

Written evidence submitted by Ofcom

DCMS Select Committee: Draft Media Bill Pre-Legislative Scrutiny

We welcome the opportunity to provide written evidence to help inform the DCMS Select Committee's pre-legislative scrutiny of the draft Media Bill.

Ofcom is the UK's communication regulator and our duties are set by Parliament. Our principal duty is 'to further the interests of citizens in relation to communications matters, and to further the interests of consumers in relevant markets, where appropriate by promoting competition'. In doing so we must ensure, among other things, the availability of a wide range of television and radio services which are of high quality and appeal to diverse audiences; and that audiences are protected from harmful or offensive material on those services. We must also have regard to promoting the fulfilment of the PSB purposes, as described in statute.

The audio-visual and audio media sectors play a significant role in UK life. The average amount of time people spent watching TV and video content in 2021, across all devices, was 5 hours 16 minutes per person per day, and nine in 10 people tune into the radio each week. How audiences consume this content has changed significantly since our regulatory powers were last updated; services that did not exist when the Communications Act 2003 was introduced are now big players in the market, with 67% of UK households using Subscription Video-on-Demand (SVoDs) in Q2 of 2022 and a quarter of radio listeners now listening online. Audiences expect high quality content regardless of how they consume it, so it is vital that the regulatory framework underpinning media in the UK remains relevant to support this world-leading economy.

This is why we welcome the publication of the draft Media Bill. The Bill will implement the key recommendations we made to Government in our 2021 review of public service broadcasting, [Small Screen: Big Debate](#) (SS:BD). This work was informed by extensive audience research and industry engagement. Public service broadcasters (PSBs) are facing challenges from a rapidly changing market, with the emergence of global players, technological changes and audiences shifting their viewing online. This is affecting their ability to meet all UK audience needs and expectations. The current legislative framework, which has changed little since 2003, remains focused solely on broadcast television services, and requires urgent modernisation to ensure it is fit for the digital age and to enable our PSBs to respond more effectively to the challenges they face.

We have worked closely with the Government as it has prepared the draft Media Bill, which we consider will deliver important and necessary reforms. In some areas the Bill introduces new regulatory obligations on services that have not previously been subject to regulation, and this pre-legislative scrutiny provides a valuable opportunity to assess the implications and effectiveness of these new requirements. We focus our comments in the following submission on matters that relate to proposed

changes to Ofcom's role, and ensuring those changes are workable, proportionate and reasonably 'future proof'.

Part 1 of the Bill: PSB remit

- Framework

We welcome the Government's intention to modernise the framework for public service media. In response to changing viewing habits, all PSBs are managing the transition from a primarily broadcast delivery model to a digital-first one, and evolving the way they deliver content to increasingly fragmented audiences. In light of this, giving PSBs more flexibility on the services they can use to deliver their public service remit, while also ensuring they are held to account, is a positive step and should help them to continue to reach audiences and deliver public value. It's important that the PSBs continue to offer content that meets the wide-ranging needs of UK audiences. As such, it is welcome that the draft Bill makes clear that, together, PSBs must make available a broad range of audio-visual content which meets the needs and interests of as many different audiences as practicable. To ensure that Ofcom is able to continue to hold the PSBs to account for delivering for audiences, it is important that this flexibility is accompanied with appropriate 'step in' powers so the commercial and PSB incentives remain effectively balanced.

- Quotas

We welcome the fact that PSBs will be able to deliver their quotas more flexibly. We are keen to ensure that this additional flexibility protects existing levels of outputs by PSBs in relation to each quota. We would also want to ensure that whatever changes are made to the quota system retain the flexibility to allow for year-on-year expansions and contractions in the market, particularly an absolute spend quota.

Part 2 of the Bill: Prominence

We welcome the new regime as described in the draft Bill and supporting documents, which broadly reflect our recommendations to Government. These are essential reforms to maintain universality and the sustainability of PSB for the future.

Given the rapid changes in the market and the rise of global platforms, our work has identified growing concerns that PSB may become less visible to UK audiences. At present, the PSBs negotiate with connected TV platforms to distribute their 'players' such as BBC iPlayer or ITVX. When negotiations fail, there is the risk that the PSB 'player' and its content are not available on the affected platforms until a commercial resolution is reached. This has occurred on several occasions in recent years. These commercial negotiations relate not just to prominence but areas such as the share of advertising inventory and revenues, access to data, and attribution.

We support the Government's intent to incentivise mutually beneficial carriage deals between parties wherever possible by allowing for flexibility in how these deals are put together and by keeping the level of prescription to a minimum. Ofcom's role under the new regime will function as a backstop to protect audience's interests and secure the delivery of PSB where carriage agreements cannot be reached. In such cases where all options are exhausted, our new powers will include the ability to impose directions

on parties to agree certain carriage arrangements/terms. We could also issue financial penalties as part of our enforcement powers.

The Bill provides for Ofcom to issue guidance on how, when negotiating carriage deals, PSBs and regulated platforms can act consistently with the underlying statutory objectives of the new regime. We think further consideration needs to be given to the exact wording of the agreement objectives and explanatory notes, to ensure they are understood by all parties and provide the basis for effective and proportionate guidance and decision making, in line with the DCMS policy intent.

On the new prominence duty, Ofcom is required to put in place a Code of Practice that will set out recommended steps that the regulated platform can take to be deemed compliant – and achieve a ‘safe harbour’. It is important that the new regulation allows for flexibility to adapt to new technology, innovation and changing audience expectations and habits. We think this would be best achieved through an approach that enables Ofcom to take a principle-based approach to the Code of Practice rather than detailing specific routes to compliance.

Part 4 of the Bill: ODPS

With viewing of live TV gradually decreasing, recent years have seen a dramatic rise in use of video-on-demand services. Viewing of SVoD has increased over three-fold since 2017 with over two thirds of all UK households now having access to a subscription service (like Netflix on Disney+). At the same time, connected televisions and set-top boxes offer a blend of live television, broadcaster catch-up and SVoD services with viewers experiencing these in an increasingly fluid way. In this context, we welcome the new duties to regulate VoD services that will provide certainty for viewers about the standards they can expect from TV-like content, and their route to complaint, no matter how they choose to consume it.

Under the draft Bill, the specific criteria for designation of Tier 1 services (which will be subject to the new standards) are a matter for the Secretary of State. Ofcom will prepare a report on the operation of the VoD market in the UK which must include matters which are specified by the Secretary of State but may also include matters which Ofcom considers appropriate and to which the SoS will have regard to when specifying the designation criteria. However, Government has been clear that it intends to capture the largest, UK-facing VoD services that provide a TV-like experience. Given the vast breadth of services that meet the definition of ODPS (from very small services run by one or two individuals to multinational organisations), this process of designation will help ensure that the new requirements do not disproportionately impact small services that may not have the resources to ensure their content is compliant with the relevant standards.

We appreciate the fundamental differences between how content is consumed on linear and video-on-demand services and how audience expectations are shaped by these. As the VoD Code will have the same key standards objectives as the Broadcasting Code, there will be similarities between the two Codes. However, we will aim to ensure that the VoD Code recognises the inherent differences between audience expectations for linear and on-demand services and the methods by which audiences can be protected.

The draft legislation requires Ofcom to consult with those who may have an interest in the Tier 1 standards code prior to publishing a code. This consultation process will ensure that the views of a wide range of interested parties are taken into account beginning from the preliminary drafting stages.

We are already in the process of conducting new research into audience expectations of on-demand content. This, alongside further research we have planned as well as close engagement with providers and other stakeholders, will help ensure the new Code is proportionate and workable. The current drafting of legislation gives VoD providers a grace period of 6 months in which to ensure compliance with the new code. We will work to ensure that the VoD Code is proportionate in its application to VoD providers taking into account: the particular features of the VoD marketplace; the importance of upholding freedom of expression; whilst ensuring that audiences are protected from harm and children are protected from unsuitable content.

We welcome the proposed accessibility requirements, which reflect our 2018 and 2021 recommendations to Government. These regulations should bring tangible benefits to the significant number of disabled people who rely on access services to be able to enjoy on-demand content. Around one in five adults have hearing loss¹ (including 87,000 Deaf people with British Sign Language as their preferred language²) and more than two million people live with sight loss. We consider that the proposed requirements are set at an appropriate level and note that Ofcom would apply exemptions in cases where it would not be proportionate to meet the full requirements. Introducing accessibility requirements as proposed will give Ofcom appropriate flexibility around determining these exemptions, taking into account future developments in the video-on-demand industry (for example, in relation to measuring audiences).

Part 5 of the Bill: Radio Selection Services

Radio is a valued part of the UK's media landscape: nearly 9 in 10 adults in the UK listen to live radio each week. A quarter of all live radio listening is online, via apps, browsers, and devices like smart speakers. Half of this online listening – around 14%, and growing each quarter - is via smart speakers, powered by voice assistants, which make decisions as to what content to provide to audiences. We maintain an understanding of how the radio sector and audience listening trends are changing, drawing on existing internal and external data sources. This allows us to track shifts in listening – in this case, the move from listening to radio via broadcast platforms to listening online.

The voice assistant regime in the draft Bill is novel and applies to a developing and dynamic sector. We have seen and continue to see a lot of innovation in this space, some of which is supported by partnerships and collaboration between the voice assistant platforms and the largest radio providers. Alongside this, we are learning in greater detail about the process for providing content to audiences via voice assistants, for example, how requests for content are processed and decisions are made, how data flows between parties, how parties engage with each other on integration and technical development.

¹ See the Royal National Institute for Deaf People's [Facts and Figures](#)

² See the British Deaf Association's [Help and Resources](#)

We plan to publish some research we commissioned which explains the technical function of voice assistants and relationships between parties in this marketplace.

In this highly technical and dynamic area, we think it's important to recognise that for these novel provisions to apply effectively, they need to be appropriately tailored to the specificities of how online content is created and distributed, and for the new regime's scope to be effective and proportionate. We think engagement with stakeholders from the radio industry will be key to understanding how the creation of radio streams may differ from linear broadcast content, for example, in how advertising is included, or in the way types of programming are combined to create the content stream. Similarly, engagement with the voice assistant platforms that will likely fall within the scope of the provisions will be important to understanding how their technology operates to make these radio services available. Additionally, we think understanding the role of aggregators, who currently fall outside the scope of the provisions, in delivering this content to audiences is also key.

We think it is important that the potential implications for all parties are worked through to ensure that any intervention in this area is effective, proportionate and enforceable, and to ensure there are no unintended consequences for audiences and consumers.

Part 6 of the Bill: Radio deregulation

We agree with Government that much of the statutory framework relating to the licensing and regulation of analogue and digital radio services is in need of updating to reflect the huge changes in the market since the 1990s.

In particular, we welcome the proposed removal of the need for Ofcom to regulate music formats and where presenters are based – the huge range of choice now available to consumers across various platforms, and developments in listening patterns and technology, mean regulating such matters on just one of those platforms (i.e. analogue radio) is no longer appropriate.

The proposals in the draft Bill also include a new requirement for stations to include 'locally-gathered' news, which Ofcom will enforce. Our research has consistently shown local news is what audiences value most about local radio, and industry research also shows that local news on commercial radio reaches audiences which other news providers struggle to reach. We agree with Government that stations should continue to be required to provide local news. The proposals in the draft Bill also include a new requirement that local news programmes should include "locally-gathered" news, which Ofcom would enforce. We think it is important the Bill is clear what is intended by this new requirement.

Conclusion

This Bill introduces urgent and necessary measures to update the regulatory framework, which should ensure that UK audiences continue to benefit from a broad range of high-quality content, and we welcome its draft publication. We look forward to hearing the Committee's views on the draft Bill.