Better Public Media Trust

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Submission to the Department of Internal Affairs (Te Tari Taiwhenua) on *Standardising Classification for Commercial Video On-Demand Content*

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The Better Public Media trust appreciates the opportunity to contribute to the Department of Internal Affairs consultation on Standardising Classification for Commercial Video On-Demand Content.

The DIA consultation paper asks for feedback on-

Option 1: Subject CVoD content to current New Zealand classification processes;
Option 2: Establish a mechanism for CVoDs to self-classify under the official regime;
Option 3: Identifying enhancements to the voluntary self-classification scheme + enhanced call-in powers

It also highlights 4 desirable characteristics of the any approach to CVOD classification:
• Timeliness at addressing risk of harm;
• Ability to address risk of harm;
• Minimising cost to providers;
• Minimising cost to regulators.

Preliminary observations

BPM supports an approach to classification which i) minimises the potential for harm to the viewer, ii) ensures consistency across all platforms and iii) maximises compatibility with international content regulation arrangements. The Department of Internal Affairs options for bringing CVOD services under a classification regime would potentially address point i) by bringing new online/on-demand services under a classification regime, however, in BPM's view, the proposal does not adequately address points ii) or iii).

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Although the Broadcasting Standards Authority's own codes of practice and programme ratings/ advisories covers online content that is also broadcast, it is obviously a somewhat different set of classifications to those currently employed by the FVLB and OFLC. The exclusion of free-to-air video on demand services (FVOD) from the scope of the current discussion is therefore potentially problematic; if the aim is to optimize consistency across all platforms then this needs to be taken into consideration.

Moreover, the DIA options for CVOD do not address other forms of online/on-demand content services such as YouTube (which has both free and pay services) and other platform operators which provide access to third party content through overseas servers (including social media such as Facebook, which had obviously received considerable recent attention after inadvertently hosting the live-streaming of the Christchurch mosque terrorist attacks).

Although BPM applauds the motive behind the current DIA proposal, BPM's view is that this should ideally be part of a coordinated multi-agency response to gaps in the current content regulation frameworks. There are reasons why the proposal for CVOD may be counter-productive in the wider context of regulatory responses to the evolving digital media ecology and efforts to redress the gaps in the regulatory framework. Specifically, a unilateral revision of the classification regime for CVOD which is not coordinated with parallel content classification developments by other state agencies may serve to further complicate the task of developing a more consistent framework across platforms, especially if a statutory response to address CVOD in the short term has to be subsequently repealed to enable a longer-term solution.

One further consideration which needs to be emphasized here is that content classification is evidently one of many responses to minimising harm related to media content consumption. Other considerations include:

- The potential to extend the availability (and audience use of) V-chip and other blocking technologies which can restrict access to undesired content without a PIN) to other platforms (although audience take-up of these technologies when available is inconsistent).
- The potential to use interactive media 'wikis' to provide more detailed information about media content (e.g. more detailed trigger warnings might be added to a wiki and linked to the main platform providers to allow easy checking prior to consumption).
- Measures to improve digital literacy among consumers and consideration of other forms of harm which may arise (both individually and socially) from misinformed consumption of otherwise legal media content (e.g. the impact of fake news and echo-chambers on public opinion, the cultivation of dysfunctional sexual attitudes through pornography, or the normalisation of ecologically damaging over-consumption through legal but misleading advertising).
- Control/manipulation of audience access to content through digital intermediaries which dominate the architectures of content discovery.
- The potential for harm/ injury to the public good stemming from the *absence or under-provision* of certain forms of content (e.g. public interest journalism, educational content for children, local/ indigenous content).

Previous efforts to address the wider issues of media regulation have been initiated but not completed. Labour's 2008 *Review of Regulation* consultation[2] explored options for creating a more consistent framework for online media and content classification. This was subsequently terminated by the incoming National-led government in 2009 which layer introduced a revised (albeit rather narrower) consultation *Exploring Digital Convergence* (including *Content Regulation in a Converged World*)[3] which attempted to address the gaps in the Telecommunications and Broadcasting Acts concerning online services and content standards. However, National's Digital Convergence Bill was put on hold by the incoming Labour-led government in 2017[4]. Meanwhile, the Ministry for Culture and Heritage also undertook a further consultation with industry and civic stakeholders in May 2018. It is also worth noting that the BSA revised its codes of practice in 2015-16, and more recently initiated review of time-bands and programme classifications (it is not clear whether the DIA initiative is intended to dove-tail with this).

Better Public Media's view is that many of the contemporary issues of media regulation in the interactive digital ecology cannot be addressed through the existing frameworks and will not be adequately resolved by partial reforms undertaken unilaterally. BPM has issued a discussion paper in the wake of the Christchurch Call scoping out a wider framework of regulatory options which policy-makers might consider in the development of a wider response to contemporary issues in the digital media ecology. An excerpt from this is included in Appendix 1. An excerpt from the BPM submission on the 2015 *Content Regulation in a Converged World* consultation (which considers the options for a converged regulatory agency and the balance between statutory and self-regulation) is also attached in Appendix 2 for reference.

BPM response to the three options

The table below summarises BPM's response to the three options in the consultation paper under two conditions:
a) in the context of the DIA proposals being the *only revision of classification standards likely for the foreseeable future*, and
b) in the context of the DIA proposals being an *interim response* to the regulatory gaps in anticipation of a *wider review of regulatory settings* for the digital media ecology, which might encompass issues such as consistent cross-platform classifications and labelling.

		No wider regulatory review	**With wider regulatory review**
Option 1- Extend existing regime to CVoD	Pros	• Would partially close a regulatory gap regarding CVOD classification. • Enables reduction of the risk of harm by supporting informed consumer choice prior to consumption. • Minimal cost tor content already classified under other regimes. • Maintain default setting for statutory provisions. • Significant costs are unlikely to be incurred unless a CVOD provides a substantial volume	• Would partially close a regulatory gap for CVOD in the short term only. • Maintain the default setting for statutory provisions.

[2] See https://mch.govt.nz/research-publications/our-research-reports/digital-broadcasting-review-regulation-january-2008
[3] See https://mch.govt.nz/contentregulation and https://mch.govt.nz/exploring-digital-convergence-issues-policy-and-legislation-august-2015
[4] See https://www.beehive.govt.nz/release/digital-convergence-bill-put-hold

		of original content such at Netflix. However, these providers are unlikely to limit content availability in New Zealand because of such compliance costs.	
Option 1- Extend existing regime to CVoD	Cons	• Imposes compliance costs on higher volume providers of content not already classified under other regimes • May lead to delays in content being made publicly available in NZ if regulators have high volumes to classify. • Reliance on pre-classification of content under other (overseas) regimes/jurisdictions may entail ambiguity or inconsistency. • Does not incorporate FVOD or FTA television codes overseen by the BSA and therefore does not resolve cross-platform inconsistency problem. • Issue of how to regulate CVOD content accessed from overseas providers outside of NZ jurisdiction needs to be considered.	As with no regulatory review *plus:* • Potential to engender regulatory fatigue and policy inertia if further classification reforms are sought in the short-to-medium term, thereby locking in an incomplete classification model.
Option 2: Self-Classify under official regime	Pros	• Reduces compliance costs both for CVOD providers and regulators; especially for content not yet classified under other regimes. • If undertaken responsibly, this would help reduce the risk of harm by supporting informed consumer choice prior to consumption.	As with no regulatory review *plus:* • Maintains official classification standards as a default in the short term.
	Cons	• Does not incorporate FVOD or FTA television codes overseen by the BSA and therefore does not resolve cross-platform inconsistency problem. • Even under a compulsory official classification regime, there is potential for a conflict of interest to arise if there is a commercial motive to award minimally restrictive classifications to maximise audience appeal. • The reduction of harm is likely to be less consistent than option 1. • Does not incorporate FVOD or FTA television codes overseen by the BSA and therefore does not resolve cross-platform inconsistency problem. • Issue of how to regulate CVOD content accessed from overseas providers outside of NZ jurisdiction needs to be considered.	As with no regulatory review, *plus:* • Potential to engender regulatory fatigue and policy inertia if further classification reforms are sought in the short-to-medium term, thereby locking in an incomplete classification model. • Sets a precedent of self-regulation for CVOD operators, making it difficult to 'claw back' regulatory control and increasing the pressure from providers of content via other platforms to be permitted to self-classify themselves.
Option 3: Enhanced Voluntary self-classification	Pros	• Minimises compliance costs for CVOD operators. • Would potentially reduce harm through supporting informed consumer choice, albeit less consistently than options 1 & 2	• If adopted as an *interim measure* in the context of a wider review, then this could serve to reduce harm until the shape of a new regulatory framework is determined. • The absence of new statutory legislation in the interim would

plus call-in powers **Option 3:** Enhanced Voluntary self-classification plus call-in powers	Pros		have a lower risk of regulatory fatigue and subsequent policy inertia. • May allow self-classification regime under NZMC to be tested without engendering the expectation that this would become the default for the foreseeable future. • Would allow time to consider measures to address harm derived from audience access to unregulated CVOD providers overseas and outside domestic jurisdiction.
	Cons	• Limited basis to infer the efficacy of any classification system overseen by the NZ Media Council compared with established OFLC system. • Potential to increase classification inconsistencies across platforms rather than harmonise them. • Increased reliance on retroactive/ remedial responses to mis-classified content represents a higher potential for harm. • Potential for CVOD providers to ignore regime or disregard rulings if cost of compliance is deemed undesirable. • Issue of how to regulate CVOD content accessed from overseas providers outside of NZ jurisdiction needs to be considered. • Would entrench a model of self-regulation for CVOD operators, making it difficult to 'claw back' regulatory control and increasing the pressure from providers of content via other platforms to be permitted to self-classify themselves.	As with no regulatory review, *plus:* • Difficult to predict the future shape of CVOD providers. Netflix, Lightbox and Neon may all be operated in a responsible manner but the classification regime needs to anticipate future scenarios where new actors, technologies and market permutations invite new modes of classification.

Based on the points highlighted in this table, BPM's response to the specified DIA questions are as follows:

Question 1: Do you support making CVoDs subject to current classification processes? Why, or why not?

In the *absence of a wider regulatory review*, BPM would support this option as the most likely to minimise harm, but would still note that it is a sub-optimum solution.

However, if a *wider regulatory review were to be implemented* then. in the short term. it may be better *not* to pursue a statutory revision of the provisions for CVOD until such time that a consistent cross-platform framework can be developed. Short-term statutory responses to one aspect of content regulation may entrench cross-platform inconsistencies and lead to regulatory fatigue/policy inertia, making it less likely

that a more comprehensive and consistent reform of content regulation would be contemplated and/or more likely that further, retro-active statutory intervention would eventually be needed.

Question 2: If you are a service provider:
(a) What cost impact would this option have on your business?
(b) What impact would this option have on your ability to continue to provide streaming services to the New Zealand market?

Not applicable.

Question 3: Do you support a self-labelling regime for CVoD providers? Why, or why not?

This is probably less likely to minimise harm compared with option 1) but more likely to minimise harm than option 3). It would potentially ensure a degree of consistency and help bring CVOD services under a classification framework without imposing significant additional expenses on industry or regulators. However, insofar as it also requires statutory intervention, the same concerns would apply in regard to option 1) above. In the absence of a wider regulatory review option 1 would be preferable, but if a wider review was likely then option 2 could also risk locking in a classification system which was not consistent across platforms and which then needed further statutory revision to change.

Question 4: If you are a service provider:
(a) What cost impact would this option have on your business?
(b) What impact would this option have on your ability to continue to provide streaming services to the New Zealand market?

Not applicable

Question 5: Do you support the Government looking to identify enhancements to existing mechanism and operate them in tandem as our system for classifying CVoD? Why, or why not?

In *the absence of a wider regulatory review*, this option is the least likely to consistently reduce harm, precisely because its voluntary nature permits CVOD operators to opt out of the scheme or, indeed, ignore rulings which have no statutory backing.

However, if a wider regulatory review was to be on the policy agenda, *then as an interim measure*, this would be BPM's preferable approach to bringing CVOD services under some kind of classification scheme- until such time as a more consistent classification framework covering multiple platforms could be developed. This would also provide an opportunity to test how effective a voluntary scheme would be in securing CVOD compliance, which might then be taken into account in the formulation of a wider content regulation framework.

Question 6: What enhancements could we make to the Chief Censor's call in powers that would pro-actively prevent harm?

It is difficult to envisage how the Chief Censor's call-in powers could be used pro-actively/ pre-emptively without some sort of advance vetting. If it was possible for CVOD providers to voluntarily agree to be

subject to the existing set of classification arrangements, then content anticipated to require a restrictive rating could still be referred to the Chief Censor. However, their willingness to comply with such an arrangement might depend on the cost arrangements. The larger CVOD operators would be more likely to comply with this as a basic cost of doing business, but smaller, offshore services might have no incentive to comply. The critical point here is that the Chief Censor's call-in powers are more likely to reduce harm in a statutory framework where rulings and penalties are enforceable.

Question 7: What could be done to ensure the voluntary scheme is adhered to and/or increase industry participation?

As noted above, the larger, established CVOD providers would likely be more willing to comply, particularly if they are formally registered in Aotearoa/New Zealand and undertake consumer subscription transactions within the domestic jurisdiction. Other, offshore CVOD services with no NZ-registered presence are probably less likely to comply and indeed, some may even be oblivious to their provision of content services to local consumers (e.g. some local consumers use VPNs to access overseas streaming services).

It is also possible that some CVOD providers would use the scenario of an 'uneven playing field' (whereby NZ-domiciled services are subject to more stringent regulations than their offshore counterparts) as pretext to lobby for a removal of *all* regulations, although this is more likely if the regulatory framework carried onerous compliance costs or the threat of penalties.

The challenge with any voluntary scheme is to make compliance more attractive than non-compliance. One possible approach here would be to subject non-compliant operators to a more stringent regulatory regime. Although arising in a very different context, the response to the Leveson Inquiry in the UK saw a proposal to require newspaper publishers sign up to a regulatory code approved by the Press Recognition Council (current options are IMPRESS and the industry-run body, IPSO[5]) or face the prospect of oversight by the state media regulator, Ofcom.

On that point, it is worth noting that the establishment of OMSA (which is now subsumed within the NZ Media Council) was in part driven by industry actors seeking to pre-empt government moves toward statutory regulation of online content services. Earlier in the 2000s, the Radio Broadcasters Association also developed their own (non-binding) local content targets in response to government intimations that local content quotas were being mooted.

Question 8: What other suggestions could you make to improve the effectiveness of the non-legislative mechanisms?

Adopt a 2-tier system wherein non-legislative industry codes/standards are reviewed and approved by a statutory body, and consistent failure to comply with these codes/standards results in the operator being referred to a more stringent statutory regime. Put simply, light-touch self-regulation would be permitted so long as industry ensured it was committed to protecting the public interest and minimizing harm. If some actors were then disinclined to comply with the industry-based arrangement then they would be

[5] Unsurprisingly, the industry-based IPSO scheme has become the default preference, although critics suggest it is little better than the Press Complaints Council under which the abusive practices which led to the Leveson Inquiry occurred.

subject to a higher level of regulatory supervision. A two-tier regulatory model wherein industry-developed standards/codes were approved and overseen by a statutory body was suggested by BPM in response to the 2015 consultation on convergence and content regulation (see Appendix 2).

Question 9: Are there any other comments, or suggestions you would like to make?

The principal rationale for content classification labels is to enable informed viewer choice *prior to content consumption*, and thereby minimise the potential for harm, particularly (but not only) in respect to parental/sibling control over children's viewing.

Two 2013 Office of Film & Literature Classification reports[6] provided evidence of how young people used film/DVD and video-game labels to inform their viewing/playing decisions. These found that age-related labels alone were not always sufficient to enable informed decisions, and that different models of classification labels (including those from overseas) were a source of confusion about what sort of content was appropriate. However, in some cases, ratings labels were easier to interpret and respond to than content descriptions. Detailed advisories (e.g. about sexual/violent content) may be helpful to parents, but ultimately they cannot prevent all harmful/inappropriate content choices among adolescent viewers making their own content decisions. The reports also found that, as children matured, the perceived relevance of classifications declined as a factor shaping content decisions. Among 16-18 year olds, classifications were nevertheless considered useful some of the time (e.g. guiding parental decisions for children or their own choices for younger siblings). However, the influence of classifications on content decisions was reduced when content was being selected for *personal or peer-group consumption*.

The BSA's work on how programme classifications are used by the viewing public may also be instructive here. For example, the 2015 BSA/NZ On Air Children's Media report[7] found that children and parents did use classifications to inform viewing choices, although identification of problematic content also occurred through actual viewing (which suggests potential harm cannot be completely eliminated), Interestingly, children exposed to challenging content online were found to respond more actively to classifications/warnings compared with those encountering challenging content on television.

The need for a more consistent approach to content classification labels across platforms was evident in a May 2018 multi-stakeholder workshop convened by the Ministry for Culture and Heritage to discuss issues around content regulation. There appeared to be a broad consensus across media sector stakeholders that greater consistency across different media (and perhaps even across national jurisdictions) would be a positive development. It therefore seems premature to unilaterally revise one set

[6] OFLC (2013) Young People's Perceptions of the Classification System and Potential Harm from Media Content. http://www.censor.org.nz/assets/PDFs/Research-Young-Peoples-Perceptions-discussion-groups-2013.pdf

See also: OFLC (2013) Young People's Perceptions of Media Content- a literature review. https://www.classificationoffice.govt.nz/assets/PDFs/research-young-peoples-perceptions-literature-review-2013.pdf

[7] NZ On Air/BSA/Colmar Brunton (2015) Children's Media Use Study- How our children engage with media today. https://bsa.govt.nz/images/assets/Research/Childrens_Media_Report_2015_FINAL_for_publishing_2.pdf

See also the BSA 2018 Time-band review: https://bsa.govt.nz/oldsite/2018_Classifications_and_Timeband_Review_-_Long_Consultation_Book.pdf

of classification codes without aligning this with other regulatory agencies (notably the BSA) and wider policy trajectories.

Given the increasingly globalised distribution of audio-visual content, there may also be an argument for exploring the options to increase the *international* coherence of content classification (and/or the translation of overseas classification regimes into their NZ equivalents) although different national audiences will inevitably exhibit somewhat different degrees of tolerance toward various forms of content, e.g. some cultures are more tolerant of nudity/sexual content while others are more tolerant of profanity or violence.)

Although consistent cross-platform content regulation is highly desirable, it is important to bear in mind that content regulation will not, on its own, eliminate the potential for harm. The evidence of the audience studies commissioned by the BSA and the OFLC suggests somewhat inconsistent viewer reliance on content classification as a guide to content viewing decisions. Nevertheless, a significant proportion of viewers (including children) do make some use of them. Removing classifications would therefore disadvantage those who do rely on them to make better-informed choices

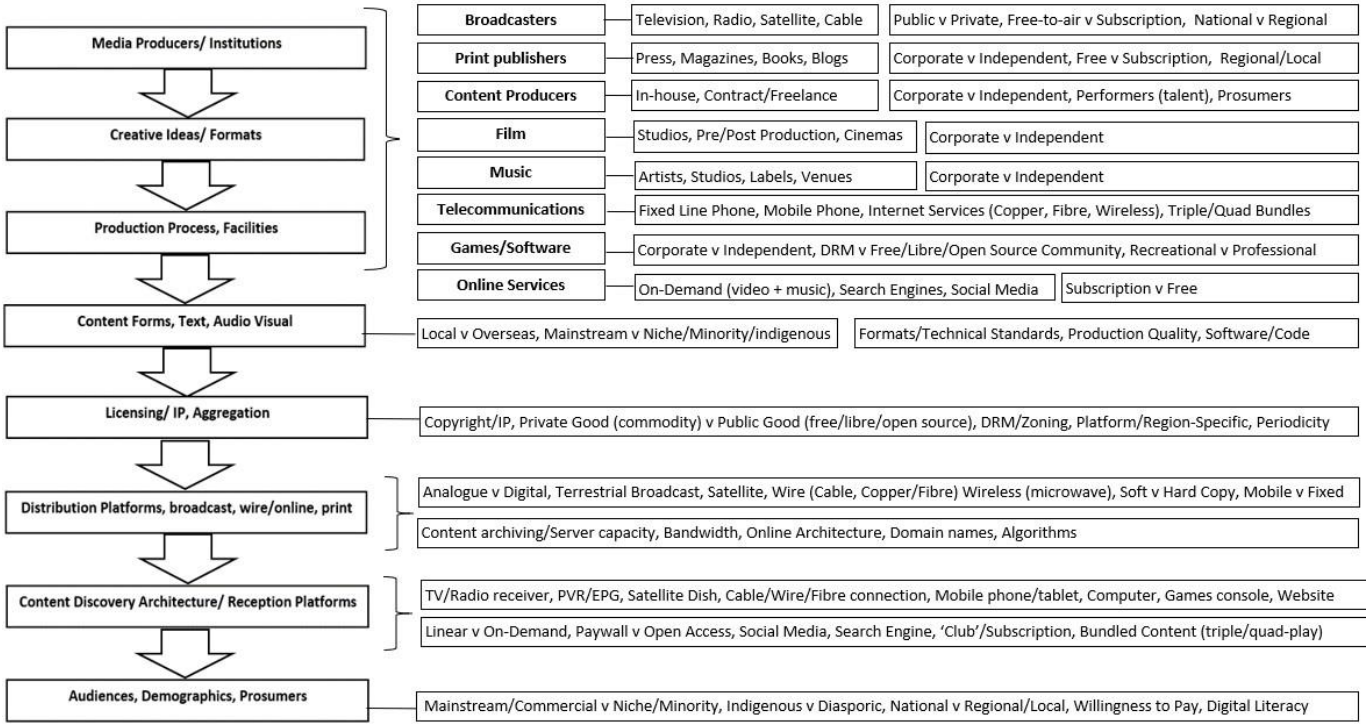
Content regulation is therefore only one mechanism for protecting the public from harm; other modes of intervention may need to be considered in the digital environment. For example, regulation of the platforms and architectures of content discovery (including EPGs, social media news-feeds, and search engine algorithms) may present an opportunity to increase audience control over content (e.g. by providing links to content advisories to allow easy checking prior to consumption or to enable a CVOD menu or a social media news-feed to filter content the user has identified as undesirable). However, such approaches require (successive) governments to demonstrate forward thinking and anticipate regulatory issues rather than continue the pursuit of incremental and piece-meal reforms of regulatory models already outdated a decade ago. A scoping framework based on a digital value-chain model, setting out different points of regulatory intervention and related policy considerations, is included in Appendix 2.

Appendix 1:

Extract from: Better Public Media *Beyond the Christchurch Call: A Scoping Framework for Developing Regulation & Policy for Social Media & Digital Intermediaries* May 2019

[An] expanded 'value chain' model is set out below, identifying different layers of the media sector which represent potential points of intervention. Importantly, this differentiates between the levels of content distribution and content discovery/reception which is a crucial point where the platforms and algorithms of social media and other digital intermediaries have become dominant (see fig.1 below).

Fig 1. Value chain break-down of the digital media sector



The same basic value chain framework can then be used to identify different policy issues and points of potential intervention on each level of the market as indicated in fig. 2, below:

One important implication of the model here is that 'upstream' levels can affect 'downstream' levels (and in some cases vice-versa). So for example, the shape of ownership and level of market concentration will affect content priorities (such as driving news providers to seek online traffic through 'clickbait') while new forms of content discovery via mobile/online platforms may fragment audiences and influence content formats and distribution channels (e.g. 'digital first' policies). Concomitantly, regulatory interventions at one level may have implications (whether intentional or inadvertent) for others. For example, imposing copyright restrictions on online content sharing or imposing a levy on online advertising spending would influence the business models of digital intermediaries. Similarly, subsidising the expansion of broadband networks affects consumer take-up of on-demand content streaming services. Obviously, this heuristic model does not make predictions about the efficacy of specific policy interventions- that depends on the configuration of the media market and the institutional priorities of the media actors comprising it. However, it does invite a more holistic approach to identifying regulatory interventions.

Appendix 2

Extract from Better Public Media (formerly the Coalition for Better Broadcasting) Submission on*: Exploring Digital Convergence- issues for policy and legislation* and *Content Regulation in a Converged World* October 2015.

The Continuing Relevance of Content Regulation

7a Preamble The paper on Content regulation in the Converged World provides a useful overview of the issues and regulatory options for applying classification and standards regimes to digital distribution and reception platforms. The current regulatory framework of the Broadcasting Standards Authority and the Office of Film & Literature Classification (and the Film & Video Labelling Board) requires alignment of the Telecommunications, Broadcasting, and Films, Videos & Publications Acts to permit the development of consistent standards across platforms. It is axiomatic that content of a similar form and substance be subject to similar regulatory principles as far as possible, although there may be some variations in how these are implemented or enforced depending on the technical features of the platform and the nature of the services provided (e.g. radio would be exempt from codes pertaining to visual images, while it would be difficult to require SVoD providers based offshore supplying access to existing 'libraries' of content which has already been published/distributed to submit each item for re-classification in line with domestic regulations). The CBB is strongly supportive of updating content standards and classifications provisions to remain applicable to the converged media environment, which would encompass elements of options 4, 5 and 6 in the discussion paper. Although industry self-regulation can play an important role here, for reasons that will be made clear, it is nevertheless important to maintain a robust statutory framework for content regulation. As noted earlier, the emphasis on the regulation of already-existing content does not deal with the equally-important questions about the institutional arrangements for the funding and production of content and questions of diversity and quality. The CBB regards these latter concerns as central to the deliberations on convergence and is concerned to ensure they are not disregarded. Some proposals for ensuring the interests of the public as citizens, not just consumers, are served in the converged media environment are included after the discussion of content issues.

7b Myths about convergence and the continuing need for regulation There is a view in some sections of industry -and perhaps government- that the complexity of converging digital media markets, the ready availability of online content sourced outside the state's jurisdiction, and the trend toward greater audience agency in actively 'pulling' time-shifted content from on-demand services (in lieu of the tradition linear 'push' of scheduled content delivery) renders content regulation both impractical and unnecessary. Convergence doubtless complicates regulatory arrangements. This does not, however, mean that the normative and practical premises of content regulation are no longer desirable or relevant. On the contrary, the proliferation of content and platforms makes it even *more important* that judicious regulation continues. The media constitute a special sector of public life because they help to shape public opinion and facilitate informed deliberation essential to civic participation. Media discourses are part of the fabric of social life and provide the conceptual and discursive resources that enable us to make sense of our place in the world, relate to other people and cultures. The rights to free speech enshrined in the Bill of Rights Act (section 14) can nevertheless be subject to regulatory restrictions where those rights are abused to harm others. Indeed, the government's recent move to introduce the Harmful Digital Communications Act recognises that our communicative rights also entail responsibilities. The potential for media content to inflict harm/injury and the need for standards and informed audience decisions about access is clearly not obviated by the proliferation of digital distribution and reception technologies. The rapid and widespread dissemination of content forms that could potentially be harmful or injurious to the public good (and the difficulty of controlling their proliferation online) suggests *the need for classification and standards is greater in the converged media environment,* although the legislation, regulatory agencies and modalities of intervention may need updating.

Another crucial consideration here, not covered in the discussion papers, is the question of how far the *absence or under-provision* of content might also constitute harm or prove injurious to the public good. A simple plurality of platforms and sources is not in and of itself a guarantee of functional competition in the wider public interest. Indeed, the converse may be true. The fragmentation of audiences across platforms should not be overstated, of course, and in some respects social media may enhance social engagement and the exchange of information. But in a converged multi-media environment with an increasing quantity (albeit not always diversity) of on-demand

content, there is more potential for audiences to avoid perspectives and issues which do not coincide with their own interests or ideological preferences. There is still a need to maintain media services which provide the public with common reference points, discourses and perspectives needed to engage in civic life.

As consumers, audiences still require information about the nature of the content they are able to access in order to make responsible, informed choices. As citizens, the need for factual content that is accurate, fair and balanced is arguably greater than ever before, given the massive increases in the availability of genre-bending infotainment and reality-TV formats and partisan opinions and misinformation presented in formats akin to news and current affairs. But as noted earlier, the presumption that media convergence and the proliferation of distribution and reception technologies ensures all forms of content are available (and affordable) to everyone is fundamentally flawed. Consideration must therefore be given to how the intensification of cross-platform competition and the prioritisation of content forms which guarantee ratings, clicks, and sales/revenue may come at the expense of de-prioritising content genres or formats that are innovative but risky, or liable to appeal to a narrower range of audiences (e.g. Mediaworks dropped Campbell Live from TV3's prime time schedule because even when drawing around 200,000 viewers, it was not commercially competitive enough; meanwhile, other more in-depth current affairs content is scheduled on weekend mornings where it will not harm ratings and revenue).

It is also important to consider the overall shape of available media content over and above the individual programme or publication. The structural tendency in commercial media markets to over-supply populist and trivial content (e.g. the proliferation of click-bait and celebrity stories and the shorter times/spaces devoted to 'hard' news analysis) may, in aggregate, serve to discourage rational citizen engagement even though none of the individual content items/ programmes violate the existing codes/standards. It is manifestly inadequate to assume that anyone interested in more in-depth information can simply source it from the internet. Although there is a great deal of useful information about politics, economics and social issues available to politically-engaged citizens, there is also a massive amount of misinformation and propaganda. Not everyone has the time or the media literacy to make the time and effort to seek out reliable sources. Even with the availability of subscription TV services including a variety of (international) news channels, viewer attention tends to default to the domestic free-to-air channels augmented by premium sports, movies and drama, with most of the other channels being routinely overlooked. Availability alone does not ensure visibility, accessibility or affordability. Some form of provision to serve the public's media/information needs at citizens over and above what is commercially expedient is therefore necessary.

7c Self-regulation v Statutory regulation. Ideological opponents of media regulation often dismiss statutory content restrictions as nanny-state interference in the free market, while vested interests within industry often contend that in a complex digital environment, practitioners are better positioned to regulate itself than any government-appointed body. The commercial media sector evidently has a preference for industry self-regulation over a statutory regulator whose decisions can sometimes carry commercial consequences. The need to remedy the obvious gap between the Broadcasting and Telecommunication Acts, especially in regard to content delivered online has been recognised for several years (e.g. see the 2006 Millwood Hargave report for the BSA[8] and the 2008 MCH paper on the Future of Content Regulation). The broadcasting sector's initiative to establish the Online Media Standards Authority was in many respects a welcome move to bridge the interim policy gaps, although a key strategic motive here was to pave the way for government to delegate the policy complexities and the costs of converged content regulation to OMSA once the legislative frameworks were eventually reviewed- as they are now. As with the Law Commission's review of news media regulations in 2013, industry's default position tends to be antipathy to statutory regulation. This is largely premised on an expedient 'market naturalist' position entailing a specious conflation of legislation with government interference, with the real motivation being avoidance of commercial risks entailed by legally-enforceable decisions with financial repercussions. Insofar as statutory regulation is regarded as a source of commercial uncertainty, such misgivings are perhaps understandable in a tight market where even small margins and market advantages are fiercely defended.

Having said that, concerns that statutory powers could be used to suppress free speech and media activity should not be dismissed lightly. Recent deployments of state powers to surveil, undermine, or discredit investigative journalists who had incurred the displeasure of the government would suggest complacency in defending democratic freedoms would be unwise. However, in defending the media freedoms against state control, one must

[8] Available here- https://bsa.govt.nz/images/assets/Research/Issues-Facing-Broadcast-Content-Regulation-BSA2006.pdf

also be cautious of expedient conflations of free speech and free trade. Not all state interventions in the market are a threat to liberty, and indeed, some level of control over media content is required to *protect* the rights of citizens. In regard to the OFLC and the classification board, it is ironic that the popular media attention given to the recent interim ban on the Into the River suggested that the state was suppressing freedom of speech when in fact the issue only arose from an attempt by the deputy censor to *relax* previous restrictions. There is doubtless an ongoing need to provide the public with information about the nature of the media content they access and to prevent (as far as possible) the harm/disturbance that may stem from inappropriate access of restricted content by minors. Of course, even those who claim to object to state censorship of all forms would generally agree that the OFLC plays a crucial role in preventing public exposure to objectionable material. The role the OFLC plays in assisting the police and courts to control illegal production and dissemination of objectionable content (especially that which entails child abuse) is probably under-recognised but obviously essential, especially in a converged environment where the criminal activities underpinning such material has been rendered much easier by digital media and the internet.

7d The role of industry self-regulation There is nevertheless a case to be made for involving the market actors subject to regulation in the formulation and implementation of codes and standards. They are, after all, most familiar with the conditions of content production and the practical and technical constraints of professional media practices. Most industry actors are socially responsible and willing to observe regulations involving classifications and standards, at least up to the point where direct competitors are not hampered by such obligations (which is an argument for a level playing field, not deregulation) or where the opportunity cost of abiding by regulations threatens to compromise commercial performance. The problem with industry self-regulation without recourse to statutory appeal and enforcement is not that the media companies are grossly irresponsible and cannot be trusted, but that over time, any self-regulatory regime will tend to accommodate the prevailing norms of practice as legitimate. Over time, incremental shifts in the boundaries of what is considered reasonable and acceptable and what is considered commercially realistic will lead to an accumulation of small compromises which can undermine the regulatory function.

For example, the Advertising Standards Authority, despite its well-respected and professional approach to resolving complaints through its formal procedures, is structurally unable to protect the consumer from misleading adverts and seems reluctant to set precedents by making decisions that might require a significant reform of advertising practices. (For example, despite widespread concerns about obesity and unhealthy diets, and the detailed codes on food advertising, it still remains possible to advertise unhealthy foods in a technically factual but unbalanced and misleading way, e.g. by emphasising vitamin contents of sugary foods). If one disagrees with the ASA's determination there is no recourse to appeal to any higher authority. Likewise, although the NZ Press Council is likewise well respected, it has no formal power to require compliance with its rulings, although the professional commitment of (most) journalists and news publications to observing reporting codes of practice has conferred gravitas on its rulings. But there is no certainty that the cuts in newsroom budgets and staffing, and increasing pressures on journalists will not over time lead to an accommodation of lower expectations about what standards are reasonable and realistic to uphold- competition among news media for immediacy has seen a growing tolerance for inaccuracy in online news reports on the assumption that corrections can easily be made later. Note these comments are *not* intended to denigrate the ASA or NZPC's members- the limitations are structural in nature. The Online Media Standards Authority, meanwhile, is a relatively new entity, but again its powers do not include any enforceable sanctions with commercial implications for those who breach standards (which in the case of certain commercial media operators, is part of the attraction). The CBB regards industry self-regulation to have a place in any regulatory approach to content in the converged media environment, but given that competition pressures, cost-cutting and risk-aversion are liable to increase, there must also be recourse to a statutory framework of regulation to oversee (and where necessary, overhaul) industry-based self-regulators.

With appropriate checks and balances and appeal provisions, it is possible to use a statutory framework to establish independent regulatory bodies at arm's length from government which treat all media actors equitably and consistently and set out standards and codes with sufficient flexibility to allow periodic revision (including consultation with affected stakeholders) without necessitating constant legislative repeal.

In contrast, the BSA does have the power to impose significant fines, or even require a broadcaster to cease transmission. But these powers have only been deployed in very rare cases of gross disregard for content standards or failures of governance which, crucially, cannot be adequately addressed by non-statutory codes which are non-enforceable. A more common (and perhaps legitimate) concern among industry is inconsistency or

unpredictability of decisions on complaints which incur appeal expenses and take up time and resources. However, there can be no guarantee that a non-statutory regulator would prevent the need to appeal against decisions. Unless codes are defined in such mechanical terms that they preclude considerations of context, then some degree of interpretation of how particular standards apply to particular content examples is inevitable in any form of content regulation. There has been a recent review of the BSA's three codes of practice for Pay-TV, Free-to-Air TV and Radio. Although the specifics of these changes lie outside the immediate focus of the convergence discussion, there are some points of overlap worth mentioning. Although some formats and platforms do remain distinct in the digital environment (e.g. the visual aspect of television is obviously not part of radio broadcasts), convergence across formerly discrete media platforms suggests there is merit in trying to ensure a level of cross-platform consistency in content standards. Although variations in the mode of audience engagement may sometimes depend on the context and technology of reception, the manifold variables that influence how audiences engage with and respond to content make it very difficult to maintain that there are intrinsic platform-related qualities which require the same media content to be subject to different regulatory treatments. Insofar as the currently separate Radio, Free-to-Air and Pay-TV codes are premised on such assumptions, changes in audience consumption of broadcast content, including the use of new reception devices, on-demand services and time-shifting suggest that maintaining rigid distinctions between the codes (and hence across platforms) is outdated.

7e The shape of classification and content standards regimes There is evidently a need to take account of multi-platform interactive distribution and reception technologies. Consequently, there is a *prima facie* case for a more generic set of content standards and classification codes. However, it is important to emphasise that this does not automatically constitute a reason *to default to the least restrictive code of practice*. In assuming the desirability of a more consistent set of cross-platform standards, the case for relaxing/minimising those standards cannot be logically premised on some notion of technological inevitability stemming from digital convergence- the case must be made on the basis of demonstrable harm minimisation and outcomes in the wider public interest.

In the multi-platform on-demand digital media environment, it might be argued that some content standards regimes are no longer practical to implement. The point of intervention in the value chain is important to consider here. It is relatively easy to impose and enforce professional codes of practice in the creation of domestic NZ content, but even though these standards are enforced post-distribution, the intention is the have an impact at the point of content creation. This is obviously less practical where content is created in and for other markets before being imported (e.g. see comments on the issues surrounding overseas news channels carried on subscription platforms in the BSA submission attached as an Appendix). Classification *prior to distribution* helps ensure that content classification and information can be provided to consumers with a high degree of confidence in its accuracy and consistency. As with the current film and video labelling system, it is also possible to maintain some level of consistency by translating classifications provided by other countries' content regulators, especially if the rules for classification are based on relatively objective manifest content criteria (e.g. sexually explicit scenes, graphic violence). This obviously does not apply to a lot of online material where NZ audiences may access content held on overseas servers. However, the online environment will always make it possible to access unregulated content which does not come with any guarantee of content standards or classification. Audiences cannot be protected against any and all forms of content exposure, but they still have a right to be protected from harm by domestic media operators, including online providers whose business models entail payments from New Zealand audiences (such as SVoD services based offshore) and in these cases it is not unreasonable to seek some level of compliance with domestic content standards and classifications.

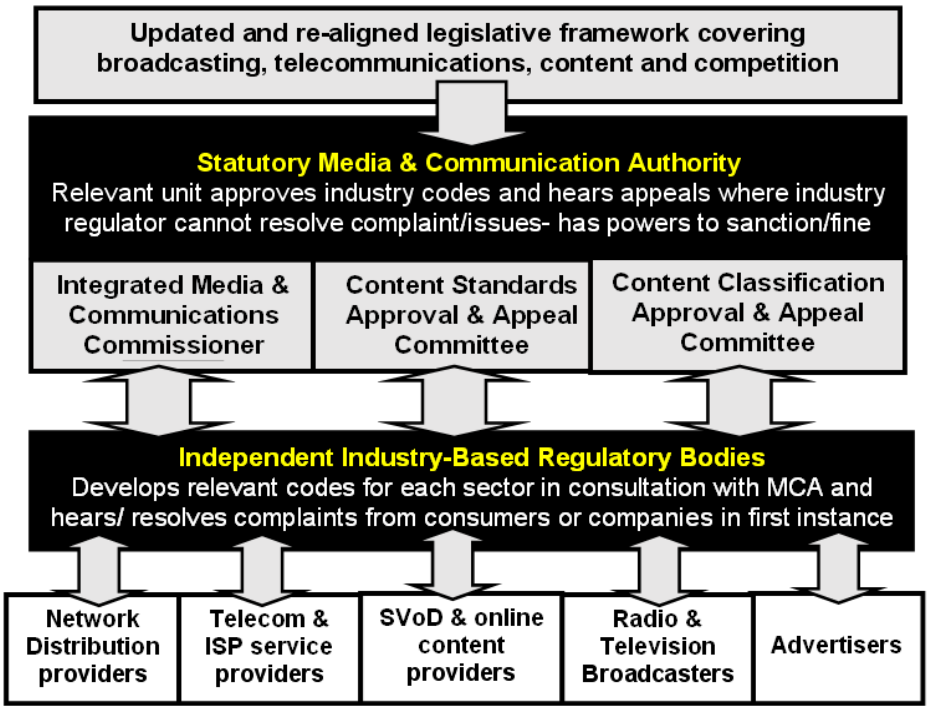
Content classification systems are generally applied at a point after content creation but before distribution to audiences (although in some cases classifications regimes influence the production process, especially if there are commercial consequences of having an overly restrictive rating imposed). Some media actors have a preference for content information disclosure regimes. The assumption here is that by disclosing relevant information about classifications, strong language, sexual/violent content and so forth, the audience is thereby empowered to make an informed choice. It may be true that *without* such information, the audience would not be sufficiently informed. But it does not necessarily follow that providing information about programmes confers sufficient levels of media literacy to make viewing or listening choices in the long-term best interests of the individual or society as a whole. That said, there is certainly no reason for content providers such as SVoD services which generate revenue from NZ-domiciled audiences *not* to provide content information, including classifications of a recognisable form (both at the beginning of a programme and where possible, at periodic intervals or at points of channel-switching to ensure the probability of 'channel surfers' or 'web surfers' inadvertently accessing inappropriate or disturbing material is minimised).

However, the incremental shuffle toward regarding programme information disclosure as the *principal and only* obligation of content providers toward the audience is potentially insidious. In effect it can lead to a position where no standards are enforced and any and all content is deemed acceptable so long as programme information is disclosed- indeed, this is arguably already happening in cases where news and entertainment genres have become blurred with the result that fact and information are no longer easily separable (indeed, one rather opinionated presenter of an early evening television current affairs/magazine programme has denied being a journalist in defence of his alleged lack of balance).

It is incumbent on (all) media providers to recognise that their content and services play a role in shaping social discourses in ways that make them incomparable to most other consumer goods. Just as car manufacturers and oil companies can (or should) take some responsibility for the environmental consequences the widespread use of their products have on the environment, so too should the media be cognizant of their collective influence on society. It is therefore important not to default to lowest-common-denominator prescriptions to eliminate regulation as a barrier to commercial flexibility and economic growth. Where content regulation regimes are inconsistent across platforms and arbitrarily disadvantage some media subsectors over others, the platform neutrality and 'level playing field' principles require solutions that enable all media operators to accept basic social responsibilities, not to abrogate them. If that is that is not practicable for technical or geopolitical reasons, it is essential to ensure that at least *some* channels and content providers and be trusted by the public to deliver content of reliable quality consistent with cultural standards.

7f **A proposed framework for media regulation in the converged media environment**

The CBB would like to propose a two-tier framework for the development of media regulation, including competition and content classifications/standards regimes. We are not proposing this as the only possible or desirable approach, and the framework here is a starting point rather than a detailed final model. However, we think this approach has the potential to cover most media platforms and ensure robust protection of the public interest while allowing for a significant level of industry input and self-regulation.



The basic model here comprises of two levels. The lower level comprises the industry-based regulators which would include, for example, the OMSA, the ASA, the FVLB and possibly the NZPC. These could remain as

separate entities but where convergence makes it practicable, it may be possible to integrate some functions. The upper level would be the Media and Communication Authority (MCA), a statutory regulator which would operate as an 'umbrella' coordinator of its sub-units, including the expanded Media & Communications Commissioner (who would also remain part of the Commerce Commission), and two committees dealing with classifications and content standards respectively.

The two tiers are related as follows:

- The industry-based bodies would develop codes/standards/operating principles for their platform/sector in consultation with the Media and Communications Authority, which would also sign off and approve them.
- Complaints would go initially to the media operator, but if this does not resolve the matter then the industry-based bodies would hear the complaint and issue rulings and sanctions in line with the codes.
- However, where the complaint does not lead to resolution at the level of the industry-based model, an appeal can be taken to the MCA , and the relevant office would then make rulings on the matter, including the imposition of legally-enforceable sanctions such as publication of apologies, fines, etc.
- Periodically (say every 5 years) the MCA would review the adequacy and efficacy of the industry-based regulatory bodies and their codes/standards regimes. If shortcomings in their capacity to maintain standards and protect the public interest are identified, then the MCA would be able to require reforms/updates.

The model is not intended to impose an unduly onerous statutory burden on the media sector. On the contrary, the system allows co-regulation including in the development of standards and codes with the industry bodies as the first port of call. Indeed, if industry self-regulation is as efficient and as functional as its proponents maintain, then the large majority of complaints will not be appealed to the MCA. However, the statutory standing of the MCA means that in the final instance, there is recourse to legal enforcement which can enforce sanctions in serious cases of code violations or abrogation of responsibility. This model also helps ensure that the potential for increasing commercial pressures to result in a gradual erosion of standards to accommodate prevailing practices is limited by periodic review.