



OFFICE OF FILM  
& LITERATURE CLASSIFICATION

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# Balancing Freedom of Expression with Public Safety in a Digital Age

The Submission of the Office of Film and Literature  
Classification in Response to Government's Discussion  
Document *Content Regulation in a Converged World*

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## Foreword

Entertainment content regulation impacts on the lives of every New Zealander. It is an issue about which New Zealanders have great passion. The Discussion Document *Content Regulation in a Converged World* is both timely and necessary. The questions it raises are not simple. Striking a balance between the right to freedom of expression on the one hand and the need to protect New Zealanders, especially children and young people on the other, is no easy task. The decisions made now about the future of content regulation in New Zealand will have far reaching consequences not just for New Zealanders today but for the next generation of young Kiwis, and beyond.

New Zealand's Film and Literature Classification regime has stood the test of time. Enacted in 1993 the system is a tribute to lawmakers of the day and still functions well in 2015. Our system is unique amongst the nations with which we usually compare ourselves in preserving a careful balance between free speech and public protection.

Nevertheless, times have changed and a revolution is occurring in how entertainment and information is created and distributed in an increasingly digital world. The same (or very similar) content is available in many different formats, accessible around the clock from almost any location. Games, films, TV series or books and magazines are available to New Zealanders in their living rooms, on their desks and in the palms of their hands.

This change is a good thing. It allows us to express ourselves more freely than ever before; to question the world around us; and to more fully participate as citizens in our vibrant democracy. But there are also challenges and risks. Repeated exposure to extreme violence, sexual violence, human degradation, torture, cruelty, crime and horror can inure New Zealanders and their children to these things, changing our attitudes and behaviours over time and putting current and subsequent generations at real risk.

New Zealanders' enduring intolerance of violence, including sexual violence has ensured that this country has remained a relatively peaceful place to live and raise our children. Our peaceful culture is supported by, and reflected in, our legislation and official systems. The film and literature classification system plays its part by ensuring that New Zealanders have the information necessary to make wise choices about what they and their families watch and play, and that the most harmful material is restricted (or even banned in very rare cases).

In a digital age – New Zealanders deserve the best information about what they are watching or playing regardless of when, where or how they watch or play. Modern technology makes consumer protection more difficult in some ways and easier in others. The ubiquity of the World Wide Web and the multitude of access points makes it impossible to patrol the border as we once did – preventing harmful films and publications from landing on our shores in physical form.

However, digital technology also makes it far faster, easier and cheaper to disseminate good consumer information. iTunes, Netflix and Lightbox, for example, are able to display New Zealand classification information for downloadable films and episodes so that their local customers know exactly what they are watching.

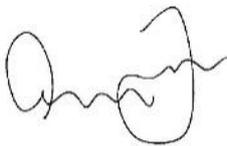
The digital environment, and New Zealand's porous virtual border also places a greater burden on the need for effective public education, providing clear examples of content that is restricted and harmful, so that we uphold our collective values as a nation.

This is a job for New Zealanders and the Government. New Zealanders need to continue to take responsibility for making wise choices for themselves and their families based on good quality consumer information. New Zealanders depend on their Government to uphold the right to freedom of expression while providing an effective safety net that restricts the worst excesses of a small minority of exploitative organisations and individuals.

It is not a role to be abdicated in favour of an Australian classification regime that would see New Zealand values replaced with a far higher tolerance of violence, sexual violence, horror and cruelty, and a lower tolerance for sexual expression.

The film and video industry have a vital role in ensuring the success of the current classification model and should continue to step up and play a vital, responsible role in this new digital age. Nevertheless, public safety cannot be left solely to those whose primary incentive is to provide financial returns to their shareholders. Commercial incentives have already led to a push for a wider distribution of harmful content. Independent, official oversight will remain necessary to protect New Zealand children, young people and families.

The challenge for the lawmakers of today is to be as far sighted and fair as their predecessors were in 1993 and to create an enduring environment that will continue to allow the minds of the current generation and the generations that follow to develop and flourish.



Chief Censor



Deputy Chief Censor

## 1: Executive summary

This paper is the submission of the Office of Film and Literature Classification (the Office) addressing the Government's discussion document *Content Regulation in a Converged World*. It sets out the essential elements of a more modern regulatory regime for entertainment and information and suggests areas where changes to the current, fragmented regulatory arrangements may be required in both the short and longer term.

The paper also discusses some of the fundamental principles and features of New Zealand's classification of films, videos and publications that are working well and considers the key risks to public safety that could result from ill-considered changes to our regulatory regime.

This submission reflects the considered views of the Office of Film and Literature Classification capturing 22 years of experience at the coal face of content regulation in New Zealand and draws on the 150 years of combined classification experience which staff at the Office bring.

The key recommendations in this submission are as follows.

New Zealand needs its own classification system. We are a nation with unique attitudes and values, and even those countries with which we have the closest traditional links have increasingly divergent attitudes towards sex, horror, crime, cruelty and violence.

New Zealand's classification system needs to continue to strike a careful balance between the right to freedom of expression on the one hand, and protecting the community, in particular children, from the harm which flows from unrestricted access to entertainment content.

Content which has the highest potential to harm the community should continue to be classified before it is distributed. Complaint-after-the-event systems can work to regulate content which is offensive or shocking but is ineffective in respect of content which does more than shock or offend and which harms the community in more enduring and pervasive ways.

Individual commercial distributors cannot be relied on to classify content with high potential to injure the public good. Their primary obligation is to their shareholders and is to make money. They make money by selling as much content as possible to the widest audience as possible. Classification limits the potential audience for content. This fundamental conflict of interest will inevitably lead to commercial distributors having to choose between the immediate commercial interests of their shareholders and the longer term interest of New Zealanders now and tomorrow. Commercial distributors have persistently sought lower levels of restriction within the current system.

The current classification system sees the Film and Video Labelling Body playing a significant role in respect of unrestricted content which has a lower potential for injury to the public good. While the conflict referenced above must still weigh heavy on the distributors responsible for governing the FVLB, they have successfully navigated it for 22 years. This is because their role is as an industry as a whole rather than as a series of separate competing distributors, and because of the personal commitment and integrity of key personnel engaged in the operations of the FVLB. They are subject to strict statutory limitations and ultimate control by the Office of Film and Literature Classification

(the Office). This sees industry actively managing the rating and labelling of about 85% of the content currently distributed in New Zealand annually, and this should continue.

There are a range of measures which should be included in any future classification system, whether permanent or interim, pending resolution of more challenging issues around the future of content classification in New Zealand. These include clarifying that all distributors of content have to comply with the same set of rules, creating a greater alignment between content broadcast and the same content supplied through other media, making the cost of the classification system fair and equitable, extending the power (which already exists for magazines) to issue prospective classifications for episodic content based on the first series or episode, and increasing the fairness and independence of the process for reviewing classification decisions.

## 2: The right to freedom of expression

The right to freedom of expression is vital to our political, social and artistic existence. The right to seek, receive and impart information and opinions is necessary if citizens are to fully and meaningfully participate in democratic political life and realise their individual and collective potential. It enables us to test and compare different ideas in pursuit of the truth, and it allows us to express ourselves through art. The right to freedom of expression is guaranteed in s14 of the New Zealand Bill of Rights Act 1990. Section 5 of that Act provides that any limitations to the right must be reasonable, demonstrably justified in a free and democratic society, and prescribed by law.

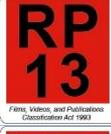
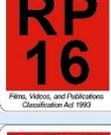
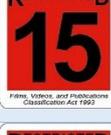
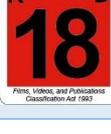
Currently, the law permits only those limitations on the right to freedom of expression necessary to protect the community, in particular more vulnerable members of the community such as children, from the harm which would otherwise flow from unrestricted access to material that deals with sex, horror, crime, cruelty or violence.

The Office considers that this careful balance between rights and protections should be prized and preserved in the development of a more modern classification system that spans the full range of traditional and new media.

A flourishing, diverse entertainment industry supports freedom of expression through the provision of films, music, written publications and games using a full range of traditional and digital distribution methods. A modern regulatory regime should place the smallest practicable burden of cost and compliance on industry that is necessary to protect the public. As the Government's Discussion Paper quite rightly states, regulation should not constrain the development of the sector, and it should also ensure that businesses are regulated equally to encourage innovation and competition.

### 3: The right to make an informed choice

The New Zealand film and video classification and labelling regime provides important information to parents, children and the wider public on the age appropriateness of publications, as well as warnings relating to content that could be concerning or harmful. This allows consumers to make informed choices about what they and their families watch.

Classification label	Descriptive note examples
	n/a
	<p>Frightening fantasy scenes &amp; violence</p> <p>Coarse language, sexual references &amp; drug references</p> <p>Some scenes may scare very young children</p> <p>Violence, coarse language &amp; nudity</p>
	<p>Drug use, offensive language &amp; nudity</p> <p>Horror, offensive language &amp; content that may disturb</p> <p>Offensive language, nudity, drug use &amp; sexual references</p> <p>Violence, offensive language, sex scenes &amp; content that may offend</p>
	<p>Violence, drug use and offensive language</p> <p>Violence and horror</p> <p>Violence</p>
	<p>Graphic content may disturb</p> <p>Sexual material, offensive language &amp; content that may disturb</p> <p>Violence, offensive language &amp; sex scenes</p> <p>Violence, offensive language, nudity, drug use &amp; suicide</p>
	<p>Horror, sex scenes, drug use &amp; offensive language</p> <p>Offensive language &amp; anti-social behaviour</p> <p>Nudity &amp; sexual content that may offend</p> <p>Sexual references, drug use, nudity &amp; offensive language</p>
	<p>Depicts graphic and realistic war scenes</p> <p>Violence and content that may disturb</p> <p>Brutal violence, torture and cruelty</p> <p>Violence, offensive language and drug use</p>
	<p>Acts of cruelty &amp; rape, sexual violence &amp; offensive language</p> <p>Graphic violence &amp; sexual violence</p> <p>Graphic animal cruelty</p> <p>Violence, horror, sex scenes, suicide &amp; content that may disturb</p>
	<p>Brutal sexual violence, graphic violence &amp; sex scenes</p> <p>Drug use, sexual violence &amp; suicide</p> <p>Explicit sex, graphic violence &amp; genital mutilation</p> <p>Violence, sexual violence and explicit sex scenes</p>

The Office considers that the current entitlement of the public to consumer information and clear labelling of film and video content should be upheld as a core feature of any new regime that deals comprehensively with a full range of media. The digital age is making an ever increasing range of entertainment available to New Zealanders, which is a good thing, but it also makes it even more important that we are given consistent, reliable information to help us make informed choices about what we and our families watch.



Both domestic and international providers of digital 'on demand' content already use New Zealand labels and classifications. This information is provided to allow their customers to make easier selections and avoid content that may be unsuitable for different family members.

The public have been clear that they understand the New Zealand classification labels and that they use this information in deciding what they and their families view<sup>1</sup>. A majority of the public also feel that the New Zealand classification regime is fair, with a minority who

#### *Classification label as it appears on Lightbox*

view the regime as too lenient and a small number who view the regime as too restrictive<sup>2</sup>.

The Office considers that the current, well understood and widely accepted classifications and labels should be retained to preserve public confidence in the classification system and provide good quality consumer information.

Research conducted by the Classification Branch of the Australian Attorney-General's office in 2015<sup>3</sup> shows that a significant majority of Australians also support continued labelling of content – including digital content – in a converging environment. The same research shows that (as in New Zealand) the primary use of this information by consumers is for child protection, and to gauge age appropriateness, and a secondary use was for Australians to determine their own viewing preferences.

<sup>1</sup> Colmar Brunton/NZ OFLC, 2011. *Understanding the Classification System: New Zealanders' Views*, p7&9. Accessed at <http://www.classificationoffice.govt.nz/PDFs/research-public-understanding-2011.pdf>

<sup>2</sup> Ibid., 8.

<sup>3</sup> Classification Branch, Attorney-General's Department, 2015. *Classification ratings: Research with the general public*, p7. Accessed at <http://www.classification.gov.au/Public/Resources/Documents/Classification-ratings-research-with-the-general-public.pdf>

The Australian research also showed that a majority of Australians (60%) supported a co-regulatory classification system with government and industry working together, as opposed to the government alone (19%) or industry alone (12%)<sup>4</sup>.

## 4: Protecting New Zealand families and their children from harm and exploitation

New Zealand law has a sequence of tests for regulators to follow in determining whether material should be classified as objectionable, or restricted to prevent harm.

In a nutshell New Zealand law decrees that a publication (a film, dvd, book or game, for example) is objectionable if it describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that it is likely to cause public harm.

- Certain things are deemed to be objectionable - such as any content that may support or promote (or tend to support or promote) child sex abuse, sexual violence, bestiality, necrophilia, urine or faeces in the context of sex and/or degradation) and the infliction of torture and cruelty.
- Next, regulators are directed to give particular weight to a range of factors in determining whether a publication is objectionable or should be restricted.
- Last, regulators are directed to consider a range of factors in determining whether a publication should be restricted to a certain age group.

The most harmful and disturbing child abuse images and other objectionable material are at one end of a continuous, consistent classification spectrum that also allows for the age restriction of other, potentially harmful, films, videos and publications to protect New Zealanders, including children and teenagers.

It is tempting to think that decisions relating to objectionable content can be made separately from decisions relating to more mainstream commercial content. A model that separates the classification of objectionable material from the classification of commercially available entertainment has some surface appeal. The involvement of the state could be restricted to the most serious cases and the entertainment industry could be left to adopt a low cost, self-regulatory model that provides maximum flexibility and profitability.

In reality, it is often impossible to draw clean lines for decision making purposes between the commercial and the criminal worlds and between content that is made available for mass consumption and niche consumption. Child abuse images and film are offered commercially on subscription or 'pay per view'. However, it is sometimes difficult to distinguish between material

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<sup>4</sup> Classification Branch, Attorney-General's Department, 2015. *Classification ratings: Research with the general public*, p7. Accessed at <http://www.classification.gov.au/Public/Resources/Documents/Classification-ratings-research-with-the-general-public.pdf>

that is commercially available, yet warrants restriction and material that promotes or supports child sexual abuse.

#### Case Study: Classification of images submitted by customs – Objectionable or R18?

The Comptroller of Customs submitted 16 computer image file printouts for classification. While 13 image file printouts were found to be objectionable, three photographic printouts required further consideration. The images are posed portraits of semi-naked young women. A logo identifying the source as the website “LS Models.com” appears on all of the images. This source is known for sexual images of young girls.

The source of the sexual images on the computer image file printouts and the fact that their subjects are young raise the question of whether the printouts promote or support, or tend to promote or support, the exploitation of young persons for sexual purposes. However, the three publications do not satisfy the criteria of s3(2)(a). The age of the images’ subjects is uncertain. Nevertheless, the figures shown do not present as young teenagers. Their faces, where clearly seen, are those of young women. Breasts, body structure and musculature are well-developed, and despite some ambiguity in one image where the genital area is not clear, the degree of sexual development tends to indicate that the figures depicted are adult. Nothing in the name of the files or in the setting suggests that they are young girls.

The computer image file printouts *gu-011-036.jpg*, *gu-011-046.jpg* and *gu-015-050.jpg* were therefore classified as objectionable except if the availability of the publication is restricted to persons who have attained the age of 18 years. In this case, possession of the images by an adult is not illegal.

In the year to 30 June 2015, the Office classified 377 publications referred by the Police, The Department of Internal Affairs and Customs. The majority, but not all, of these items related to publications and images that were suspected to promote or support child abuse.

More conventional film and entertainment can also approach, and sometimes go over, the line that divides restricted material from objectionable material. These decisions can be complex and far from clear-cut. For example, the Office has also classified films that are part of the ‘torture porn’ genre – some of which have carried an R18 classification along with appropriate warnings and made available for subsequent commercial release, and some of which have been banned or passed with significant excisions. A case study in section 7 of this paper deals with one such film, *Hostel Part II*.

At the most extreme end of the spectrum, entertainment (most often films and discs) that is undoubtedly objectionable under current New Zealand law is produced overseas for mass consumption. Films such as *The Human Centipede 2 (Full Sequence)* and *Megan is Missing* deal with torture, extreme degradation and, in the latter case, graphic and sustained depiction of child sexual abuse. These films are widely available overseas – even in Australia – but have been classified as objectionable in New Zealand.

The Office’s audiovisual presentation that accompanies this submission deals with these films (and others) in greater detail.



*Scenes from The Human Centipede 2 and Megan is Missing*

While these films continue to be accessible over the internet, consumers must actively seek them out while, in many cases, knowing that their content has been declared objectionable in New Zealand. The law also provides for continued protection against the further distribution of these films within New Zealand by making it a serious offence to do so.

In practice, the control over these objectionable films, and the restriction of others, has only been achieved through a system that retains state oversight of all aspects of the regulatory regime – is independent of industry, and makes the tough calls about public safety, when necessary. In overseas jurisdictions where this is not the case (the United States for example) or where social values and legislation are different (in Australia for example), these films are widely available.

## 5: New Zealand's classification system reflects the attitudes and values of our nation

The New Zealand classification system reflects a careful balance between freedom of expression and public safety. The Act requires the Office of Film and Literature Classification, led by the Chief Censor, to only limit the availability of publications when they deal with sex, horror, crime, cruelty or violence in such a manner that it is likely to be injurious to the public good. This sets a high bar with a strong emphasis on the right to freedom of expression and is a key strength of the New Zealand classification system.

The classification systems of different countries are all unique – offering their own balance between freedom of expression and public safety, and applying their own criteria and thresholds to assess levels of potential public harm. Consequently, New Zealand only accepts ratings from the two jurisdictions that were thought in 1993 to be the closest to our own (The United Kingdom and Australia), and only for films that have received a classification from those jurisdictions that is equivalent to New Zealand's G, PG or M ratings. This is called 'cross-rating'. In all other cases restricted content, or content that could be restricted, is assigned its own New Zealand classification.

In fact the tests in both Australia and in the United Kingdom are quite different from New Zealand's high-bar test based on demonstrable injury to the public good. In Australia for example the test of whether or not the film is to be restricted is "The standards of *morality, decency and propriety*

generally accepted by reasonable adults". This is one factor leading to Australia's greater restriction of nudity and sex.

In addition, Australian and British societal attitudes and values towards sex, horror, crime, cruelty and violence are different from those held by New Zealanders. Both countries have a much higher tolerance of violence than New Zealand.

In spite of these shortcomings the current cross-rating system for lower risk films and discs works very well – most of the time. It does accept a certain amount of injury to the public good in the interests of reducing compliance costs for industry and remaining flexible and responsive to industry demands. This level of 'acceptable' harm to New Zealanders is minimised by restricting the cross-rating system to the unrestricted end of the content spectrum, where the level of harm to the public is likely to be low.

However, in practice, the different classification mechanisms, criteria, thresholds and judgements made in the United Kingdom and Australia can and do still produce results that are dramatically different from the New Zealand classification system.

The classification system in the United Kingdom is based on a similar hierarchy of age restriction – albeit with restrictions at 12 and 15 years compared with New Zealand's 13 and 16 year thresholds. As in New Zealand adult content in the UK is restricted to people 18 years of age and over – although the UK has a further restriction at 18 that tightly prescribes the manner of distribution of certain adult sexual material.

The Australian classification hierarchy is similar to New Zealand at lower levels – with G (General), PG (Parental Guidance) and M (Mature Audience) labels – but diverges quite significantly at higher levels of classification. Australia does not restrict material to those 13 and 16 years and over. Instead an MA15+ label covers a broad range of content and restricts the hire, sale and watching of material to those aged 15 and over unless the young person is in the company of an adult.

Australia's R18 and X18 labels usually apply to strong sexual content with any explicit, unsimulated sex being classified X18 (only available in ACT and Northern Territory). In New Zealand explicit, unsimulated sex is usually classified as R18 and can be made available commercially to adults.

In practice, the greatest challenge to the current cross-rating system is posed by the Australian M classification. In general, Australia is far less restrictive of films and games containing serious violence. New Zealand often applies RP13, R13, RP16 and R16 ratings to material that has been unrestricted, rated M, in Australia.

### Case Study: *Autumn Blood*

The film *Autumn Blood* was classified R16 by the Office, with a note that the film contains violence, sexual violence and content that may disturb. The DVD was originally cross-rated by the New Zealand Film and Video Labelling Body from its Australian rating of M, with a note for violence and offensive language.

A member of the public contacted the Classification Office with concerns about the DVD's classification. The complainant noted that the film depicted the violent rape of a child. She had watched the film with her 16-year-old foster daughter, a victim of abuse, who was extremely upset and traumatised upon viewing the scenes of sexual assault, causing her to revisit events from her past. The complainant noted the American classification of 'R: Violence including rape and nudity', and questioned the New Zealand M classification. She stated that if the film had a more appropriate rating she would not have selected the film, and her daughter would have been spared this upset.

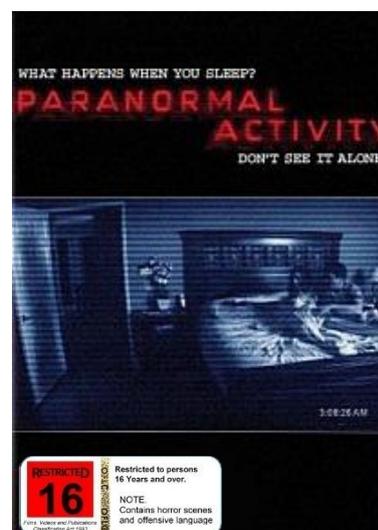
The Office considered that the DVD's unrestricted availability is likely to be injurious to the public good, due predominantly to its depictions of sexual violence. The first rape scene in particular is confronting and harrowing to watch, focusing on the girl's helplessness, distress and pain. The scene is likely to shock and disturb younger viewers, and be highly upsetting to victims of sexual violence regardless of age. The cruel treatment of the girl and her brother, and the lack of legal redress or consequences for the murderers and rapists increases the impact. *Autumn Blood* was therefore restricted to viewers aged 16 and over with the descriptive note 'Violence, sexual violence and content that may disturb'.



### Case Study: *Paranormal Activity*

The film *Paranormal Activity* was classified as R16 by the Office with the descriptive note that it 'Contains Horror Scenes and Offensive Language'. The film was originally cross-rated M by the Film and Video Labelling Body based on its Australian classification.

After receiving complaints from members of the public that the classification was too low, the Office used its statutory power to examine the film and re-classify it. Although *Paranormal Activity* was classified M in Australia (and therefore unrestricted) it had been rated R in the USA, 16 in Germany, The Netherlands and Singapore, 15 in the UK, Finland, Sweden and Norway, 15A in Ireland, and 14A in Alberta, British Columbia, Manitoba and Ontario.



*Paranormal Activity* is a horror film from the United States. Micah and Katie, a couple living in a suburban house, become increasingly disturbed by a demonic presence in their home. Micah, a sceptic, decides to run a video camera to capture the demon's activity whilst they sleep. The activity becomes more frequent and aggressive, and Katie's nocturnal behaviour begins to change. The film is shot entirely by hand held camera, and the film takes on the guise of 'found footage' – all footage seen appears to be shot by Micah or Katie – enhancing the realism of the film.

The Office concluded that the images of horror, the sinister supernatural themes, and the tension and realistic fear the characters experience in the film are likely to be greatly shocking and disturbing to younger teenagers and children. Although deliberately designed to scare and disturb all viewers, adults and older teenagers will be more likely to be able to put the images and themes of the film into context. Children and young teenagers, on the other hand, are likely to sustain lasting damage from seeing films like this, including nightmares and persistent upsetting thoughts. Therefore, the Censor restricted the film to persons who have attained the age of 16 years.

Very occasionally, a New Zealand R18 label is applied to Australian M rated content. For example the film *Open Windows* was unrestricted in Australia and labelled M but was classified as R18 in New Zealand primarily due to its portrayal of sex, cruelty and violence. The feature contains an exploitative scene of sexual coercion that has a high degree of impact and would be very disturbing to children and young teens. The fusion of sex with sadistic violence, while trivialising it as screen entertainment, creates a risk of impressionable viewers becoming desensitised to this kind of extreme material.

The audiovisual presentation that accompanies this written submission discusses material that has been rated as MA15+ in Australia (Restricted to those 15 years and over unless in the presence of a parent or guardian) and has been restricted in New Zealand as R18, largely due to extensive, high-impact violent content and sadistic cruelty. Examples include: *Saw*, *Wolf Creek 2*, *The Raid* and *Only God Forgives*.



The Office strongly recommends that New Zealand retain a classification regime that reflects and upholds our shared values and continues to reflect a low level of tolerance for the exposure of children and young people to serious and disturbing violence. As a nation, we can't altogether rely on the classification systems of other countries with different societal norms and regulatory regimes, particularly when these reflect different societal views of sex and a far greater tolerance for crime, violence, cruelty and horror.

## 6: Current regulation of content protects and informs New Zealand consumers – most of the time

The current regulatory regime for content dates back to 1989 (for the Broadcasting Act) and 1993 (for the Films, Videos, and Publications Classification Act) and has proven surprisingly adaptable and durable. Since 1993, we have seen:

- Video cassettes give way to disc (DVD – then Blu-ray);
- Adoption of new, immersive digital technologies by cinema (such as digital surround and 3d) to remain competitive with home based entertainment;
- Video games supplied on cartridges and floppy disk give way to sophisticated and immersive console and computer based games supplied on disc, downloadable, or accessible online;
- The establishment of the internet based on demand entertainment industry and the decline of traditional neighbourhood video rental stores; and
- Significant consolidation of retail sales into major chains and a handful of large online providers.

Nevertheless, throughout this period of revolution and upheaval, New Zealanders have been served and protected by regulation covering the vast majority of their information and entertainment.

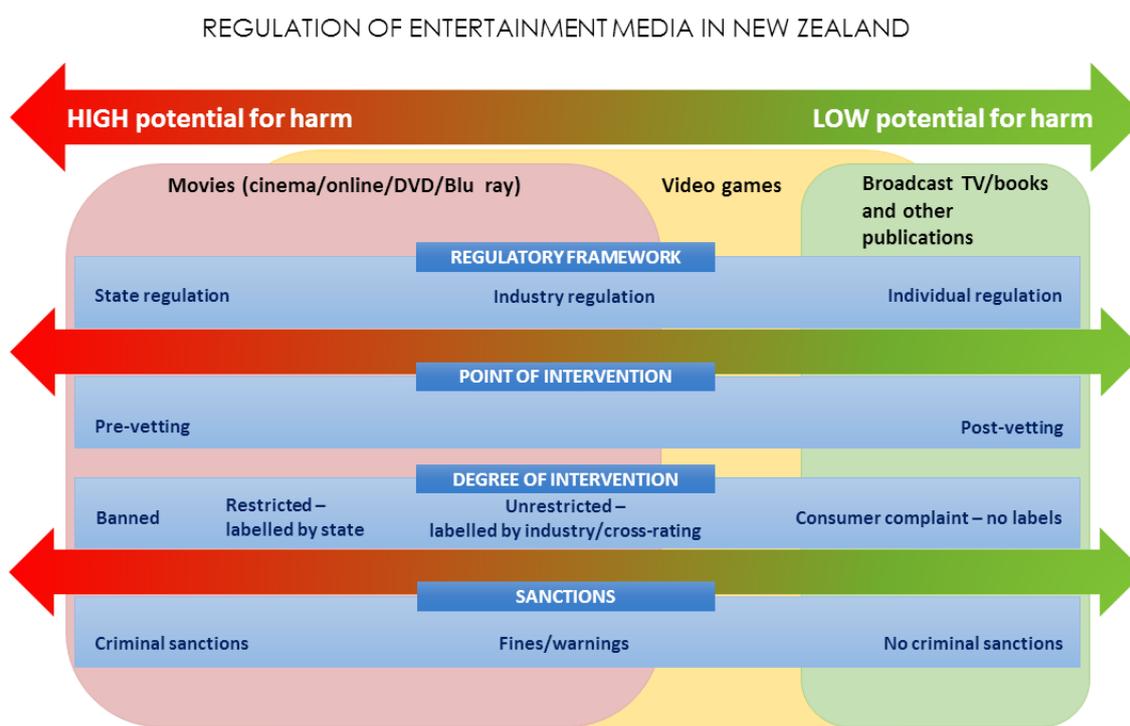
Figure 1 sets out the key features of the current regime. In general – the regime provides for heavier regulation where there is high potential for harm, and lighter regulation where there is lower potential for harm. For instance:

- The regulatory framework provides for a relatively high level of state regulation and control for cinematic entertainment, mass marketed discs and online/on demand content where these are likely to pose a hazard, but permits industry to self-regulate for the much higher volume of lower -risk releases and individual entities to regulate themselves in respect of broadcast TV, books and other publications.
- Content is pre-vetted/pre-approved in high risk areas (such as films and videos that are likely to contain restricted content) and subject to an after the fact, complaints based process for lower risk content (such as books).
- Similarly, the degree of intervention varies from banning films and other publications where they are objectionable, through to restricting the availability of the content (to minimise the harm that would otherwise be caused) through to unrestricted material being labelled by industry and, where the potential for harm is lowest, no restriction or labelling.
- In general, the level of sanction available for breaching the regime is also proportional to the level of harm caused, ranging from criminal sanctions through to fines and warnings.

The current regulatory regime provides broad regulatory coverage and protection across a full range of media. Books, magazines, broadcast content, films, discs and games are all covered by the relevant pieces of legislation. The Office of Film and Literature Classification and the industry's Film and Video Labelling Body are also of the view that films provided online, on demand are covered by the Films, Videos, and Publications Classification Act 1993.

iTunes, Netflix and Lightbox display New Zealand classifications for their online content and submit new publications for labelling and classification. Google Play also displays New Zealand classifications for most movies. A minority of smaller on demand providers claim confusion and are currently non-compliant.

Figure 1: Features of the Current Regulatory System for Entertainment and Information



The films, videos and publications classification system has adapted to digital content

The Government's discussion paper paints a picture of the current labelling and classification system as cumbersome, slow and unresponsive to the changing needs of the entertainment industry in the digital age. This is totally inaccurate.

The labelling and classification system has already begun to adapt to the digital age with a good degree of success. Changes have occurred to the way that material is submitted for classification and to the time-frames within which distributors require classification decisions and labels. Films, episodes and games are now commonly received in digital format by the Office, sometimes over a secure web-link and short turnarounds are often expected to meet tight release schedules for films and games and "same week as the U.S.A" releases for online providers.

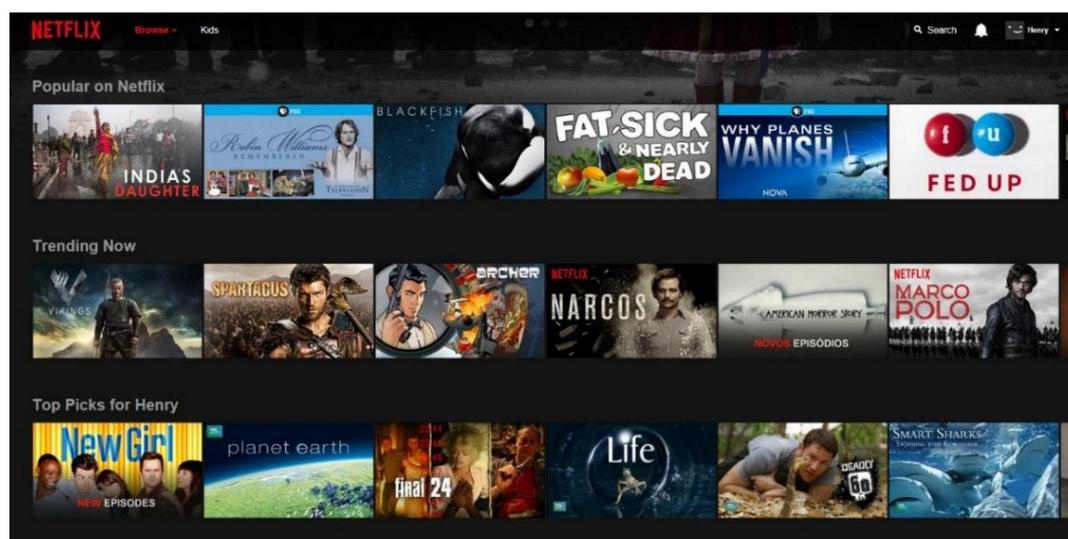
Episodes of popular online, on demand series such as *Vikings*, *Outlander*, *Black Sails* and *Better Call Saul* have all been classified under urgency – sometimes in a matter of hours – to allow for international release schedules and to ensure that on demand providers can remain competitive by offering the latest entertainment. Most recently, every episode of the entire first season of the new

on demand horror series *Scream* was examined and classified within one week in order to support a marketing deadline by Netflix.

Classifications for the most recent games in popular game series *Call of Duty* and *Halo* were turned around overnight by the Office to allow for the production and release schedules of these highly popular and engaging games. A gaming specialist examined the games using advanced, beta, pre-release versions provided to the Office under strict security and with access codes to allow all levels and parts of the game to be played and assessed.

The predations of online pirates have also changed the speed at which the office is expected to respond. Distributors of Indian Bollywood style films often have only a very short window to exhibit their product to the public before online piracy destroys their market. The Office routinely examines these cinematic releases under urgency – providing distributors with a classification in 1 – 3 days depending on the requirements of the distributor.

### Case Study: Establishment of Netflix as a responsible provider of on demand video for New Zealanders



The advent of on demand video service is still a relatively recent innovation for New Zealand consumers. The availability and cost of high-speed broadband that had previously constrained these services has recently become less of an issue for consumers – particularly in the main centres.

Netflix is a large international supplier of video on demand and successfully operates in a number of countries – complying with the classification and labelling regimes in each country. They entered the New Zealand market in February 2015.

One of the first tasks was to assign labels and classifications to their extensive existing catalogue of entertainment, much of which had already been classified and labelled in New Zealand. Netflix was able to purchase digital labels to display online for a few thousand dollars.

The next task was to classify and label existing entertainment that had not previously been available to New Zealand audiences and/or could not be cross-classified by the Film and Video Labelling Body. A positive aspect of video on demand is that New Zealanders can have access to a far greater variety and

depth of entertainment than ever before. The faster this new content can be made available to them the better. However, Netflix had a stock of new material waiting. A total of 383 new shows needed a New Zealand classification and label.

Working in close cooperation with the Film and Video Labelling Body and Netflix, the Office processed these submissions from Netflix rapidly. The submitter was organised, all material was able to be viewed and they provided clear information about their commercial priorities. The total regulatory cost for Netflix of establishing themselves as a fully compliant, responsible provider of on demand video to New Zealanders was less than \$150,000.

## Increased access to information and entertainment requires better regulatory consistency and coverage

The impact of digital convergence – the eroding of barriers between new and traditional ways of accessing information and entertainment – creates a greater need for consistency in how material is regulated and classified. The same material – available at different times or through different devices – should be treated the same for regulatory purposes. Leaving holes in the regulatory regime will, over time, allow content to be increasingly delivered in unregulated ways – eroding the careful balance between freedom of expression and public protection that New Zealanders currently experience and value. For example, New Zealanders shopping for content online or on demand should expect to enjoy the same high degree of consumer protection and information as if they were purchasing exactly the same content on DVD and Blu-ray at a retail store.

Similarly, holes in the regulatory regime will create imbalances in the entertainment industry with some channels and providers enjoying favourable treatment relative to others. For example, if games and online, on demand content are exempt from meaningful regulation, these channels will be handed a competitive advantage relative to cinema and more traditional broadcast media and may also fail to provide consumers with adequate information and warnings.

Inconsistency can also be confusing for consumers. A film viewed at the cinema with an R16 classification and carrying warnings for horror scenes and violence (*Prometheus*, directed by Ridley Scott for example) can be seen at 8.30pm on free to air broadcast television with an Adults Only (AO) classification and a different warning.

## Games are inadequately regulated compared with films and on demand content

Video games are exempt from the labelling requirements placed on commercially distributed films. Distributors should submit a game for labelling if they believe that it contains restricted content. In practice, this means that neither the Office nor the Film and Video Labelling Body retain an effective oversight of the content of games.

These days, the production and promotion budget of games can equal or exceed some large studio film releases. Popular games can achieve large audiences very quickly with releases of successful franchises such as Call of Duty and Halo being eagerly anticipated by loyal fans. In sharp contrast to 1993, games are now often presented in highly realistic environments that can deeply engage the player in the action and story. Gameplay can last hours, days, or even longer for some large and

online games. Consequently, games now present a far greater potential for harm than was envisaged in 1993, greater even than films that only play for a couple of hours.

The Office routinely applies restrictions to the selection of games submitted for classification. Most often, the restriction is related to violence, horror and/or cruelty with restrictions for sexual content less common. We have no reliable way of knowing what proportion of games currently for sale in New Zealand carry inadequate labels and warnings – posing a potential danger to children and young people and a threat to public safety.

Occasionally, games are referred to the Office for classification by the Department of Internal Affairs or after complaints from the public. One such example is discussed in the case study below.

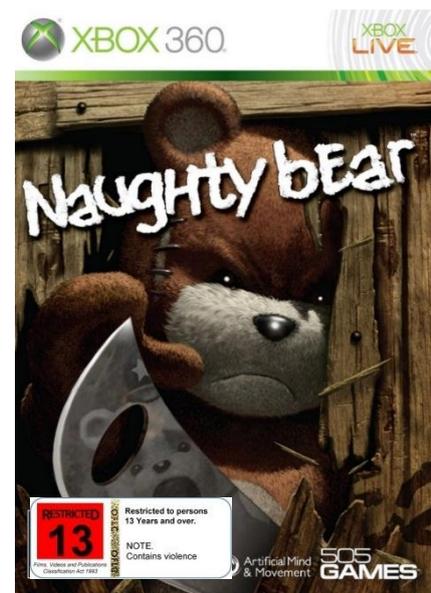
The Office is aware of the large number of digitally distributed games available to consumers via mobile platforms (such as Apple iOS and Google Android) and is monitoring the trial of the International Age Rating Coalition (IARC)<sup>5</sup> system in Australia.

### Case Study: *Naughty Bear*

The game originally carried an Australian M rating as games do not necessarily have to be submitted to the Labelling Body or to the Office of Film and Literature classification (unless the distributor assesses that they contain content that may be restricted). However, in referring the game to the Office, Internal Affairs stated that in other jurisdictions the game has received a higher age restriction than the M rating given to it in Australia. For this reason, they believed that there may have been grounds to have the game classified at a higher rating than the current M.

*Naughty Bear* is a violent, satirical game with a similar tone and appearance to that of children's television shows, such as *Tellytubbies*. The player controls an anthropomorphic teddy bear whose sole task is to kill other bears on the island. This is achieved by scaring the bears into killing themselves, actively killing the bears using a variety of weapons, or participating in various challenges to kill the bears by other means. Points in the game are achieved by the level of mischief, sabotage and overall anti-social behaviour the player commits on each level. During the game a narrator instructs the player on how to systematically catch and kill other bears. The narrator enthusiastically praises the player for committing violence and driving other bears insane. The more sadistic the violence the player engages in, the more encouraging the narrator becomes. The bright colourful settings and the playful nature of each level are juxtaposed against the game's insidious objectives.

As well as weapons, the player can use objects and fixed chattels to harm the other bears. For instance, if a bear is using a payphone the player can sneak up behind them, grab the phone off the bear and hit them with it. The combination attack concludes with the player shoving the phone handset into the mouth of the bear and choking it to death. Other forms of sadistic killing include shoving a bear's face onto a BBQ hotplate, dunking a bear's head into a toilet and drowning it, slamming bears' heads into machines, and electrocuting them.



<sup>5</sup> The International Age Rating Coalition: see <https://www.globalratings.com/about.aspx>

The Office concluded that the emphasis on killing was likely to desensitise children to violence in general and that this effect would be compounded by the player's skill at killing being acknowledged and rewarded. Children would be especially disturbed by the depiction of a familiar childhood toy engaged in frequent acts of violence against other toys. However, teenagers and adults possess the maturity to recognise the game's contrived representations of violence and the satirical nature of the game. Therefore the game was restricted to persons aged 13 years and over.

### Although the costs of the current regulatory regime are low – they are not shared equitably

The Motion Picture Distributors Association report a 5% increase in revenue for 2014 (to \$183,100,000) making 2014 the most successful year ever in New Zealand. The Interactive Games and Entertainment Association (IGEA) reported an 18% increase in revenue (to \$346,000,000) for the same year. This gives a combined revenue for motion picture and games distribution of \$530,100,000, and significantly this excludes the burgeoning online distribution market.

The total annual cost of the Office of Film and Literature Classification's activities regime for 2014/15 was \$2,994,000. Of this \$1,996,000 was funded through appropriation. Commercial revenue, the money paid by distributors for classifications, was \$1,034,000.

Distributors also pay a modest additional amount to their own Film and Video Labelling Body to cross-rate and label unrestricted films, discs and online shows (approximately \$1,000,000).

The cost of meeting New Zealand's very light touch classification system as a proportion of distributors' revenue is therefore less 1%. This infinitesimal cost would be an even smaller proportion of when turnover from online on demand distributors is included.

However, there are some inequities in the distribution of costs.

#### ***Disincentives for small scale, specialist releases***

Small scale distribution of films, discs and online content incurs the same classification fee (\$1124.40 GST inclusive) as mainstream commercial releases. This means that the commercial viability of film festivals, special interest discs and online shows can be affected, reducing the range of material available to New Zealanders. It can also mean that smaller scale releases pay more than their fair share of the total cost of the system – effectively subsidising profitable, mainstream releases. The Office of Film and Literature Classification has discretion to waive up to 75% of the fee in such circumstances which partly addresses the inequity – but this depletes the overall resource of the office and reduces the ability to respond to urgent, high volume requests from larger distributors.

#### ***'Coat-tailing'***

Further, the classification and labelling cost falls exclusively on the distributor that first makes the film, disc or online show available in New Zealand. If the same content is picked up by another distributor or sold through another channel – the subsequent distributor enjoys all the benefits of the prior classification and labelling without sharing any of the cost.

### ***Duplication***

Costs are duplicated between the film, video and publication classification and broadcasting regimes. Broadcasters often assign ratings to films and shows that are also assigned a classification by the Film and Video Labelling Body and Office of Film and Literature Classification.

### ***Under-regulation of games***

As noted above, Video Games are currently exempt from the requirement to display New Zealand standard labels and consumer information – except where they may contain restricted material. As a form of entertainment that is at least as popular as films, discs and on demand content, and posing potentially greater risks to public safety, games should participate fully in the regime and meet their fair share of cost.

### ***Impact of non-compliance***

The minority of smaller online on demand providers who do not comply with their classification and labelling obligations are not paying their fair share of costs and are effectively free-loading on compliant film and disc distributors and responsible online, on demand providers such as iTunes, Netflix and Lightbox.

### ***High costs for long-running series***

Successful TV series can potentially run for 5 – 10 seasons and contain between 10 and 25 episodes per season. They are usually established on a stable formula of characters and plot. However, each episode of an online, on demand series and each disc of a box-set series, is charged a separate fee for classification. The Office currently charges a lower rate for grouped submissions – but this only partially addresses the inequity of paying to have very similar content classified repeatedly over many years.

### ***International comparison of cost***

Despite these shortcomings, New Zealand is able to provide a high quality, responsive classification and labelling service at a low overall cost compared to other countries.

Fee to rate or classify a 3½ hour DVD	NZ	Australia	UK
DVD cross-rated by Film & Video Labelling Body from Australian or UK classification	NZD \$27	NZD \$1187	NZD \$3118
DVD rated G, PG, or M by Film & Video Labelling Body	NZD \$160	NZD \$1187	NZD \$3118
DVD classified by the NZ Classification Office	NZD \$978	NZD \$1187	NZD \$3118

## 7: A new co-regulatory model for the digital age

This part of the paper outlines the key features and changes to the regulation of content recommended by the Office of Film and Literature Classification.

New Zealand's current classification regime for films videos and publications is largely an industry based regulatory model – with approximately 85% of films and discs assigned a rating and label by the industry's own Film and Video Labelling Body. An element of co-regulation exists in the form of the Office of Film and Literature classification and the Film and Literature Board of Review to address a minority of films, videos and literature that may require an additional restriction to prevent harm to the public.

The Office of Film and Literature Classification is there to exercise oversight and to correct any imbalances that may occur. For example, the Chief Censor currently has the power to call in publications to be classified where these have not previously been submitted (or when he believes that the cross-rating system has not operated correctly) and to grant leave to review (or reconsider the classification of) publications.

Rather than reinventing the wheel, a future model for content regulation should build on the successful co-regulatory model for films, videos and publications that balances freedom of expression and short term profit incentives with public protection to ensure that:

- a. Accurate consumer information is provided; and
- b. Children, young people and families are protected.

In contrast, the Broadcasting Standards Act is relies chiefly on self-regulation by broadcasters – backed by a regulatory body established by statute. It dates back to the late 1980s when all broadcasters were state-owned and therefore considered to be low-risk as they were under the ultimate control of the Government of the day. As a result, broadcasting regulation is a sparse regime that provides minimal public information regarding programmes and an 'after the fact' complaints process rather than 'up-front' protection for New Zealanders.

### A vital regulatory role for industry and the tough calls made by the state

Put simply, the greater the level of restriction, the smaller the potential audience for a commercial film, disc or game and the lower the revenue for the distributor. Therefore, increased profitability and wider availability of harmful material must inevitably be traded off against lower levels of protection for children and teenagers and greater potential harm. Private companies with a primary duty to their shareholders to maximise return on investment cannot be fully objective about this trade-off and must always err towards greater availability of content in their own commercial interest.

### *Industry should continue to successfully shoulder their share of regulatory responsibility*

The current classification system for films, video and literature is largely regulated by industry, but still has strong safeguards and regulatory protection for New Zealanders. The system operates efficiently in a way that allows adult New Zealanders the widest practicable access to information

and entertainment. It works because the industry's role is confined to the high volume low risk end of the content spectrum, as shown above in figure 1, and because its role is carried out by an organisation representing the industry as a whole rather than as a series of separate competing distributors, is tightly confined by statute, and is under the ultimate control of the Office of Film and Literature Classification.

While the conflict referenced above must still weigh heavy on the distributors responsible for governing the FVLB, they have successfully navigated it for 22 years. This is because their role is as an industry as a whole rather than as a series of separate competing distributors, and because of the personal commitment and integrity of key personnel engaged in the operations of the FVLB. They are subject to strict statutory limitations and ultimate control by the Office of Film and Literature Classification (the Office). Industry actively manages the rating and labelling of about 85% of the content currently distributed in New Zealand annually, and this should continue.

### ***The state should continue to make the tough calls on behalf of New Zealanders***

The Office is of the view that the balance between regulatory efficiency and public protection that has proven to be durable and successful for films, video and literature should be carried over as a fundamental feature of a modern regulatory regime applying more widely to a full range of media. A largely self-regulated regime is both possible and desirable at the low-risk, high-volume end of the content spectrum, but a greater level of protection is required at the high-risk, low-volume end.

In practice, it is a very tough call to restrict the availability of films, discs, games and online content, let alone determine the nature and degree of the restriction. This requires sound judgement, and a good deal of specialist knowledge and experience to balance what is, in essence, a restriction on individual freedom with the need to protect the public. A quasi-judicial, expert and well respected institution that is statutorily independent of commercial and political interest is required to ensure that this balance is maintained in all cases where some restriction to freedom of expression may be necessary in order to protect the public.

Even within the minority of films and videos considered by the Office, we observe that industry can tend to seek less restrictive classifications than those that are often applied by the Office in order to increase the potential audience for films and videos and boost the profitability of each release.

The following two case studies illustrate the conflict that can arise between industry profits and the protection of the public. In both of these cases, the statutorily independent parts of the classification system were required to ensure that the risk to the public was reduced. The accompanying audiovisual presentation contains further examples of industry seeking to lower the classification of films restricted for sex, horror, crime, cruelty and violence.

### Case Study: *Hostel Part II*

*Hostel Part II* was originally deemed objectionable by the Office unless a particular scene was excised from the film – in which case the Office would issue an R18 classification. The title was rated R18+ in Australia.

*Hostel Part II* is a sadistic horror film made as part of the 'Torture Porn' genre that became popular in the middle of the last decade. The story is about three young American women who travel to Slovakia on holiday. On arrival at a hostel, they surrender their passports to the clerk checking them in. Without their knowledge, the clerk transmits their identities around the world, auctioning each to the highest bidder. Bidders are members of a Slovakian 'hunting' club that is really an abduction syndicate. The winner of each auction travels to Slovakia and enters into a contract with the club to torture and kill the victim in any manner they desire. One of the women is killed in a sexualised torture sequence.

The other two are tortured by two American businessmen. Many more people are shown being tortured, killed, or both, before one of the three women buys the right to torture and kill her torturer and, in so doing, joins the syndicate to save her life.

The Office recommended that the following scene be excised.

The torture scene depicts a naked woman hanging upside down by her ankles from a meat hook, her arms bound behind her. A female client then enters and allows her robe to fall to the ground, revealing her naked body. She lies down in the bath directly below the victim and reaches for a nearby scythe. The viewer sees the client taunt her victim by running the blade up and down her victim's naked body as if to caress her. She is shown taking sexual pleasure from inflicting pain on her victim, from the victim's pleading and screaming, and from the feel of warm blood on her skin. She is filmed smearing the blood over her naked body with one hand as she cuts with the other. More incisions to the flesh are made with increasing depth and rapidity. The amount of blood that drips down onto the client increases, creating a bloodbath. The sounds of flesh being slashed and screams of pain and agony are highly disturbing. This frenzy of bloodletting culminates when the client slits her victim's throat with a sickle, releasing copious amounts of blood as the client writhes in ecstasy.

There is no doubt that the scene described above depicts physical conduct in which sexual satisfaction is derived from inflicting cruelty and pain extensively, to the highest degree, and in a manner that invites the viewer to share in the protagonist's enjoyment of it. This scene was instrumental in determining the film's objectionable status. The Office stated that, if the offending scene was excised an R18 restriction could apply.

Sony Pictures declined to excise the scene and appealed the Office's decision to the Film and Literature Board of Review seeking to have the classification lowered. The Board arrived at a similar conclusion as the Office and Sony subsequently made the required excision prior to releasing the film.



### Case Study: *Breaking Bad Season 4*

Although rated MA15+ in Australia, the boxed set of discs for the TV series *Breaking Bad Season 4* received an R18 classification in New Zealand, with a descriptive note that the publication contained 'Drug Use and Violence'.

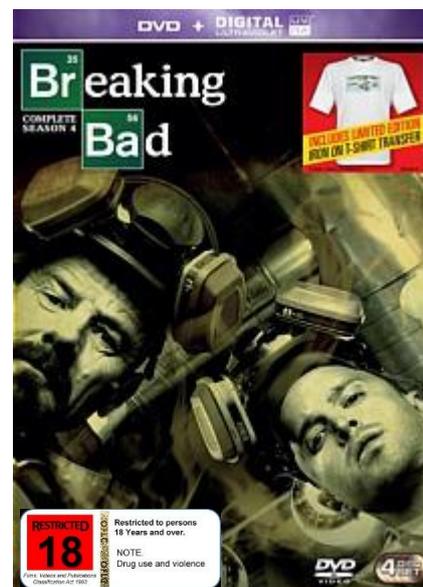
Subsequently, The Warehouse decided not to stock R18 titles.

The distributor (Sony) promptly requested a review of the Chief Censor's classification of *Breaking Bad Season 4* citing, as part of their application, that The Warehouse were no longer stocking any R18 titles. The Chief Censor declined their request.

The television series deals with matters of crime, cruelty and depictions of violence and serious physical harm. Season 4 has an increasingly dark atmosphere and a strong spike of realistic and brutal violence and cruelty. The Office considered that those images would disturb and shock younger viewers, and desensitise them to this level of strong violence. The criminal elements, in the form of drug use, manufacture and dealing are suitable for an older audience. Adults are able to put the sophisticated treatment of these elements into a coherent context with experience and maturity that younger viewers do not possess.

In a significant early scene, the two main characters (both methamphetamine cooks) are shown being held at the methamphetamine lab by two henchmen. When the drug kingpin arrives, one character begins to babble, desperately explaining why they killed a rival methamphetamine cook. The kingpin ignores him, and calmly undresses and puts on a pair of laboratory coveralls. He stands in front of the two main characters holding a box cutter, and suddenly grabs one of his own henchmen from behind and slits his throat. The henchman struggles, and the kingpin continues to hold him, splaying the cut in his neck with his hands. Blood spurts out of the wound and the henchman gurgles and sputters. The expression on the kingpin's face remains deadpan, and he stares at the shocked main characters as the henchman slowly dies. He eventually lets the body slump to the floor. A large pool of blood begins to ooze over the floor. He calmly walks over to a basin and washes his hands and face. He wordlessly dresses in his suit, tells the two main characters to get back to work and leaves. They then drag the body into the next room, eventually stuffing it in a large plastic drum before pouring acid over the corpse to dissolve it.

The scene described above is highly disturbing. It has been filmed in real-time, and there is no soundtrack. The death is shown in bloody detail. The brutality and realistic violence of this scene is shocking.



## Dealing with harm up-front or after the fact?

An 'after-the-fact' complaints based system such as the current Broadcasting Standards Act will allow more harm to occur than would be the case if content is classified and clearly labelled 'up-front' before it is distributed. As New Zealanders, we prize the safety of our children and young people very highly.

### *The damage is already done*

There is simply no way to 'un-see' or 'un-experience' highly disturbing content. The harm is caused upon viewing regardless of whether a complaint is subsequently laid. So at best an after-the-fact complaints based system can only stop perpetuating harm. It cannot undo it. Even if a distributor is obliged to pay a fine after a complaint is upheld, it cannot undo the harm; it simply offers commercial content distributors an opportunity to purchase the right to harm the community if such a purchase is in its commercial interests.

Furthermore most consumption of entertainment content is immediately on release. Popular movies and games attain the largest share of their audience in the days and weeks following their release. Therefore, any harm done is done very quickly. By the time a complaint is laid, investigated and a conclusion reached much of the harm to the public will already have happened. So even the capacity of complaint after-the-fact system to stop perpetuation of harm is limited.

### *The long term damage to society is harder for New Zealanders to recognise and complain about*

Another limitation on after-the-fact complaint systems relates to the nature of the injury and the motivation of individuals to complain. Individuals generally complain about content because they are directly and personally affected by what they see. Shocking or disturbing content will motivate people to complain. However, it is much more difficult to recognise and complain about the more subtle, insidious injury to the public good that occurs through longer term attitudinal conditioning, inuring mass audiences over time to violence, sexual, racial and other stereotyping.

There have been longstanding concerns about the perpetuation of gender stereotyping through 'pornification' of mainstream Hollywood productions, and about the inuring effect of high levels of violence typical in some genres of mainstream movies. After-the-fact complaints systems have limited capacity to regulate distribution because they rely on complaints being made, and individuals may not complain about the injury to the public good from the indirect, long term and community wide focus of harmful content. Neither the content nor the injury impact on them as individuals in the direct and immediate way needed to motivate them to complain.

Furthermore, individuals who are genuinely concerned about the wider public good may be unaware of the existence of the most problematic content in the New Zealand market. For example, the harm caused by a popular new game that inures young people to graphic violence will not necessarily be directly observable to those who do not play games.

However, like the rest of us such a person may ultimately be a victim of the harm occasioned by that content. For example, they may be the victim of violence, cruelty or discrimination or they may simply be forced to live in a society where these acts are more commonplace. In any event, it is

unlikely that they will complain about the content that lead to the harm because it is not immediately observable to them.

The examples presented in this submission and in the accompanying audio visual presentation clearly show that restricted content can be disturbing and traumatic. Complaints after the fact would likely have been made after a degree of public harm had already occurred, and after the public perception of their rights to be informed and protected had also been damaged.

### *After the fact complaints still have a useful function*

However, an after-the-fact complaints based system can be useful for dealing with the following cases:

- Where offence has been caused, and where an apology could potentially remedy the offence;
- Where there has been a lack of balance in coverage – particularly for news or current affairs – and additional coverage could address the balance; and
- For news and live broadcasts, where it is simply impractical (or oppressive) to fully vet content before it goes to air.

The existing Films, Videos and Publications content regulation system does not deal with matters of public taste and decency or balance in coverage. Nor should it. Freedom of expression should only be restricted in circumstances where injury to the public good is likely. Being offended is not an injury, it is a privilege and an inevitable consequence of free speech.

Nevertheless, a public, industry based code that deals with taste, decency and balance, and provides for after-the-fact complaint and resolution may have a role in a future entertainment content regulation system to provide catharsis and feedback to content distributors on how target audiences feel about, for example, offence and balance.

Such a system may also be useful for dealing with news, current affairs and live coverage – which cannot, and shouldn't be, vetted in advance.

In all other cases it is both possible and desirable to achieve greater consistency across platforms, better consumer information and better public protection by examining and classifying content in advance. The Office recommends that this approach is applied to a new regulatory regime for content.

A low-touch, low-cost regulatory regime that covers broadcast, online, cinema and disc is both feasible and desirable. We know enough to suggest how some of the key elements of this system might work together to encourage a vibrant industry that also informs and protects the public.

## Aligning the classification regimes of traditional broadcast media with films, videos and publications

The regulatory models established for broadcasting standards and films, videos and publications do not align precisely. In a converging environment, citizens may well wonder why the same film comes with different classifications and information depending on whether it is viewed on television or on DVD.

Initially, the relevant Broadcasting Codes of Practice could be amended so that if content has previously been classified, the classification and label must be displayed instead of the different, less granular, labels currently used by conventional broadcasters. Anyone viewing the same content on television as previously shown in cinemas or on disc, would therefore see the same classification. This initial step could be taken without any legislative change and eliminate one of the most obvious inconsistencies in the current regime.

Over time, all content that is not news, current affairs or live broadcast, could be classified consistently in advance of screening. This is both feasible and highly desirable as it will address the remaining inconsistencies between broadcast television and films, videos and publications as well as provide a vastly superior level of consumer information and public protection. Legislative change would be required.

One of the key arguments for maintaining a separate regime for broadcasting has been that it is impractical to address the dynamic nature of broadcasting through an up-front classification process.

Aside from news, current affairs and live television, this is simply untrue. Most films and series broadcast in New Zealand relate to unrestricted material and could be easily cross-rated. Most films and series are still broadcast in New Zealand after a substantial delay from their initial screening overseas. Almost all films and series have a considerable period in post-production overseas (or in New Zealand in rare cases) that can include the time taken by networks to determine appropriate scheduling. Therefore material can be easily submitted for classification prior to screening by both traditional broadcast media and newer on demand providers – especially if it is submitted digitally.

Timely classification can still occur when, for whatever unforeseen circumstance, content becomes available only at very short notice. Section 6 of this paper provides examples where the Office has turned around films and episodes under urgency in a matter of days and sometimes within a matter of hours (if the content is made available online).

### Case Study: *The Walking Dead: Season 5 Disc 1*

Classified as R18 by the Office of Film and Literature Classification on DVD.

The same episodes carried an Adults Only warning when shown on free to air broadcast television at 9.30 in the evening and then shown round the clock, on demand.

*The Walking Dead* is based on a comic book series of the same name and follows a group of people attempting to survive in a zombie apocalypse. The four episodes depict the infliction of serious physical harm and acts of significant cruelty to a high extent and degree. The first episode depicts the strongest material: Rick and several others are forced by the cannibals of Terminus to line up in front of a steel trough with gags in their mouths and hands tied behind their backs. Two of the cannibals stand behind them, one holding a baseball bat, the other a butcher's knife. The man with the bat hits one of the captives in the back of the head, causing the man to slump forward. The second cannibal then grabs the victim and slices his throat open and pushes him forward so that his neck bleeds out into the trough. This behaviour is depicted graphically and has a high degree of impact. The cannibals then do this twice more, though each time the filming is less graphic, and focused more instead on Rick's and the other group members' mounting terror as the cannibals get closer to butchering them.



All four episodes show zombies being killed in variously brutal and graphic ways. They are squashed, shot, burnt, decapitated and dismembered. There are also scenes of zombies attacking people, eating them while they are still alive. There is a very cruel scene in which a character wakes up to find himself captured by the cannibals. As he slowly regains consciousness he discovers that his leg has been amputated at the knee, and the men around him are eating his leg; there is a shot of his foot sitting on a grill roasting over a fire. The cannibals are brutally slaughtered in the following episode after they are cornered in a church. The cannibal leader is hacked to death with a machete.

Season 6 of *The Walking Dead* is currently screening at 9.40pm on Monday evenings on free to air television and carries an Adults Only warning. It then screens round the clock on TVNZ on demand, available to all, with no restriction. Although it is screened the same week as its United States release it could still be properly classified in advance as with other series described in section 6 of this paper.

### Aligning on demand media with the classification regime

As noted earlier, the majority of large online providers (such as iTunes, Netflix and Lightbox) already submit their online content for New Zealand classification. The Office is appreciative of their efforts to provide New Zealanders with good consumer information and to comply with local restrictions on harmful content.

Other, smaller on demand providers do not currently comply and have claimed to be confused about how New Zealand law applies to them. To save smaller online providers from further confusion – it would be a relatively simple matter to make slight changes to the Films, Videos and Publications

Classification Act and remove any lingering doubt (expanding the definition of supply, and making less reference to physical product for example).

These straightforward changes would also level the competitive playing field between industry stragglers and their law-abiding counterparts.

Otherwise, the regulatory regime is working well for online, on demand content and New Zealand consumers are well served by responsible providers such as those mentioned in this report.

### Properly regulating interactive games

In many ways, interactive gaming is the ‘elephant in the room’ in terms of content regulation and digital convergence.

As noted in section 6 of this paper, the revenue of the interactive gaming industry in New Zealand, at \$346 million, dwarfs revenue from film and disc distribution, at \$183 million. Popular games often contain highly cinematic and realistic components as well as interactivity designed to draw players into the game, and keep them playing. Games can have development and promotional budgets that equal or exceed blockbuster films. Large franchises like *Halo* and *Call of Duty* are shaping our popular culture and influencing more than one generation of New Zealanders and yet the games industry as a whole enjoys a degree of competitive advantage over traditional entertainment media and on demand content due to their exemption from labelling requirements.

In addition to their popularity and availability, games are also a higher risk medium than film and disc because of their immersive and interactive nature. However, because their evolution was not foreseen in 1993 (at which time they were simple, low-resolution, and low-impact), they were explicitly exempted from the labelling requirements under New Zealand legislation.

Bringing interactive games within the labelling requirements of the Films, Videos, and Publications Classification Act 1993 is extremely simple. The exemption for labelling “video games” contained in 8 (1) (q) should be removed as soon as practicable.

The large and growing volume of digital mobile content may need a separate approach.

### Improving the fairness and independence of appeals relating to classification decisions

Currently, those dissatisfied with any decision made by the Office of Film and Literature Classification can apply to the Film and Literature Board of Review to have a publication reviewed. The Board is a specialist quasi-judicial body, independent of the Office of Film and Literature Classification, whose decisions are, in turn, reviewable by the High Court. As a small, single purpose, stand-alone entity, it can struggle to bring the depth and breadth of expertise to bear in decision making – especially in an increasingly fast moving and diverse digital environment.

The relevant expertise and the required degree of independence arguably already exist in other quasi-judicial roles across the public sector. For example, the Human Rights Review Tribunal could be well placed to consider complaints relating to the restriction of free speech and has the existing expertise and breadth of role to place decisions in a wider context.

## A fairer apportionment of the costs of the regulatory regime

The amount of revenue provided by industry to the Office to examine and classify commercial content is \$1,034,000. The industry also funds the modest cost of its own Film and Video Labelling Body. Even if the regime were expanded to include labelling of all games and on demand content (from those providers who don't currently comply) the likely total cost would still be in the single millions of dollars. Government could choose to forego the negotiation and ongoing transaction costs with industry and fund the content regulation regime in its entirety without significant impact on the Government's net fiscal position. This would be a principled approach that recognises the significant public good of labelling and classification for New Zealanders.

In any event, the administrative costs of the regulatory regime – even if the changes proposed in this paper were made – are insignificant compared with entertainment industry revenue in excess of half a billion dollars (once on demand revenue is added to games and films). Government may well reach the view that such a profitable and successful industry should pay its own way and make a contribution to the safety and welfare of the country in which it operates.

Nevertheless, as outlined in section 6 of this paper – there are inequities in the current funding regime that make small scale distribution of content more costly and difficult, thereby restricting the choice and variety of material available to New Zealanders. One way to address this problem, and to deal with the 'coat-tailing' aspect of the current regime described in section 6 of this paper would be to apportion the cost of the regulatory regime across industry in proportion to sales.

This method could be implemented in several different ways and may require some transparency of sales information between industry participants.

The remaining inequities in the funding system arising from duplication between the broadcasting and film, video and publication regimes, non-compliance of smaller on demand providers and inadequate participation by the gaming industry would be addressed if the other recommendations in this paper were implemented.

### *Addressing high examination and classification costs for long-running series*

As set out in section 6 of this paper, successful TV series can potentially run for 5–10 seasons and contain between 10 and 25 episodes per season. They are usually established on a stable formula of characters and plot, yet are classified episode by episode or disc by disc.

The Chief Censor currently has the power to issue a serial publication order for magazines and other printed publications (excluding newspapers) where regularly published content is not expected to vary greatly. Expanding this power beyond printed media would lower the cost and speed up the process for long-running series.

## Appendix 1: Comment on the options presented in the discussion paper *Content Regulation in a Converged World*

The Government discussion paper “Content Regulation in a Converged World” contains six options for regulation of on demand content. This section of the paper briefly summarises each option and presents the view of the Office of Film and Literature Classification on each option.

### Option 1: Status quo – no regulatory intervention

The discussion paper states that neither the broadcasting, nor the film and video regime specifically applies to on demand content. The discussion paper contends that content providers are responsible for interpreting the existing regimes in relation to new services.

#### *Option 1: The view of the Office of Film and Literature Classification*

The Office of Film and Literature Classification agrees that the extent of the application of the Films, Videos, and Publications Classification Act 1993 could be clearer. In fact, however, the status quo is that the majority of the online, on demand industry are already compliant with the existing classification and labelling requirements of the Films, Videos and Publications Classification Act 1993. Nevertheless, there remains an inequity between the larger providers such as Netflix, iTunes and Lightbox who responsibly meet their obligations and a minority of the industry who don't, and this needs to be clarified. Option 1 does not address this inequity.

Minor legislative amendments (such as clarifying the definition of ‘supply’ in the Act and relying less heavily on legislative references to physical product) may serve to put the issue beyond all doubt and create a level competitive playing field – not just between the different on demand providers, but also between on demand providers and traditional distributors of films and discs. These amendments should be relatively non-controversial and could be drafted and implemented quickly.

With these relatively minor amendments – and a handful of others, such as the removal of the exemption for games from labelling requirements – this option could be a satisfactory solution while a more comprehensive approach is developed.

### Option 2: Voluntary code – no regulatory intervention

The industry might elect to work together on a voluntary classification regime for audio-visual content delivered over the internet, in the same way as the Online Media Standards Authority (OMSA) operates. Such a system might be similar to the existing broadcasting standards system, with an agreed set of standards, a process for classifying content, and a user-friendly complaints process. Whether a new complaints body would be established or the mandate of an existing body such as OMSA would be extended, would be up to the providers to decide.

The discussion paper notes that this option would add yet another mechanism for classification of similar content and could be confusing for the public.

### *Option 2: The view of the Office of Film and Literature Classification*

The Office agrees that this option would not adequately address the issue of convergence and would add yet another regime for classifying similar content.

The far more serious problem with the option is that it abdicates the role of the state in protecting its citizens and will allow commercial incentives to drive increased availability of harmful – even objectionable content. Unfortunately, the experience of the Office has clearly shown that industry has tried to push the boundaries in relation to harmful and objectionable material and that the oversight of an independent State body has been required to balance the safety of children, young people and their families. The case studies set out in section 7 of this report provide clear examples.

Section 7 of this paper clearly sets out why reliance on an ‘after the fact’ complaints process is a wholly inadequate response to the level of risk and harm posed by commercial entertainment at the extreme end of the spectrum. What’s experienced cannot be ‘un-experienced’ and what’s seen cannot be ‘un-seen’. Given that most of the harm occurs upon the initial release of films, episodes and games, the time taken to make a complaint, consider it, and take any action will mean that the damage is already done.

The other problem with this option is that it ignores the current good work of the film and video industry and the majority of the online, on demand industry in successfully running their own Film and Video Labelling Body for the vast bulk on unrestricted, low risk content. The Office is strongly of the view that industry should be supported and encouraged in this approach.

### **The Office does not support Option 2.**

### **Option 3: Extend the Broadcasting Act regime to cover on demand content**

As noted, the current Broadcasting Act applies to content provided on a “one to many” basis, and as such on demand content falls outside its remit. Live streaming of content is implicitly covered by the Act as it is considered to be provided on a “one to many” basis.

The Act could be amended to extend the BSA’s and the broadcasting standards regime’s jurisdiction explicitly to cover video on demand and live streaming. This could be done by amending the “one to many” definition of “broadcasting” in the Act, or by extending to the broadcasting standards regime the Act’s definitions of “content” and “transmit on demand”. These latter terms were added to the Broadcasting Act to allow the broadcasting funding agencies NZ On Air and Te Māngai Pāho to fund video on demand content that had not also been broadcast in the conventional, linear sense.

Classifications would be assigned to content by the video on demand providers, as they are now by broadcasters. Complaints could be made by the public in response to content, and the rulings on those complaints would guide the programming of future content. However, content deemed objectionable under the Classification Act or that had been classified as objectionable by the OFLC would be unable to be screened.

### *Option 3: The view of the Office of Film and Literature Classification*

The Office considers that Option 3 still perpetuates different rating systems for films and discs versus online and broadcast content versus games. In short, Option 3 still doesn't address digital convergence.

More seriously, the option relies on self-regulation by the on demand distributors backed up only with an after the fact complaints process which, as discussed under the Office's view of Option 2, is wholly inadequate given the level of risk posed by harmful and objectionable content.

Option 3 also assumes that it is possible to separate consideration of objectionable material from material that should be restricted and/or carry some sort of warning or description. Section 3 of this paper, with case studies, clearly shows that it is not possible to divide the classification system in this way and that the decisions must consistently reflect the full spectrum of material presented.

Current broadcasting regulation is a sparse regime that provides minimal public information and very little protection for New Zealanders. As the case study on *The Walking Dead* presented in section 7 clearly shows – broadcasters currently display disturbing, graphically violent and horrific R18 material on free to air television and make it available on demand, around the clock with no restriction. The Office places an R18 restriction on the same material.

**The Office does not support Option 3.**

### **Option 4: Extend the Classification Act regime to include on demand content**

The Classification Act regime provides a very important public service, protecting the community from objectionable content, restricting some content to certain groups of viewers, and labelling films so that people can make informed choices. The labelling regime is already applied to films shown in cinemas, DVDs (including content other than films), and video games. Under this option it could be extended to on demand providers.

Content providers would be required to submit content to the Film and Video Labelling Body (FVLB – see Annex A [*Content Regulation in a Converged World*]) in advance of making it available to consumers. For material that had been classified as unrestricted in Australia or the UK, the FVLB would issue New Zealand ratings by cross-rating to Australian or UK classifications and issue the appropriate label. For material that had either been restricted or not classified in these countries, the FVLB would either: examine the content and determine the rating (for material likely to be unrestricted); or refer it to the Office of Film and Literature (OFLC) for classification. For some content this would mean that no label was required (for example, documentaries) or a label would be issued.

### *Option 4: The view of the Office of Film and Literature Classification*

This option would provide a credible initial response to digital convergence and has an important advantage over the other options in that it is already partly implemented.

As set out in section 6 of this paper, the Office is already able to work to the tight timelines demanded by industry and, over the past two years, has supported the establishment of a domestic on demand provider (Lightbox) and an international online provider (Netflix) in the New Zealand market.

The industry's own Film and Video Labelling Body already provides a responsive, good quality and low cost service to film, game and on demand providers and is well placed to play a continued role in a co-regulated environment.

Under this option, relative to options 2,3 and 5, New Zealand consumers would receive a better degree of protection and information across all of the most commonly accessed media and providers would have a fair and comprehensive environment that would provide a level playing field.

The Office would recommend some additional improvements to strengthen this option.

- Removal of the labelling exemption for games – bringing them into the regime on an equal footing with other media;
- Amendment to codes of broadcasting practice to reduce public confusion by ensuring that content that has been previously classified by the Office is broadcast with the correct label, warning and level of restriction;
- A fee model that was based on a contribution in proportion to sales – to reduce the comparatively high cost for smaller providers;
- Extension of serial publication orders to cover series and other electronic media – to reduce the compliance cost for long running series of similar content.

The Office considers that Option 4 could be a workable step to a more comprehensive, long term solution.

### Option 5: A broadcasting regime with increased self-regulation

This option is a variation of option 3 - that is, it could encompass linear television and VOD - but with an increased role for content providers.

Content providers would operate a standards body, which would be established by statute. This standards body would consider and rule on most complaints as a collective, rather than have complaints dealt with by individual content providers, or appealed to the BSA.

Alternatively, individual content providers could nominate individuals who could be certified, under a statute, as regulators, or they could individually follow a commonly agreed code or template.

Under this option the BSA could still potentially be retained to address more complex complaints or those involving fundamental matters of principle or rights such as freedom of expression and privacy.

### *Option 5: The view of the Office of Film and Literature Classification*

The Office does not support Option 5. The only advantages over options 2 and 3 are that the industry is forced to work collectively and held to some sort of statutory account. Otherwise, all of the disadvantages of options 2 and 3 remain.

- An after the fact complaints process will not prevent or address the very real risk posed by harmful and objectionable content;
- The lack of effective oversight by an independent, official body will allow industry to increase the availability of harmful and objectionable content;
- Reliance on the sparse broadcasting framework will not provide adequate public information or protection.

### **Option 6: A new Media Content Standards Act**

Under this option a single Act would cover all audio-visual content and would ensure that content is subject to the same regulation, regardless of the platform it appears on. It would be important that the regime be user-friendly, both for consumers relying on the ratings and for providers who need a timely and reliable service.

### *Option 6: The view of the Office of Film and Literature Classification*

This option may be the only solution that could fully encompass the full range of issues canvassed in the Government discussion document including advertising restrictions and promotion of New Zealand content.

The essential elements set out in this paper should form part of a comprehensive long term solution.

- New Zealand should retain its own classification system and independently assess restricted and harmful content rather than placing an increased reliance on overseas classifications;
- Pre-vetting of high risk content is required to protect the New Zealand public – children, young people and families in particular;
- Government should retain oversight over the operation of the regime and ensure that an independent, official body can make the tough calls between freedom of expression and public protection;
- Industry should continue to play a significant co-regulatory role, with collective responsibility for labelling unrestricted content according to New Zealand requirements.

However, this option would be a longer term solution and there are some straightforward improvements (such as those suggested under options 1 and 4 above) that could be implemented straight away.

## Appendix 2: Balancing freedom of expression with public safety in a digital age – audiovisual presentation