

Chair
Cabinet Policy Committee

Broadcasting And Digital Technology: Future Of Broadcasting Content Regulation - Public Consultation

Purpose

1. Cabinet's agreement is sought to release a public discussion paper, incorporating a questionnaire, on the future of broadcasting content regulation, given technological changes in broadcasting and communications generally. This consultation is proposed as an input into policy development.

Executive Summary

2. This paper proposes that the broadcasting sector and wider public be consulted on the future of content regulation for broadcasting. It is concerned with the spread and replication of broadcasting channels and broadcasting-like content on new platforms and the expectations of consistency of regulation for such content.

3. The driver for this proposal is the rapid development and uptake by New Zealanders, of on-line and mobile ways of receiving content. Government is seeking to encourage this development through its own policies in digital broadcasting and telecommunications, and needs to consider the implications for broadcasting content regulation.

4. The trend in broadcasting of content being accessed on demand by the viewer or listener via various technologies is transforming what is currently understood by "broadcasting".

5. The present model of broadcasting standards regulation under the Broadcasting Act 1989 is based on the conventional concept of scheduled broadcasting and passive viewing. It effectively regulates television delivered by traditional broadcasting technology, but does not apply to the same streams of content available on the Internet or cell phone. If a viewer wishes to complain about a perceived breach of code, they can do so if the content was viewed on a television, but not if the same or similar content was viewed on a computer screen or cell phone.

6. The policy question arises of whether content regulation should extend beyond conventional broadcasting, and, if so, in what ways, or if a new approach is required to the regulation of electronic content more generally.

7. Drawing in part on questions raised by research into other jurisdictions commissioned by the Broadcasting Standards Authority in association with the Ministry for Culture and Heritage, a draft paper, incorporating a questionnaire, is proposed for public consultation (attached as Appendix I).

8. This paper seeks the views of the broadcasting sector and the public on some preliminary questions about the future scope of content regulation. It does not make policy proposals and does not seek to look at regulation of all on-line content. It does not propose any changes to the scope of the content regulation regime, nor does it present options for structural reform to government's arrangements. The input it seeks, however would inform further policy work on such options.

9. Cabinet's approval is sought to release the attached discussion paper.

Background

10. The spread of content of all kinds to new, digital platforms is a fast-developing trend in New Zealand and internationally. These newer platforms are being used – and contributed to – with particular enthusiasm by younger sections of the population but are increasingly important to most New Zealanders, whether at home, school or work. They are bringing an ever-growing variety of international content within the reach of New Zealanders. They are compelling broadcasters and other media providers to adopt new business models, as described in the Policy Committee paper, "Broadcasting and Telecommunications Convergence: Maximising Benefits of Government Digital Initiatives". Government is seeking to encourage this development through its own policies in digital broadcasting and telecommunications.

11. General audio visual content on digital platforms, including platforms that enable user generated content is currently not subject to the same regulatory codes as television broadcasting. Consideration of regulation of general digital content is complicated given the globalisation of both content production and reception. However as Broadcasters move toward providing their 'television' content for reception on different screens and transmission by different technologies, the regime for regulating broadcast content in New Zealand requires re-examination.

12. In New Zealand, content regulation in broadcasting is governed by Parts 1-3 of the Broadcasting Act 1989, which establishes the Broadcasting Standards Authority (BSA) as a complaints body and requires broadcasters to observe codes of broadcasting practice. The Act also makes broadcasters responsible

for receiving complaints about their content in the first instance, and requires them to maintain and publicise a complaints process. Those who are unsatisfied with the broadcasters' response to their complaint can refer it to the Authority for a decision. The BSA also reviews and approves the codes that the broadcasters use in selecting programmes and in assessing complaints.

13. The system for broadcast content regulation is distinct from the ratings system used for films and publications and the regulation of the press, advertising, mobile telephony and the internet. None of the following areas is covered by the Broadcasting Act.

- The Office of Film and Literature Classification, under the Films, Videos and Publications Classification Act, classifies “publications” (widely defined to include films, books, musical recordings and computer files) submitted to it, as unrestricted, restricted (generally to certain age groups) or objectionable according to standards set out in the Act. In addition to the providers of content, the Act provides for individual consumers who, for example, possess objectionable material or make restricted material available to underage persons, to be penalised. (The Telecommunications Act 2001 also provides the state with such a power in relation to individuals, via a section on “Misuse of Network”.)
- The Press Council operates a self-regulatory set of principles that applies to the websites of newspapers and magazines as well as their paper content. Some of these principles include ideas that are comparable to those guiding the broadcasting regime (in particular in such areas as fairness and balance).
- Mobile telephone service providers (such as Vodafone or Telecom) operate a self-regulatory industry code of practice for the provision of streamed and downloaded audio-visual content via their networks. While this code provides for classifications, it does not include a set of standards, and complaints can only be made where complainants believe that content has been inappropriately classified.
- Advertising in all media was made self-regulatory in 1993, under the Advertising Standards Authority, an industry body. The codes the Authority uses cover some comparable areas of concern to those under the broadcasting regime, such as the protection of children.
- Internet service providers in New Zealand currently operate without a code of practice.

14. The public broadcasting Programme of Action, approved by Cabinet in December 2004 (POL Min (04) 31/5), envisages a possible revised role for the BSA, or a renamed or reconstituted authority, taking into account both the extent of technological change in broadcasting and the absence in New Zealand of controls, such as media ownership laws, that might influence the diversity and quality of broadcasting in this country. The recent decisions on the development of digital broadcasting have also foreshadowed a review of content regulation

(POL Min (06) 8/8). As with the development of digital broadcasting, the modernisation of broadcast content regulation, as may be required in response to digital technology, would be compatible with National Digital Strategy objectives and those of the Digital Content Strategy.

15. Decisions under the current broadcasting standards regime are made in accordance with the New Zealand Bill of Rights Act 1990, which affirms, among other rights, the right to freedom of expression. Any discussion of changes to the scope or nature of content regulation needs to be conducted with the Bill of Rights in mind.

Key Issues for New Zealand

16. As noted, digital technology now makes it possible for broadcasting-like content to appear on a variety of platforms in addition to conventional television and radio. Examples include podcasting, sending content via mobile telephony and other mobile devices, the use of the internet to offer additional opportunities to see or hear programmes, or to access supplementary material, and, as technical capacity allows, internet protocol television. The pace of this change is difficult to predict, and it has been slowed by the lack of broadband capacity, but the success of government policy in such areas as broadband and digital policy generally will accelerate it. Conversely, government's support of digital television has partly been motivated by the wish, through the support of new content, to drive the development of new platforms, like broadband, for carrying that content. The share of listening and viewing time taken up by the newer platforms will thus continue to increase, supplementing and to some degree replacing conventional scheduled broadcasting.

17. By raising new possibilities for the reception of content, however, digital technology also poses new questions for the traditional model of content regulation, here and internationally. Because it engages audiences in different ways, it brings into question the rationale for the regulation of content, and the methods by which it is regulated: is a similar standards system appropriate to audio-visual content available on new and emerging platforms such as the internet and, if so, to what extent?

18. The Broadcasting Act presently confines content regulation to broadcasting in the traditional sense of transmission at scheduled times from "one to many". This conventional form of broadcasting is sometimes termed "linear". The future of "broadcasting" (the word itself being increasingly used more for convenience than for accuracy), however, is one of individual viewers and listeners exerting much greater control over when and how they receive content, on a "non-linear" basis. Yet, while the content involved may be the same, or similar, in nature, matters of content standards are currently, as noted, governed by different regulatory regimes depending on the nature of the network by which the content is distributed.

19. In reviewing the broadcast standards regime in the light of these developments, government needs to assess:

- what it is reasonable for the public to expect in the way of a consistent approach to the same or similar material delivered by different technologies;
- what kind of approach would be fair to conventional broadcasters in relation to other providers of content; and
- what can be regulated at all, in an era when content can be accessed internationally, without the intervention of a local broadcaster or content provider.

20. In 2006, as an input into work on this aspect of the broadcasting Programme of Action, the Ministry jointly commissioned with the BSA a research report on international trends in broadcast content regulation, examining the effect on regulatory regimes of the convergence of distribution technologies and the spread of broadcasting-like content onto a variety of platforms. The researchers were also asked to provide examples of regulators with roles extending beyond common functions such as complaints adjudication.

21. The research has established that the use of state broadcast content regulators is still common, and that regulators enforce codes that generally they either create themselves or, as in New Zealand, approve once the codes have been created by the industry. In this respect, New Zealand finds itself in the mainstream of international practice, as it does in requiring complaints to be made to the broadcaster in the first instance.

22. This report, *Issues for Broadcast Content Regulation*, by Millwood Hargrave Ltd of the United Kingdom, with New Zealand academic partners, has been published online by the BSA. The research report and analysis by officials have identified key issues concerning the scope of content regulation, the role of regulators, and the statutory concepts applied in determining standards.

The Scope of Content Regulation

23. The fundamental issues concerning the scope of content regulation are, first, determining what is appropriate – and what is desired by the public - across platforms. The second issue - which may lead to different conclusions – is what is practically possible. Starting from the current model of broadcast content regulation, an essential issue for New Zealand is whether a consistent complaints regime should be available to the public in relation to the entire output of a broadcaster (or provider of content) across all platforms, or whether the

nature of different platforms makes different forms or levels of regulation desirable. Related points to consider are:

- whether broadcasters should be held to account on all the platforms they use, and for non-linear content as much as for conventionally broadcast content – whether, for example, audiences and other parties should have the same recourse to complaint against a set of standards in relation to this material as they do in relation to conventional broadcasts;
- whether the government should seek to regulate the new forms at all from a broadcasting policy perspective, or stay focused on a content framework for conventional broadcasting, which remains an important medium;
- whether, within any given scope of regulation, statutory regulation should be augmented - or supplanted - by co-regulation (in which government collaborates with an independent industry organisation), or by self-regulation;
- whether, if a platform-neutral approach is taken, the application of broadcasting-style regulation should be determined by a threshold, such as the size of the audience or the organisational or economic status of the provider of content;
- whether public broadcasters should be held to higher standards than private broadcasters, reflecting their public mandates and special role; and
- in the case of content provided from overseas sources (in particular via the internet), whether such content can be covered by a standards regime, and, if not, the advantages and disadvantages for New Zealand-based broadcasters and providers of content, were they to be covered by such a regime. (Advantages might include the advantage to a broadcaster's reputation of being seen to be subject to a standards regime, weighed against a competitive disadvantage in relation to such externally-sourced content.)

24. The overseas regulatory regimes investigated fall into two groups: “broadcasting-centric”, the dominant model, in which the regulator focuses on broadcasting in the established sense, and does not directly regulate new media; and the “converged content regulation” model.

Broadcasting-centric

25. The research report's analysis judges the “broadcasting-centric” model to be the more flexible in relation to rapidly changing media platforms, but with the concomitant weakness that the regulator has a more limited experience of the newer platforms and their social implications. A further consequence is that similar material appearing on different platforms is regulated differently, so that the regime is not technologically neutral. By contrast, the converged model seeks to apply common principles across different platforms.

Converged

26. In the converged model, represented in the study by Australia and Malaysia, the regulator's role extends to a "co-regulatory" (with the relevant sector) responsibility for the internet and audio-visual content delivered on mobile devices. This approach does not entail a uniform set of rules across all platforms, but it places responsibility for content regulation on "old" and "new" platforms within the same agency.

A hybrid approach

27. A hybrid form is also possible that retains a focus on broadcasters or providers of broadcasting-like content on newer platforms, rather than the profusion of material from all sources on various platforms, but offers some level of consistent treatment of output across platforms. Such consistency need not extend to applying exactly the same code to each platform: the regulator and conventional broadcasters or other providers of content could be free to determine codes with differing levels of detail to acknowledge the amount of control the audience can exercise in receiving the content, as is presently done in distinguishing free-to-air from subscription television. It could be argued that this approach would be in keeping with broadcasting policy since 2000, which has emphasised the continued centrality of broadcasting as a source of information and as a cultural influence.

28. Such an approach would recognise the relationship between the provider of the content and the audience, rather than focusing on the distribution channel used by the broadcaster: that is, it would treat Xtra or Telecom, for example, when used as vehicles of "broadcasting", as being analogous to the broadcasting transmission company Kordia (to which complaints about conventionally broadcast content are not referred). The proposed European Union criterion of "editorial responsibility", noted below, or a similar concept, could be used to distinguish the provider from the carrier.

The European Audio-Visual Media Services Directive

29. An important international development that has occurred since the 2006 research project was completed is the first reading by the European Parliament, in December 2006, followed by further amendments by the European Commission, of a modernised Audio-Visual Media Services Directive. The Directive would provide a broad framework within which the states of the European Union would be required to operate their individual regimes for broadcast content regulation. The Directive's essential innovation is to apply "at least a basic tier of coordinated rules" to "audio-visual media services", linear and non-linear. These are defined as services "under the editorial responsibility of a media service provider". Such services may be either television broadcasts in the conventional sense or on-demand services. Editorial responsibility, in the Directive's terms, "applies to the composition of the schedule, in the case of television programmes, or to the programme listing, in the case of non-linear services".

30. “Editorial responsibility” is thus made a criterion for applying content regulation, regardless of whether the content is broadcast conventionally or accessed on demand. The draft Directive also states that “the definition of audiovisual media services covers mass media” (emphasis added). In these ways, and also through specific exclusions, the draft Directive omits from its ambit web logs (“blogs”) and other user-generated content, even when they take audio-visual forms, as well as private correspondence such as e-mails. The Directive also excludes the use of the internet and other electronic platforms by newspapers and magazines. In its emphasis on broadcasting-like content it falls between the “broadcasting-centric” and fully converged approaches.

31. The European draft Directive, which is likely to undergo further amendment, does not, any more than the other regimes examined in the research exercise, provide a model that can simply be adopted by New Zealand to ensure the “future-proofing” of its content regulation. It indicates, however, how the region of the world in which digital broadcasting is most advanced is beginning to address the definitional and boundary problems raised by the new technologies.

The Role of the Regulator

32. The research has also noted a trend towards a greater stress on media literacy and the part regulators can play in promoting it, particularly with a view to protecting children. The current content regulatory structure in New Zealand is essentially protective. In the face of a widening range of ways for the public to access content, it should be considered whether New Zealand’s regime should become more outward-looking and proactive, further promoting media literacy initiatives and education¹, and conducting or fostering research about a wider range of broadcasting issues.

33. The 2004 Report to the Minister of Broadcasting, Towards Precautionary Risk Management of TV Violence in New Zealand, called for an extension of responsibilities and a wider focus for the Broadcasting Standards Authority. In considering the report Cabinet noted that the recommendations of the Working Group relating to the mandate for the BSA was to be considered as part of the present wider review of content regulation (POL Min (04) 23/10).

34. An emphasis on individual responsibility, through information and education, may be an inevitable, and desirable, response to the profusion of audio-visual and other material from all sources available on the various platforms now in use. Such an approach is unlikely to be satisfactory by itself, however. It would fail to take into account the interests of third parties – those who are not the audience but the subject of content. The existing complaints

¹ A Media Literacy website is managed by the New Zealand School of Broadcasting in partnership with the Advertising Standards Authority, BSA and Families Commission.

system for conventional broadcasting in New Zealand is for the use of such parties as much as it is for viewers or listeners. The public may also continue to wish to have some form of redress across a variety of standards, not just those of particular relevance to third parties. The question thus arises again of whether a unified form of regulation, distinct from that otherwise applying to content on the internet or other platforms, should apply to the use of the new media by broadcasters, given broadcasters' extensive reach and impact.

35. The international research has not uncovered precise examples of regulators playing the broader role of commentator or “watchdog” (monitoring the broadcasting and wider media environment, researching more widely, issuing reports) outlined in the broadcasting Programme of Action as a possible expansion of the functions of the New Zealand regulator. The wide research and consultative remit of the UK's Ofcom, which allows it to examine in depth such themes as the future of public broadcasting, includes aspects of this role. There is no agency independent of government in New Zealand charged with the oversight of public broadcasting, or the monitoring of whether public broadcasting objectives, in the widest sense, are being met. Given that there are currently few regulatory means by which the public's interests in broadcasting can be protected or promoted beyond what the market produces itself, there is the possibility that an agency with this kind of role may have some value.

Statutory Concepts

36. A further area for review, as also foreshadowed in the Programme of Action, is the set of statutory concepts on which New Zealand's regulatory regime is based. These are set out in Section 4(1) of the Broadcasting Act (“Responsibility of Broadcasters for Programme Standards”) and include “the observance of good taste and decency” and the principle of balance, by which differing points of view on controversial issues should be aired within the same programme or “within the period of current interest”. If the role of an authority in a changing broadcasting environment is to be reviewed, it would seem timely to reconsider whether these concepts are optimal for guiding a standards regime. It would be advisable, in seeking views on the scope and nature of regulation, to seek views on the kinds of standards that should underpin that regulation. Those who favour widening the scope of regulation or a greater role for self-regulation, for example, may take a different view of the underpinning standards from those who favour the status quo. Such a review would consider issues such as:

- whether the concept of “good taste and decency” is preferable to that of actual social harm (such as for example, the concept of material that is “injurious to the public good”, used in the Films, Videos and Publications Classification Act 1993); and
- whether the principle of balance, as currently expressed in the Act, remains important in an era of an increasing variety of outlets for

information – and the extent to which the achievement of accuracy is dependent on the availability of a balance of views.

Conclusion

37. To date, much consumption of broadcasting remains unaffected by the technological developments discussed in this paper. Nevertheless, as the availability of new platforms adds to the ways that broadcasting-like content can be accessed, our sense of what broadcasting is will undergo dramatic change. “Broadcasting”, for the audience, is becoming a more fragmented and individually customised activity, in New Zealand as elsewhere, as the audience takes advantage of the choice between selecting from linear schedules or from non-linear menus of content. The implications for content regulation need to be considered to determine possible changes to New Zealand’s arrangements. The review of broadcast standards arrangements will be co-ordinated with work on other aspects of broadcast regulation, as agreed by Cabinet in its decisions on digital television (POL Min (06) 8/8).

Public Consultation

38. As noted, a public discussion paper (Appendix I), incorporating a questionnaire, has been drafted to seek input on key issues that have been identified by research and policy analysis, before any decisions on alternative approaches to the status quo are taken. The paper includes questions about the scope of regulation, and the role of the regulator, as well as about the statutory concepts. I recommend that Cabinet approve it for publication by the Ministry for Culture and Heritage. It is proposed that the discussion paper be mailed to particular interests in the broadcasting sector, including community organisations, and published on the Ministry’s website. It is proposed that two months be allowed for responses. The public response to this consultation will inform the development of options for structural reform, should it appear that amendments to the status quo are desirable. I propose that I report back to the Committee by the end of February 2008 on any options identified for investigation. **[NB – a later report-back date will apply consistent with the timetable for public consultation]**

Departmental/Agency Consultation

39. This paper has been prepared in consultation with the State Services Commission, Ministry of Economic Development, Te Puni Kokiri, Department of Internal Affairs, and Broadcasting Standards Authority. The Department of the Prime Minister and Cabinet has been informed.

Fiscal Implications

40. There are no fiscal implications arising directly from the recommendations in this paper.

Legislative Implications

41. No legislative implications arise directly from this paper, although the policy work for which public consultation is proposed as an input may result in proposals for legislative change.

Human Rights, Gender Implications and Disability Perspective

42. There are no implications in these areas.

Regulatory Impact and Compliance Cost Statement

43. Not required at this point. The discussion paper poses general questions about the scope and future purpose of broadcast content regulation but does not contain actual proposals for changes to regulation.

Publicity

44. Subject to Cabinet's approval of the discussion paper, it is proposed to issue a ministerial media release to publicise its availability and highlight the issues it raises.

Recommendations

45. It is recommended that the Committee:

1. **note** that changes in the broadcasting environment, in particular technological changes allowing content increasingly to be accessed on demand, are putting pressures on the existing model of content regulation, established under the Broadcasting Act 1989;
2. **note** that internal policy analysis and international research jointly commissioned by the Ministry for Culture and Heritage and the Broadcasting Standards Authority have suggested a series of policy issues about the future purpose and scope of broadcast content regulation in New Zealand;
3. **approve** the publication by the Ministry for Culture and Heritage of the attached consultation paper, incorporating a questionnaire, as an input into policy work on options for future broadcast content regulation;

4. **invite** the Minister of Broadcasting to report to the Cabinet Policy Committee by the end of February 2008 **[NB – a later report-back date will apply consistent with the timetable for public consultation]** on possible options for investigation; and
5. **note** that a Ministerial media release will be issued to coincide with the publication of the paper referred to in recommendation 3.

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...../October/2007

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