

4 April 2008

The Broadcasting Content Regulation Paper
Broadcasting Unit
Ministry for Culture and Heritage
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CONSULTATION PAPER – BROADCASTING AND NEW DIGITAL MEDIA: FUTURE OF CONTENT REGULATION

The Human Rights Commission welcomes the opportunity to have input into the future of broadcasting standards in New Zealand. The Commission is an independent Crown Entity which operates under the Human Rights Act 1993. As well as promoting and protecting human rights, the Commission is charged by statute with encouraging the development and maintenance of harmonious relationships between the diverse groups that make up New Zealand society. The Commission has a strong interest in promoting, protecting and strengthening freedom of expression as set out in Article 19 of the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights and affirmed in the New Zealand Bill of Rights Act 1990.

Broadcasting regulation plays an important role in the promotion and protection of this right, and has wide influence in terms of encouraging harmonious relationships and understanding between diverse groups in New Zealand. As such, the Commission places particular importance on issues surrounding children and young people, privacy, racial disharmony and media accountability. This is illustrated by our active research on the right to freedom of expression, the chapter in *Human Rights in New Zealand Today Ngā Tika Tangata O Te Motu 2004* and our engagement around the revision of charters and codes of media bodies.

The Commission has answered the questions outlined in the consultation paper “Broadcasting and New Digital Media: Future of Content Regulation.” There are, however, two preliminary points to which the Commission would like to draw further attention.

First, on reading the consultation paper and additional information concerning the review of regulation, there appears to be a presumption in favour of a single or converged regulator. On the basis of the Commission’s knowledge of overseas converged regulators we question the apparent presumption that a converged regulator would be a preference. In the absence of hard evidence to support the

effectiveness of converged regulators, the Commission views the Broadcasting Standards Authority (BSA) as the appropriate institution to act as lead agency for future broadcasting content regulation. The Commission believes that the BSA's role should be widened to include the regulation of new digital media.

Second, the Commission stresses that future broadcasting regulation should continue to focus on the actual content conveyed to the public, rather than on the platform in which content is carried.

The Commission's responses to the consultation paper questions are set out below.

What the regulation of content should be concerned with

Q1: What concerns are appropriate to be addressed through content regulation?

The Commission strongly supports the themes of protection of children, portrayal of violence, accuracy, the protection of privacy, and fair treatment of all people being addressed through content regulation. In addition, the active promotion of journalistic standards of fairness, balance and non-discrimination should be provided for. Moreover, issues of incitement, discrimination and hate speech are contentious matters that need careful consideration. The Commission believes that although legislation alone cannot curb the most harmful effects of hate speech, the promotion of positive relations between groups in society through media education and public awareness is important. Therefore, the Commission considers that a proactive duty to promote positive relations between groups and reduce social harm is an additional factor that content regulation should contemplate.

A single regime?

Q2: Should a single regulatory regime apply to all broadcasting-like content no matter how it is distributed?

No. There is no compelling evidence provided that a converged regulator would be more effective in regulating broadcasting content. As the term *content* regulation clearly denotes, regulation must be concerned with content first and the regulation of the platform as a secondary but related issue. Nor is there evidence of overlap in existing regulatory measures, with key regulators such as the BSA and the Office of Film and Literature Classification maintaining regular contact to avoid such duplication. A single regulatory authority is also likely to be opposed by other agencies such as the Press Council and the Advertising Standards Authority which are autonomous and self-policing industry bodies.

The Commission considers that the BSA is the appropriate body to act as lead agency in respect of broadcasting content regulation including new digital media. The BSA's regulation would clearly exclude regulation pertaining to the print media which is within the mandate of the Press Council. The Commission responded to the recent review of the Press Council and hopes that the review recommendations will be implemented to enhance the Council's effectiveness. Importantly, the

Commission supports the development of a common code of practice for all broadcasting entities. This must include new digital media service providers.

Q3: Should the same general regime apply, but with a less strict or detailed code for content received on the demand of individuals than content broadcast conventionally?

No. The Commission urges that uniform standards of content regulation must apply regardless of platform. Increased consumer choice is not a substitute for regulated standards.

Q4: Publicly-owned broadcasters have special mandates to set standards of quality (such as the Charters of TVNZ and Radio New Zealand or the legislation of Maori Television). Should their content be regulated differently from the content of private-sector broadcasters or the same?

The Commission strongly considers that *the same* regulation be applied to both public and private-sector broadcasters. A standard is a benchmark which is non-derogable in nature. Any deviation from this notion risks the erosion of fundamental journalism standards and core human rights principles. New Zealand is also a signatory to a number of international conventions that make essential the development of guidelines through content regulation. Article 17(e) of the United Nations Convention on the Rights of the Child urges the encouragement and development of appropriate guidelines for the protection of the child from mass media information and material injurious to his or her wellbeing. The Commission believes that broadcasters have accepted universal broadcasting content regulation as part of the media's social responsibility obligations.

In relation to public-sector broadcasting, the Commission advocates that their respective charters require stronger accountability checks to ensure that performance in respect of their mandates is more transparent.

Broadcasting-like material from outside New Zealand

Q5: Should broadcasting-like content provided to audiences from overseas be subject to New Zealand's regime for content regulation?

Yes. Content regulation must be applied consistently within the New Zealand jurisdiction. An alternative approach risks open licence for the most vulnerable members of society such as children and young people to be exposed to damaging content such as pornography, extreme violence and racial denigration.

Q6: If you answered yes, what form should regulation take, and who should regulate such content?

Please see the Commission's answer to question 2.

The role of the regulator

Q7:

a) Should there continue to be a state agency available in New Zealand to operate a system of content regulation?

Yes. The Commission considers that the BSA is the appropriate agency and that the BSA's present degree of independence must be preserved and enhanced. Also, its mandate should be enlarged to cover new digital media and the development of "social codes" to govern behaviour such as invasions of privacy, pornography, cyber-bullying and hate speech in order to protect children and young people.

b) Should broadcasters be able to regulate themselves, within the requirements of legislation?

No. The Commission supports the need for a statutory body that regulates broadcasting content and that the public has confidence in. There is evidence in New Zealand's media history that self-regulation is less effective than statutory-based regulation. Non-effective regulation damages public confidence and faith in broadcasting regulation and damages the credibility of media processes that are seen as neither transparent nor accountable.

A broader role for an agency?

Q8:

a) Are the current arrangements for monitoring public broadcasting and the broadcasting environment adequate?

Yes. The Commission considers that the current arrangement is adequate. It is the Commission's view that the expense associated with establishing a new bureaucratic mechanism for policy advice is not warranted. However, it is suggested that the name of the Ministry for Culture & Heritage be changed to include broadcasting, that is, the Ministry for Culture, Heritage & Broadcasting.

b) Are there any gaps in the current arrangements?

No. The Commission does not believe a new bureaucratic mechanism is required.

Q9: If you answered "no", what other ways of monitoring the broadcasting environment could be explored?

The Commission suggests that there is a need for more public and political accountability and transparency around the monitoring of public-sector charters.

Media literacy and education

Q10: Do you favour a stronger role for a state agency in encouraging media literacy?

Yes. The Commission robustly supports a stronger role for a state agency in encouraging media literacy. In *Human Rights in New Zealand Today Ngā Tika Tangata O Te Motu 2004* the Commission states that:¹

- Few media and public opportunities exist for both informed stakeholders and members of the public to freely debate, in an informed and constructive manner, the modern tensions between the right to freedom of expression and social responsibility (for example, the impact of hate speech).
- While education about the right to freedom of expression is widely seen as important to protecting it as a right, education aimed at balancing freedom of expression with the rights of vulnerable groups such as children is currently poorly coordinated, resourced, presented and disseminated.
- Understanding would be improved by:
 - information in non-legal language about the importance of the New Zealand Bill of Rights Act 1990
 - public education opportunities to develop strategies for exercising a right of reply
 - journalist and newsroom training aimed at improving news media coverage of Māori, Pacific peoples and ethnic minorities
 - greater inclusion in the primary and secondary curricula of media literacy opportunities
 - development of individual protection and responsibilities in relation to the internet
 - industry, government and public commitment to the precautionary model in relation to television violence
 - continuing public education about the use of complaints mechanisms, including section 61 of the Human Rights Act 1993, that relate to aspects of freedom of expression.

Among the many challenges of absorbing new technologies into healthy societies, few can be more important than educating citizens in media literacy. The Commission supports the development of media literacy programmes in schools to help children and young people differentiate between reliable and unreliable sources of information and become more critical about what they see and read in the global media. This notion is consistent with the priorities of the United Nations Alliance for Civilisations and its media literacy education policy.²

The Commission regards the BSA as the appropriate body in this respect and notes they have this mandate under section 21 of the Broadcasting Act 1989. We believe that media literacy would be enhanced if the BSA actively carries out its function under section 21(d). In order for such an educative function to be effective, the BSA must be adequately funded.

¹ Human Rights in New Zealand Today *Ngā Tika Tangata O Te Motu* (2004) Auckland, Human Rights Commission, p148.

² United Nations Alliance of Civilisations: *Media, Media Literacy Policy & the Media Literacy Clearinghouse*. Available at <http://www.unaoc.org/content/view/83/116/lang,english/> [last accessed 1 April 2008]. Also available at <http://www.aocmedialiteracy.org/> [last accessed 1 April 2008].

Q11: Would a greater emphasis on media literacy be useful to New Zealand audiences in order to identify and avoid undesired content sourced directly from overseas?

Yes, naturally. However, media literacy must *not* be a substitute for content regulation. Media literacy must only ever be an addition to principled content regulation that is legislated for and properly resourced.

Are there any other measures that should be considered?

We support greater emphasis on media literacy in the New Zealand education curriculum.

Media education and violence

Q12: Should these roles be part of the mandate of New Zealand’s broadcast content regulator

Yes. The Commission considers that the BSA is the logical agency to undertake an educative and collaborative role with educationalists, the wider broadcasting sector and the public.

Q13: Should it have a similar educative and collaborative role in relation to other matters, such as, for example, the interests of children and young people?

Yes. The interests of children and young people in this respect are of fundamental importance. Children and young people are the most vulnerable section of New Zealand’s population. Equally, the United Nations Convention on the Rights of the Child grants the right of freedom of expression to children.

As such, active collaboration between the BSA and other key agencies is vital. This collaboration must include the Children’s Commission, the Families Commission and the Human Rights Commission, in addition to other agencies and non-governmental organisations.

The concepts guiding broadcasting standards

A single set of concepts?

Q14: Are a single set of broad concepts as a basis for content regulation important in an era of increased choice in content and in the ways of receiving it?

Yes. The advent of increased choice does not eliminate the need for standards in content regulation. In fact the ubiquity of new media makes content regulation even more essential.

Q15:

a) Should the concepts currently guiding the standards applying to broadcasting continue to apply to broadcasting?

Yes.

b) If yes, should they apply more widely across the scope of content regulation, - that is, beyond conventional broadcasting?

Yes. Please refer to the Commission's answer in question 2.

c) Are there different concepts that should be added or substituted for those in the Act, and applied either to broadcasting or to a wider range of content?

The Commission considers that the following concepts must be taken into account:

- the acknowledgement of freedom of expression and the balancing of rights and responsibilities associated with it; and
- a new widened concept that resolves issues surrounding racial denigration. In particular, such a concept should seek to restore the balance between freedom of expression and those who suffer harm from racial denigration in the media. In addition, meaningful thought should be given to the responsibility to positively promote racial harmony and the difficulties in relation to hate speech regulation.

Particular concepts

Actual social harm or "good taste and decency?"

Q16: Do you have a preference between these two possible approaches?

Yes. The Commission has a strong preference for the concept of "good taste and decency." The Commission considers that the present arrangements are adequate.

The BSA currently undertakes effective and regular public and community research on current issues relating to "good taste and decency." The BSA also engages in an exercise which appropriately balances freedom of expression with issues of "good taste and decency." The Commission considers that the idea of actual social harm (or "injurious to the public good") should not be included within the Broadcasting Act 1989. The determination of actual social harm is an extremely difficult exercise in practice, and applying such an approach would inevitably narrow the scope of New Zealand's current content regulation. The concept of actual social harm risks the erosion of broadcasting standards and fundamental human rights principles.

Q17: Does the principle of balance, as currently expressed in the Act, remain important in an era of an increasing variety of outlets for information?

Yes. The Commission categorically believes that the principle of balance is a fundamental tenet of journalism and current affairs reporting, the importance of which should never be diminished no matter what outlets carry or broadcast the news.

Q18: If the principle of balance remains important in conventional broadcasting, should it apply more widely if the scope of regulation is widened beyond conventional broadcasting?

Yes. The principle of balance must apply to all content irrespective of platform.

Q19: To what extent is the achievement of accuracy dependent on the availability of a balance of views?

The Commission questions the framing of this question. The concepts of accuracy and balance *cannot* be divorced from one another. The Commission firmly believes that both accuracy and balance are immutable principles that must always operate in conjunction. Inaccuracy is not mitigated by so called “retrospective balance.”

Q20: Do you have comments on aspects of the content regulation that are not covered by the questions above?

The Human Rights Commission has an ongoing interest in the protection and promotion of freedom of expression as evidenced by *Human Rights in New Zealand Today Ngā Tika Tangata O Te Motu 2004* and our work on content regulation relating to children and young persons, fairness and balance and racial discrimination. The Commission wishes to be involved in future work on broadcasting content regulation.

Conclusion

The Commission stresses two overall points. First, we reiterate our doubts about the effectiveness of a converged regulator. As this consultation proceeds it would be helpful for the Ministry for Culture and Heritage to provide evidence from other jurisdictions on the merits and disadvantages of single and converged regulators. Second, we believe that broadcasting regulation must apply consistently to all content irrespective of platform.

The Commission would be happy to discuss our responses to the consultation paper in more detail if desired. Should you need further information, please contact Brandon Van Slyke, Policy Advisor, Strategic Policy Team at brandonv@hrc.co.nz .

Yours sincerely,



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EEO Commissioner