performance (i.e. someone is fully aware they are being filmed and for what, and do not object).

Broadly, you do not need to obtain the consent from people who are filmed incidentally in the background of a shot in a public place. Care should still be given during the editing process to whether any context or narration over people filmed incidentally who are still identifiable gives rise to any issues.

Consent – news and current affairs content

For news and current affairs content (from any division of SBS), the approach to obtaining consent may differ given the nature and production timelines of content. Content producers should refer to the Codes.

Children as participants

Minimum legal requirements

You must comply with any current applicable "working with children" guidelines and regulations that apply in all states to children engaged professionally.

For SBS content producers, please consult the applicable SBS Working with Children policy.

External producers must ensure they obtain appropriate advice and implement their own policies. In particular, it may also be a requirement to establish a Child Safe Code of Conduct, which is a document required to be developed by the producer in accordance with all relevant laws, which outlines the minimum expected behaviours between workers and children in the production company's organisation.

In relation to the content, content producers must ensure that it does not breach any relevant legal prohibitions on the identification of children's juvenile records, participation in court proceedings or adoption, family court or guardianship orders.

The courts also have an inherent jurisdiction to protect the interests of children and have exercised this jurisdiction at times to injunct programs before broadcast. Factors similar to those set out below have been cited in such cases.

Where necessary, seek legal advice.

Consent - children identified and featured in content

The following guidelines are not a legal standard but reflect SBS's expectations of best industry practice concerning children identified in programs and content.

Generally, content producers should always obtain written consent from the child and their parent/guardian prior to participating in SBS programs.

At a minimum, the child should be given the opportunity to understand what the program or content is about and how they will be portrayed by the content before deciding to participate, and their parent/guardian, or if appropriate, a responsible adult family member or carer must sign the release on behalf of the child, or co-sign with the child if appropriate. For NITV content, reference should also be made to the related NITV provisions in the SBS Editorial Guidelines.

Where a child's parents are separated, consent may be required from *both* parents, depending on the particular situation. For example, if the



child only lives with one parent, or one parent has sole custody or care for the child, then consent from that parent alone may suffice. The subject matter of the child's contribution will also be a key consideration in terms of from whom consent should be obtained.

The *best interests of the child is the paramount consideration*. In some cases, even if the child and/or their responsible adult have consented, there is an additional ethical responsibility of the producer to independently assess the likely impact of the child's participation in the program and take reasonable steps to mitigate any impact. This additional responsibility may be present if one or more of the following factors apply:

- the child is under 16
- cultural considerations (e.g. if the child is Aboriginal or Torres Strait Islander or other background)
- the content is likely to reveal private details about them such as their sexuality, medical history, genetic identity or mental illness
- the content discusses family conflict
- the content discusses their criminal behaviour, abuse by others or may show them in a light that could negatively impact on their future

It may also be necessary to consider any public interest justifications that may be relevant.

Where heightened risk factors are present, content producers should consider with appropriate consultation whether it may be necessary to:

- consider whether an on-screen support person (parent or guardian) might be appropriate
- de-identify the child
- offer them a pre-broadcast screening of the program
- offer them independent counselling before, during and/or after filming/broadcast or
- take any other reasonable steps including cancelling their participation.

External producers should discuss with the SBS Commissioning Editor any proposals regarding the above prior to making such offers.

Consent - vulnerable persons

Vulnerable people may not be able to provide informed consent for various reasons, including mental capacity and literacy levels. Where risk factors are present, you should consider the same factors outlined above in relation to children. Producers should discuss these issues with the SBS Commissioning Editor or SBS EP before embarking on any filming.

Careful consideration should also be given when proposing to film identifiable people who may be under the influence of substances including alcohol or drugs, and/or have diminished capacity to give informed consent, even if temporarily. What may be appropriate will depend on each specific situation.

An appropriate filming protocol should be established setting out the process for obtaining consents. It may also be necessary to have flexibility within that protocol to deal with different scenarios and levels of capacity.



A 'one-size-fits-all' approach to obtaining consents will often not readily apply to all situations. Some factors to take into account and considerations when determining the most appropriate approach include:

- Whether or not someone has capacity to consent is a judgment call to be made by the production team member who has contact with the person. If your production is likely to involve seeking consents from vulnerable people on location, ensure production team members with appropriate experience and judgment are tasked with this role.
- If there are doubts as to the person's ability to consent, then it may be necessary to discuss with the SBS EP/SBS Commissioning Editor.
- 'On-camera' consent in addition to written consent may be useful. This will provide some evidence as to the contributor's capacity at the time if that may be disputed. Subject to the circumstances, 'on camera' consent alone may suffice.
- Consider whether a two-stage consent process may be appropriate. Step 1 – obtain consent to film a person; Step 2 – obtain consent to broadcast their contribution (which may be obtained at a later stage).
- If filming in an area where people may become under the influence of alcohol (e.g. in a bar/pub /festival), it may be appropriate to display 'Filming' signs notifying people that filming for television is taking place and the contact details for someone at the production company should someone not wish to appear. This approach may

negate the need to obtain individual consents, but it will always depend on the circumstances and extent of a person's contribution

- Is the person a featured contributor or incidental? Is filming in a public or private place? If incidental and if filming is in a public place, consider whether specific consent is necessary. Where specific consent is not considered necessary, it may still be useful to engage with those who may be filmed incidentally particularly if the subject matter is sensitive or where those filmed ask for information.
- You should endeavour to obtain sufficient consent to enable you to broadcast or use someone's contribution in your program. Be careful about suggesting to a contributor that they may be able to 'withdraw' later if that approach has not first been agreed with the SBS EP or SBS Commissioning Editor.
- Should the psychological support or other well-being measures be implemented? This may be applicable during the consent process to ensure a person is sufficiently robust to participate in the program or content, as well as during production and after broadcast.

Consent – Low English literacy and Non-English speaking participants

Where a participant doesn't speak English or has low English literacy skills is to appear in a program, the producer should arrange for:



- a translation of the release into the participant's fluent language (where relevant), or
- an on-camera consent to be given by the person after having the release read to them (including in their own language, where relevant).

Withdrawing consent

Generally, it is not recommended that participants and contributors are given the ability to withdraw consent after filming or their participation has taken place. This creates uncertainty, can cause editorial issues and may even result in there being insufficient material to complete and deliver a piece of content.

However, in some cases, it may be appropriate to incorporate an ability for a participant to withdraw their initial consent. For example, if the participant is particularly vulnerable or the subject matter is very sensitive, then it may be reasonable and appropriate to give the participant an option to withdraw. Including this option must be discussed with the SBS EP or SBS Commissioning Editor prior to being offered to a participant.

An alternative approach to offering a right to withdraw consent is to include a provision in the contributor release form that gives the contributor an opportunity to raise any concerns they have with the Executive Producer, including if they no longer wish to be involved in the program or content. It could be agreed that if concerns are raised, the producer and SBS will consider the concerns in good faith and take appropriate steps.

Seek further advice from an SBS lawyer if assistance is required drafting a clause like this.

Participant and production team welfare and duty of care

In addition to legal, Codes and regulatory obligations to ensure the welfare of participants and crew members, content producers should also take into account ethical considerations. Overlooking this consideration could have a serious reputational impact on SBS.

While involving a person in a program may be compliant with Codes and legal obligations, there may be additional factors which might invite the question – is it ethically appropriate to involve the person? For example, if informed and parental consent was obtained in relation to a teenager talking about their experience of sexual assault, but during filming the teenager becomes upset or distressed – is it still appropriate to use that material?

Decisions regarding whether to include a participant in a final program or piece of content are not black and white and should be upwardly referred where appropriate. If there is any doubt as to a participant's willingness to be involved in filming or the broadcast – even if they do not expressly raise a concern – it would be advisable to discuss with the SBS EP or SBS Commissioning Editor in the first instance.

Such considerations also extend to members of the production team, who are often at the front-line of dealing with and experiencing sensitive or disturbing subject matter. It may be necessary to offer psychological or other support to production team members.

Measures can be put in place to address welfare concerns, such as having a psychologist or support person on the production team, or made available for contributors or production teams to contact. For particularly sensitive or distressing content, regular check ins with production team members may be useful.



(see also 'Risk, safety and wellbeing' below)

Keeping records

Always retain a record of dealings with all contributors and participants to programs and content. Where formal release forms may not be obtained, it may be necessary to rely on other written correspondence (e.g. emails, text messages), telephone and in person conversations.

Despite all best endeavours, the parties' recollection of what was said or agreed to at the time consent was obtained can sometimes come into question, especially where a participant informs you late in the day that they did not believe they had given consent. Maintaining good records can assist to address any misunderstandings and find a resolution.

Payments

The SBS Commissioning Editor or SBS EP must be made aware of any proposal to pay compensation to a participant or contributor. While payment of reasonable expenses or for someone's time may be acceptable, extra thought may be required if a payment is proposed to a convicted criminal, a child or vulnerable person, a participant who has drugs or alcohol problem, or a person who may be likely to be a witness in criminal proceedings – among others.

For in-house produced SBS programs, compensation (where offered) must be a payment of money. SBS Finance must be consulted to advise on and implement any necessary payment processes for such compensation.

For externally produced programs, compensation does not necessarily need to be

a payment of money, but may be the supply of a supermarket or gift voucher or phone credit.

Consideration is necessary to ensure that such payments do not adversely impact on the perception of a participant's credibility or the integrity of the program. In particular, due consideration should be given:

- if payments are proposed to participants in an observational documentary
- if significant payments are proposed to construct situations or events in an observational documentary (e.g. a wedding). Factual accuracy and transparency in programs which contain these arrangements is vital

Anonymity

If a participant requests that they are not identified, this should be discussed with the SBS EP or SBS Commissioning Editor prior to agreeing to the request. It is useful to understand why anonymity is being requested

Legal advice may also be needed as a request for anonymity can raise confidential source protection issues and may compromise legal defences to defamation.



5. Risk, safety and wellbeing

You should give particular consideration at an early stage to the safety and wellbeing of production staff, participants and members of the general public who may come into contact with production filming.

SBS and external producers must comply with applicable work health and safety (WHS) laws, and any applicable film industry safety regulations.

Under WHS laws, SBS and external producers are required to do *what is reasonably practicable in the circumstances* to ensure the health and safety of workers, including those engaged on an SBS production. What action or precautions are appropriate will depend on the nature of the production, work involved, location and other factors.

Producers should have in place a plan to address and mitigate risk and impacts from risks identified. The risks and impact include, but are not limited to health and safety, disruption to your production, employment and commercial considerations.

It is recommended that if you are not clear about your legal obligations to employees or to your production teams more generally that you seek legal advice.

Addressing risks at an early stage is also necessary as risk considerations may need to be given when establishing a production budget. Some elements set out in this section may incur costs e.g. involvement of psychological support or other welfare measures.

If a producer becomes aware or suspects a breach or a potential breach of any WHS law or obligation on a production, or any threat to the

health or safety of any person involved in the production, the SBS Commissioning Editor should be notified.

Physical and psychological risk management

Potential risks should be discussed well in advance with the SBS Commissioning Editor, SBS EP or the program's Executive Producer as appropriate.

Consideration should be given to insurable risks, waivers, informed consent of participants and other risk management strategies. Potential participants may need to be medically and psychologically assessed and where appropriate, proactively offered psychological support throughout the production and post-production/broadcast period.

Background checks on participants in high risk factual content should be undertaken, such as internet and social media searches. Criminal checks may need to be obtained with the participant's consent prior to making final casting decisions.

What checks and assessments are necessary will depend on the nature of the content to which the participants are being considered, what their contribution is likely to involve and a subjective assessment of the individual participant.

Special care must be taken in relation to children and vulnerable people (see section 4 above).

Depending on the level of risk, SBS may require an independent expert risk assessment to be prepared. It may also be necessary to engage medical, psychological, security or other expert personnel for the production and to make contingency plans in the event of an emergency.



If in SBS's view a risk cannot be adequately managed or is not editorially justified, or if an occurrence during filming significantly raises a risk, production plans may need to be altered or in extreme cases, filming abandoned.

Dangerous locations

Dangerous locations include places with extreme physical conditions or personal security concerns. SBS will usually require a risk assessment to be undertaken before filming in or visiting dangerous or potentially dangerous locations.

If overseas, travel advisories should be consulted and SBS may arrange for internal advice from its news bureau regarding country conditions. Medivac, security, contacts for a local lawyer and consular support may need to be arranged in advance and participants may need to be provided with training (e.g. hostile environment training) and immunisations.

SBS requires producers create a risk and security protocol document which covers all essential details about the filming and personnel involved, as well as travel schedules, risk assessments, emergency and security protocols, and how risks will be controlled or addressed.

Potentially volatile situations

Some filming may inherently carry a significant physical risk or involve exposure to very traumatic or personally confronting subject matter.

Where filming in public, production teams must take care not to exacerbate or inflame a volatile situation. In some cases, the presence of a camera can do this.

If personal safety is in danger, it may be necessary to alter production plans, or abandon filming.

'Constructed' reality situations and high-risk factual content

Safety to those involved in a production can also arise from participant behaviour, particularly in a "constructed reality" scenario and high-risk factual content where the producer has selected participants on the basis of their differences.

Where participants are to interact together in extreme psychological pressure situations, in unsupervised close contact, or in set-up or 'constructed' situations, consideration should be given to:

- potentially dangerous or violent or otherwise unsuitable participants (see above: 'Casting participants and background checks')
- the situations participants are being asked to be involved in, including physical and psychological impacts

Risk and Informed consent of participants

Where a program involves heightened risks, including to the physical or emotional welfare of participants, it is important to obtain the informed consent of the program participants and to conduct appropriate risk assessments.

In some cases, it may be necessary for editorial reasons not to inform the participants of the exact nature or location of filming. However, participants should have the opportunity to receive relevant information about the general nature of the activity or location well before filming begins and before they sign any release. Participants should be given reasonable time to



consider this information, including the potential risks and obtain independent advice on the release.

During production, the participant may need to receive a fuller briefing and opportunity to withdraw before or during filming, and it may be appropriate for follow up support to be offered after filming is complete.

The information provided to participants from the time of program call out onwards, risk assessment, protocols for any background, medical or psychological checks, release and production filming protocols will need to be reviewed by the SBS Commissioning Editor or SBS EP and SBS lawyer.

Social media, publicity and promos – welfare of participants

If content involves children or vulnerable people, or deals with sensitive subject matter, due consideration should be given to the potential adverse impact to those participants if the content or excerpts of the content are posted on SBS social media platforms.

In particular, the ability for viewers to post comments should be considered carefully. Steps to mitigate potential adverse impacts or reactions such as blocking the ability to post comments, or applying an appropriate moderation regime may be useful to consider.

If content is to be included in other forms, such as a promo or on social media, consideration should be given to the context of the use and the associated platform and risk. While in most cases consents should cover this use, it may still be appropriate to at least inform the participant as a courtesy before the promo is posted or broadcast - subject to the nature of the contribution.

Participants should be advised that participating in a program may result in those individuals becoming more publicly recognisable in the wider community, leading to unwanted attention and criticism, including via social media. It may be appropriate to arrange a briefing for participants with SBS publicity about managing media generally, including online profiles, social media and media questions.

Vicarious trauma – welfare of production crew and live audiences

If a production involves production crew or live audiences being exposed to traumatic content, consideration should be given to the adverse impacts of that content on those individuals, and how that can be managed, including by:

- providing qualified psychological support to production crew through the relevant Employee Assistance Program, or in the case of SBS staff through the SBS EAP (Converge International)
- providing content warnings before showing distressing content wherever possible, and for live audiences providing the option to each audience member to remove themselves after a content warning is given
- providing resources to support live audiences, where applicable.



6. Filming with criminals, illegal activities and court proceedings

There is no prohibition on working and filming with convicted criminals, filming illegal activities or with people involved in court proceedings, but care is required given the legal risks that may arise. SBS content producers should discuss plans with the SBS Commissioning Editor or SBS EP and SBS lawyer before embarking on filming any potentially illegal activity.

Court proceedings

If a program is covering matters which are or have been the subject of criminal court proceedings, checks should be carried out to ensure any reporting of the proceedings is accurate, and to confirm whether there are any reporting restrictions.

To report something that is prohibited either by statute or by Court order could be a 'contempt of court' and attract criminal liability.

Illegal activities

If you are filming illegal activities (e.g. graffiti artists, drug use) you must only film observationally, including at a distance if necessary. You must not under any circumstances contribute to, encourage or facilitate the illegal activity. This may include offering to drive a participant to a location or allowing them to use your mobile phone to make calls. To do so may expose your production staff to criminal charges.

Care should also be given to the potential impact the presence of a camera or other recording device has on a participant and their actions. If you become aware that a participant may be involved in an illegal or potentially illegal activity, you and your filming schedules

and plans should not in any way influence the participant's actions in this situation. The risk is the participant may claim they were encouraged to partake in the activity to ensure it was 'for the camera' or simply that their decision to embark in certain conduct was influenced by you.

In some instances, you may have an ethical or legal duty to report serious criminal offences (including terrorism) to authorities. Upwardly refer any situations which you think may fall into this category and where necessary, seek legal advice.

Police requests for program material

Filming illegal activities or controversial situations can sometimes attract the attention of police, who may be investigating matters related to the subject of your program.

If you are contacted by a member of the police, any other authority or person requesting material from your program (e.g. footage, notes, contact details of participants) – do not provide or agree to provide any material without first contacting the SBS Commissioning Editor or SBS EP in consultation with an SBS lawyer for advice. In most cases, SBS will require a subpoena or search warrant before agreeing to provide program material in its possession to a third party.

Contempt of court – participant checks

In some programs, there will be participants who are or may become involved in court proceedings during the course of filming which could impact on what you can broadcast or publish, including where publication may risk being in contempt of court.

Depending on the nature of the court proceedings and the person or persons



involved, certain statutory restrictions may also apply to what can be published. There may be a risk of contempt if an identifiable participant in the program is facing a criminal charge which is still active (i.e. they have not yet been acquitted or convicted) at the time of broadcast, and their appearance in the program poses a substantial risk of interfering with the course of justice; or prejudicing the proceedings.

Broadcasting information which tends to impute guilt or innocence on an accused could be in contempt. For example, if a participant is facing a charge of aggravated assault, references to any past convictions, violent tendencies or information about their character may be problematic, and legal advice must be sought.

If you become aware that a participant is involved in criminal or civil court proceedings, find out as many details as you can from the participant, their lawyer, the courts and/or through your own independent research. Discuss the matter with the SBS EP or SBS Commissioning Editor and an SBS lawyer.

Where a decision has been made to include a participant who is facing criminal charges in a program, you will need to follow carefully the status of the court proceedings up until at least the time of broadcast in case there is any change. It is always useful to know what the charges are; which court is the matter being heard in; when is a trial expected to take place; whether the accused has entered a plea; whether it is going to be a jury trial or 'judge alone'.

Ensure that the SBS Commissioning Editor or SBS EP and an SBS lawyer are kept updated.

Whether a participant's involvement in a program has the potential to prejudice proceedings is a matter of fact and degree, and

also the extent of the participant's involvement in the program. Each situation must be determined on a case by case basis, so it is best to always seek legal advice if this is an issue.

Animal welfare

Filming animals or people interacting with animals can sometimes raise animal welfare concerns, even if the activity is seemingly justifiable and legal. All states and territories have legislation which regulates animal welfare, including offences relating to cruelty to and treatment of animals.

Filming may capture an animal being mistreated, injured, killed or slaughtered, and also the methods used to do so. The question may be asked whether or not the conduct contravenes applicable animal welfare legislation, and whether there are any legal exceptions to the conduct. Equally, proposals to film animals in a studio environment will also require careful planning.

It is important that research is undertaken and legal advice sought at the appropriate time so you have a fully informed understanding of the process or incident that is taking or due to take place, including reviewing any legal obligations or cultural guidelines relating to the process. In addition, including for studio-based filming of animals, it may be necessary to seek advice from adequately qualified animal-handlers and/or a veterinarian as to the most appropriate way to conduct the filming.

Once this information has been obtained, any legal or other risks to the production team and SBS may be assessed and measures taken to address any risks, including how to film the conduct, what information should be conveyed to the viewers, and whether a line against enquiry should be drafted with publicity.



7. Editorial independence and integrity

SBS is obliged under the *Special Broadcasting Service Act 1991* (SBS Act) and its Codes to maintain the editorial independence and integrity of its programs and content.

All SBS content producers should consult and be familiar with the SBS Editorial Guidelines which cover editorial and legal responsibility, conflicts of interest and commercial and external funding guidelines.

Editorial control

You must ensure that participants or any other party are aware that they do not have editorial control over the program. This wording should be reflected in the release signed by the participant and approved by an SBS lawyer (see also: 'Access agreements').

You must bring to the attention of the SBS Commissioning Editor or SBS EP any proposed conditions or undertakings requested by a participant, including where a participant requests a 'viewing right' to see the program or their contribution prior to broadcast or publication.

Participant viewing rights

The decision whether to offer an advance screening of a program or content to any third party prior to lock off should be discussed with the SBS Commissioning Editor or SBS EP. Such a decision might be taken in order to comply with The Greater Perspective or to ensure the accuracy of narration about a participant who appears in the program. However, the benefits and potential risks of doing so should be discussed with the SBS Commissioning Editor or SBS EP and, where appropriate an SBS lawyer and the Codes team.

Where possible, any screening offered should be at a secure location and distribution of private recordings prohibited. Depending on the nature of the content, it may be appropriate for a producer to be present at the screening.

Under no circumstances should a participant or other third party be given a copy of the program prior to broadcast without the matter being first discussed with the SBS Commissioning Editor or SBS EP, who should give approval.

Advance screenings of programs are carefully controlled by SBS (in consultation with the production company and other stakeholders), so it is important that the dissemination of any copies of the program prior to broadcast is managed with care.

The SBS Editorial Guidelines also provides guidance on the supply of SBS content to third parties.

Access agreements

In some cases, content producers may wish to obtain access to locations that are otherwise restricted from public or filming access (e.g. hospitals, filming with the police) or obtain access to materials not available on the public record. In these cases, the relevant authority may wish the producer to sign an access agreement.

Prior to agreeing to the terms of an access agreement, it may be prudent for any proposed agreement and correspondence with the relevant authority to be reviewed by an SBS lawyer. Provisions often included in access agreements are obligations granting the authority a screening of the program; allowing the authority to veto content or make editorial changes. Such provisions must be carefully considered in light of the obligation on SBS to maintain editorial independence and control.



There may also be legal reasons why allowing the authority rights over content could be problematic.

Reasons that may be acceptable to agree to could include allowing viewing rights for the purposes of checking accuracy or ensuring that protected persons are not identified, or for similar privacy or other legal reasons. However, if editorial independence cannot be sufficiently guaranteed, SBS may require that the agreement is not signed or that it be amended.

Special legal conditions currently apply to access to Australian immigration detention centres. As any breach of the conditions signed by producers of SBS programs may affect SBS news journalist access, these agreements also require careful review by an SBS lawyer prior to signing.

Care should also be taken regarding broader media access agreements which may bind all SBS, rather than just the production team seeking access for a specific piece of content. Carefully review the terms and conditions of access agreements, and seek legal advice before signing if necessary.

Filming in hospitals or other similarly sensitive locations will require careful consideration in particular with regard to privacy and identification of patients and members of the public. Filming in such locations will usually require permission, as well as a filming protocol setting out the process to be followed for obtaining consents of people filmed. In some circumstances, it may be necessary to pixelate or otherwise anonymise people filmed in post-production.

Right of replies

In some circumstances, it may be editorially necessary to seek a right of reply from an

interested party in relation to a particular claim, allegation or comment made in a program. The right of reply process can also be useful in order to aid the assessment of legal risks, as well as assisting in program research and importantly, factual accuracy.

It is important to ensure the substance of a right of reply, whether by letter, email or phone, is thought through carefully and that the recipient is given relevant and accurate information on the issue to which you would like them to respond. This will vary depending on the issue, but take care not to mislead the recipient as to the program's content. Equally, it may not be necessary to include a detailed, scene-by-scene account of the entire program's content or investigation.

Generally, a right of reply should succinctly set out the issue to which you require a reply and any relevant background which would assist the recipient to provide a response. It is not usually necessary to include references to every bit of research obtained.

Care should also be taken not to use the right of reply process to undermine your program or content's credibility - for example, by making it obvious that you have gaps in your research or are uncertain about the basis upon which you may be seeking their response. In some situations, you can use this process to assist with your research, but consider whether it is better to seek this research information separate to seeking answers to particular allegations or claims.

Timing when to send a right of reply is also critical. It will depend on the program, the subject matter/issue, and what kind of a response you are seeking (e.g. filmed interview, or written statement). Sending a right of reply on a legally contentious point (such as one which may be perceived as potentially defamatory or



as disclosing confidential information) may have the potential to trigger injunction proceedings to prevent broadcast or other pre-broadcast challenges, so seek legal advice at an early stage and discuss with the SBS Commissioning Editor or SBS EP to ensure that any challenge to the program can be robustly defended or otherwise addressed.



8. Misleading conduct and pranking/set-ups

Misleading and deceptive conduct

Current consumer laws prohibit 'misleading and deceptive conduct' in the course of trade or commerce. This can apply to conduct in the arranging, filming and broadcast of programs. There are some exceptions to the broadcast of SBS content.

Misleading or deceptive conduct may include: not revealing the true nature of your program or who you are; taking on an assumed persona; giving misleading information to someone in order to obtain an interview or elicit a reaction or response. It can also apply in more generic commercial matters such as contractual negotiations.

Such conduct may result in a legal claim for damages, material not being able to be included in the final program, and can adversely impact on the credibility of SBS, the program and its makers. In some situations, there may be justification to disclose only certain details about who you are and what is the nature of the program or content. For example, these may be necessary for editorial, journalistic or safety reasons.

If you are unsure whether proposed conduct may constitute misleading or deceptive conduct, it is best to discuss your plans in advance with the SBS Commissioning Editor or SBS EP and an SBS lawyer to assess the proposal and risks.

Stunts, set-ups and use of hidden recording devices

Filming stunts or set-ups often involve a departure from the usual 'best practice' approach to aspects of program making such as

the process of obtaining consents, privacy considerations and the use of hidden cameras or recording devices. As such, they carry with them an element of risk, but with early advice risks can be identified and mitigated.

Any proposal to 'prank' or use a set-up, including the use of any hidden recording devices must be discussed with the SBS Commissioning Editor or SBS EP and an SBS lawyer at an early stage. Areas for consideration may include:

- What is the editorial justification for the prank, set-up or use of hidden recording devices?
- Consent forms: may require careful drafting to ensure the filmed material is usable and consents sound (including considerations of any element which could be construed as misleading)
- What is the process for obtaining consents from people who are not the target of the stunt/set-up? On-camera consent? Blurring?
- The nature of the stunt or prank, including location, health/safety risks (for both the production crew and participants), impact on people who have not given consent
- Who is the 'target' of the set-up? Are they robust enough? What can be done to mitigate any risk (e.g. talking to friends/family of the target in advance)
- Are any children or vulnerable people involved in the set-up? Is it appropriate they are involved?



- Are there any cultural impacts? Is it necessary to consult any applicable Indigenous protocols?
- What are the on-location filming procedures? For example, if an individual realises they are being secretly recorded and asks for recording to stop, in most cases the producer should do so.

Hidden recording devices

Each State and Territory in Australia has surveillance laws that apply to the use of hidden microphones, cameras, GPS tracking and computer surveillance. Rules are not consistent between States and Territories so it is advisable to discuss your plans with the SBS Commissioning Editor or SBS EP and an SBS lawyer.



9. Record keeping and legal disclosures

Records

Research and correspondence files appropriate to the program must be retained and made available to the SBS Commissioning Editor or SBS EP, an SBS lawyer or Codes advisers on request.

In particular, the producer must keep and provide to SBS on request:

- Full interview rushes and/or transcripts with all participants;
- Advices from your legal advisers relating to issues covered in the Handbook or otherwise relating to program content risks;
- Copies of press clippings, online or other searches or background checks on participants or in relation to factual verification of content;
- Correspondence with third parties including requests for interview, correspondence with authorities, copyright licensors and correspondence with location owners.

These materials must be kept for a minimum of 12 months after the program first airs.

As a research file is likely to contain personal information about the participant, it is important to ensure the participant consents to disclose that information to SBS and other relevant parties, and that this information is stored securely in accordance with applicable privacy policies.

Legal privilege and confidentiality

When SBS lawyers provide legal advice to SBS, or a lawyer provides advice to their client, e.g. a production company, or information is conveyed for the purpose of providing legal advice, that advice has a special legal protection called 'legal privilege'. This protection is important to ensure that both lawyer and client can communicate openly and also prevents information being disclosed without the client's consent. This may be particularly important should a legal issue arise.

Correspondence regarding legal issues between SBS and the producer should be clearly marked "legally privileged" and notes of conversations with the producer's or SBS's legal advisers should be separately recorded and headed "legal advice/meeting". Such correspondence should not be circulated internally other than on a need to know basis. Do not circulate legal advice to third parties or privilege could be lost.

Matters of commercial in confidence, such as discussion of licence fees and other commercial terms, should be clearly marked as such.

Legal disclosures

While SBS respects the confidentiality of its arrangements with external producers, SBS may be required to disclose information about the program or its arrangements with the producer by law.

SBS must comply with a valid legal subpoena or other legal disclosure order.

SBS may also be required to provide information to the Australian Communications and Media Authority if a complaint about the program is being investigated under the SBS Code of Practice.



Undertakings

An 'undertaking' to do or perform an act can have particular legal consequences. If you are asked to 'give an undertaking' it may be advisable to seek legal advice as to the status of that 'undertaking' prior to agreeing to give it.

Freedom of Information Act disclosure

As a Commonwealth agency SBS is subject to the *Freedom of Information Act 1982 (FOI Act)* that in some circumstances may compel SBS to disclose information to third parties.

SBS will consult with the producer before providing such materials in relation to any request. SBS may be entitled to rely on an exemption provided for in the FOI Act for 'program materials'.

The exemption applies to all versions of a program (whether or not incorporated into the complete program) and any document acquired or created for the purpose of creating a program (which may include program development agreements and production agreements, for example). If necessary, SBS will raise exemptions if the disclosure would reveal commercially valuable information, private personal information or otherwise be legitimately refused.

Legally privileged material is also exempt from disclosure.

Senate Estimates

As a Commonwealth agency SBS is obliged to answer questions at Senate Estimates and questions asked in Parliament, and may be required to respond to government inquiries in relation to financial or other matters relevant to SBS's operations.

If SBS is required or requested to disclose information about the program or the producer that is otherwise confidential, it will, where appropriate consult with the producer in advance and keep the producer informed of the outcome.

Public interest disclosures

The *Public Interest Disclosure Act 2013 (PID Act)* applies to SBS. As a contractor to SBS, this Act also applies to external producers.

The Act provides whistle-blower protection in the case of allegations of wrongdoing by SBS or its current or former employees or contractors, or an officer or employee of a contracted service provider and provides certain obligations to report and investigate such allegations. Contractors, subcontractors and their officers and employees may also make a public interest disclosure under the Act. For more information please visit the SBS Website at <http://www.sbs.com.au/aboutus/corporate/index/id/186/h/Public-Interest-Disclosure-Act-2013>.



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