

*Review of the  
Pay Television  
Code of  
Broadcasting  
Practice*

**REVIEW OF  
THE PAY TELEVISION CODE  
OF BROADCASTING PRACTICE**

**Phillipa Ballard**

for the

**Broadcasting Standards Authority**

**October 1997**

October 1997  
Published for the Broadcasting Standards Authority  
ISBN 0-477-01811-4

Copies are available from:

Broadcasting Standards Authority  
PO Box 9213  
WELLINGTON  
New Zealand

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# FOREWORD

This Review is the culmination of over two years' work by the Broadcasting Standards Authority, which first announced its intention to review the Pay Television Code of Practice in March 1995.

The members of the Authority who have been involved in the review are Justice Judith Potter, Chairperson until May 1997; Lyndsay Loates; Rosemary McLeod; Allan Martin, who was appointed after the review had commenced; and Sam Maling, Chairperson from June 1997. The Review has been coordinated and the report written by Phillipa Ballard, Complaints Manager for the Authority.

The Authority sought submissions from interested parties, held hearings in Wellington and Auckland, commissioned a literature review, researched practices in other countries and, when its funding became secure in 1996, conducted a research project which included qualitative and quantitative research.

In concluding its review and making its recommendations, the Authority acknowledges the assistance it has received from:

- Senator Margaret Reynolds, Australia (former Chair of the Senate Committee which examined similar issues in Australia)
- Joanne Morris, Chair of the 1988 Ministerial Inquiry into Pornography
- Paul Rishworth, Senior Lecturer in Law, University of Auckland
- Dr Peter McGeorge, Auckland, Clinical Psychiatrist
- Dr David Chaplow, Dr Steve Allnut and Dr Sandy Simpson, Regional Forensic Service, Auckland
- Dr David Wales, Senior Psychologist, Kia Marama Special Treatment Unit, Christchurch
- Kathryn Patterson and staff at the Office of Film and Literature Classification
- Linda Sheldon, Registered Psychologist, Research Consultant
- Staff of the Broadcasting Standards Authority

The Authority commends the following Review, which includes a discussion of its functions, an overview of censorship and classification issues, a summary of the review process, an examination of the issues raised in conducting the review, a summary of the Authority's findings and, in conclusion, its recommendations.

Sam Maling  
Chairperson  
October 1997



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# EXECUTIVE SUMMARY

The Broadcasting Standards Authority's functions are set down in the Broadcasting Act 1989. Its functions include receiving and determining complaints about broadcasts, and encouraging the development and observance of codes of practice.

All broadcasters, including subscription service providers, are required by the Act to maintain standards of good taste and decency, and standards consistent with the codes of practice. The protection of children, the portrayal of violence and safeguards against discrimination are matters which are required to be in the codes.

No broadcaster is exempt from these requirements. They are set down in the legislation.

The Authority's task is to interpret the standards. Within the constraints of the legislation, it is required to reflect the norms of the community.

The Authority has conducted a major public opinion survey in which it sought to ascertain community views about the broadcast of adult material on pay television.

The results of that survey reveal that a majority of people think that pay television subscribers should be able to see a wide range of programmes including R18. They express concern about access by children to adult material, and show a preference for it to be broadcast late at night. When asked whether the rules should be the same for pay and free-to-air television, respondents are equivocal, although there is a slight preference for a single code of practice for all television broadcasters.

The Broadcasting Act does not distinguish between free-to-air and pay television broadcasters, and it is the Authority's view that a single code of practice for all television broadcasters is consistent with the existing legislation. The reasons advanced for separate codes are not compelling in light of the Broadcasting Act requirements. It is the Authority's task to interpret the legislation and make the judgment as to whether programme standards have been breached.

It is the Authority's considered view that:

- Time band restrictions should be standardised for pay and free-to-air television and R18 films should not be broadcast until 10.00pm.
- It is confusing to viewers that the pay television code uses the same classification symbols as films and videos, even though restrictions cannot be applied to a broadcast medium. This confusion must be removed.
- A single code of practice for all television broadcasters is appropriate.

The Authority will develop a draft code as a basis for consultation with broadcasters, which will incorporate:

- One system of classification using symbols which are distinct from those used for the film and video industries.
- Time zone restrictions for adult material.
- Appropriate warnings for programmes advising viewers of the content.
- Classification of promos.



# 1 REVIEW OF THE PAY TELEVISION CODE OF PRACTICE

## 1.1 INTRODUCTION

This Review of the Pay Television Code of Broadcasting Practice examines the existing Code of Practice and makes recommendations as to whether any changes should be made. It identifies anomalies in how the standards in the present Pay and Free-to-air Codes of Broadcasting Practice are applied, and investigates whether the same standards regime should apply to all providers.

Underpinning the Authority's investigation is the awareness of the principles of freedom of expression and freedom to impart information which are enshrined in the New Zealand Bill of Rights Act 1990. It is necessary to balance competing rights. Viewers' freedom of choice and the freedom of broadcasters to impart information are limited by the provisions in the Broadcasting Act 1989 ("the Act") by, for example, the requirement to observe standards of good taste and decency, the requirement to observe codes which seek to restrict material which discriminates against women or portrays violence, and the requirement to protect children.

The Authority believes that it is essential that the public is well informed about the material available through the medium of television broadcasting by providing:

- i) Reliable, comprehensive information to the public; and
- ii) A clear classification system for television programmes.

## 1.2. FUNCTIONS OF THE BROADCASTING STANDARDS AUTHORITY

The functions of the Authority are set out in s.21 of the Act. Its main functions are to receive and determine complaints, to encourage the development of codes of broadcasting practice, to issue such codes itself where appropriate, and to conduct research and publish findings on matters relating to standards in broadcasting.

The Authority has no powers of censorship. The Act places the onus on broadcasters to maintain programme standards and to comply with Codes of Broadcasting Practice. A complaints regime is set out in the Act whereby complaints from viewers and listeners are dealt with first by broadcasters and, where there is dissatisfaction with the outcome, by the Authority. The Authority has power under s.13 of the Act to apply sanctions against broadcasters when standards have been breached.

The one exception to the absence of controls prior to broadcast is contained in s.13A which was enacted in 1996. The process described in that section only comes into operation upon receipt of a formal complaint about a programme within a series which has been broadcast, and where a complaint has been upheld on the grounds that the programme contained material which was "injurious to the public good". If, after viewing other programmes in the series, the Authority is satisfied that the broadcast of any programme in the series is likely to be injurious to the public good, the Authority may make an order to prohibit the broadcast of that material.

Under a 1996 amendment to the Act, broadcasters are obliged to publicise the procedures for making formal complaints by broadcasting one notice per day at different times of the day (s.6(1)(ba)).

Viewers may make complaints when they believe the material is in breach of any broadcasting standards. Television broadcasters, as well as exercising judgment as to whether broadcast material complies with the codes of practice, voluntarily assign classifications to some programmes and publish classification advice.

The majority of the Authority's work is concerned with complaints. However, it is also required to encourage the development of codes of broadcasting practice "appropriate to the type of broadcasting undertaken". When the Authority was established, it approved codes of practice for free-to-air television and radio broadcasters. Since then a code has been developed for pay television (by Sky Network Television) and approved by the Authority, and there are also codes which regulate the Portrayal of Violence, the Promotion of Liquor, and Election Advertisements.

The present Pay Television Code, while based largely on the Free-to-air Code, includes an introductory statement which asserts that Sky's different method of service delivery warrants a standards regime different from that of free-to-air television.

The continued relevance of the code is a matter which the Authority will address in the Review. It notes that Sky is no longer the sole pay television operator, and advises that consultation will be carried out with all subscription service providers in New Zealand before any changes to the code are made.

### 1.2.1 The Regulatory Function

Parliament has considered it necessary to impose restrictions on broadcast material because of its ready availability and widespread use, and because there is a general perception in the community that limitations on particular types of broadcast material are necessary to protect members of society, particularly the more vulnerable.

Broadly speaking, there have been three principle rationales for restrictions on published material.

#### Morality Principle

The moral view is that certain depictions and behaviours are wrong, that they have a tendency to deprave and corrupt people and that they lead to anti-social behaviour which is harmful to society. As a dominating criterion for restraints on expression, the "morality basis" is generally accepted to be unworkable in view of a lack of consensus over the parameters of morality. Some of the submissions received by the Authority in 1995 were based on the belief that pornography was the cause of deviant behaviour and was antipathetic to family and community values. On that view, prohibition is the only effective means of ensuring that people do not have access to such material.

## The Community Standards Principle

This principle would justify restrictions on broadcast material on the basis that they are desired by a majority of the community. From that standpoint, it is not necessary to show evidence that the restricted material causes harm. Nor does this approach depend upon any moral view.

### Harm Principle

The harm principle justifies restrictions on material on the grounds that the material may cause harm. The Films, Videos and Publications Classification Act 1993 ("the Classification Act"), for example, rests upon the harm rationale. The Chief Censor is required to identify content which is "injurious to the public good" and to limit public access to those materials so that the likely harm is minimised.

### 1.2.2 Applying the standards

The Act reflects both the harm principle and the community standards principle. Features of the Act which reflect the harm principle are s.21(1)(e)(i), (ii) and (iv). There, the statute directs broadcasters to develop codes of practice bearing upon "protection of children", "portrayal of violence" and "denigration of, or discrimination against, sections of the community". It is implicit that a legislative judgment has been made that harm may be caused to certain groups if broadcast material were to be completely unregulated.

The Act reflects the community standards principle in imposing the "good taste and decency" requirement on broadcasting through s.4(1)(a). Although "good taste and decency" is not defined, it is clear from the legislation that the phrase requires reference to standards set by the community. It is the task of the Authority to articulate community standards of good taste and decency rather than its own. Further support for the conclusion that it is community standards which inform the standard of good taste and decency is to be found in ss.21(1)(h) and 25 of the Act, which provide for the Authority to commission surveys, including audience research. These provisions imply (inter alia) that through surveys the community standards as to good taste and decency can be discerned.

A community standards rationale for regulating broadcasting, as opposed to a harm rationale for publications (as reflected in the Classification Act) is not surprising. It reflects the pervasive nature of radio and television broadcasting.

It is incontrovertible that pay television is covered by the Act and, accordingly, the requirement to observe standards of good taste and decency applies to pay television because it is a requirement of s.4.

The Authority was set up under the Broadcasting Act. Its tasks include: putting in place, through codes of practice, requirements which seek to protect certain groups (s.21(1)(e)); and reflecting community standards when it makes decisions on complaints about good taste and decency under s.4.

As part of the information-gathering process involved in this Review, the Authority commissioned an attitudinal survey, which was conducted in April/June 1997, to seek information on what the community expects from pay television, and to assist the Authority to decide whether the standards for pay and free-to-air television should be the same or different. That information is invaluable in

helping to establish the parameters for the Pay Television Code Review, and for developing the Authority's subsequent recommendations.

## 1.3 BACKGROUND TO THE REVIEW

### 1.3.1 Complaints

In 1994 the Authority received two complaints about adult material on Sky Network Television. At that time Sky was broadcasting adult programmes which contained nudity and sexual content in the late evening and early hours of the morning most days of the week. Because the programmes were made specifically for television, they were exempt from the labelling requirements of the Classification Act, and were classified as R18 by Sky's own appraisers. In addition Sky screened, and continues to screen, versions of films which have been classified under the Classification Act by the Chief Censor at the Office of Film and Literature Classification ("OFLC") as either R16 or R18.

Material which has been classified by the Chief Censor has been examined under the requirements of the Classification Act. The Chief Censor classifies a publication, which includes film, according to s.23(2) which states:

23(2) After examining a publication, and having taken into account the matters referred to in section 3 of this Act, the Classification Office shall classify the publication as-

- (a) Unrestricted, or
- (b) Objectionable; or
- (c) Objectionable except in any one or more of the following circumstances:
  - (i) If the availability of the publication is restricted to persons who have attained a specified age;
  - (ii) If the availability of the publication is restricted to specified persons or classes of persons;
  - (iii) If the publication is used for one or more specified purposes.

Material which is classified under s.23(2)(c) is conditionally objectionable and is only available if it is restricted according to the censor's classification. If restricted publications are made available to persons or for purposes outside those specified in the classification, they are objectionable publications.

There are penalties for those who exhibit restricted material - cinema operators who admit under-age patrons and video outlets which rent videos to under-age people (s.125), and adults who permit such material to be watched in the home, knowing that it is restricted. (s.126)

Broadcasting is specifically exempt from the Classification Act and is subject to an entirely different regime. Broadcasters are obliged to comply with the Broadcasting Act's requirement for good taste and decency, and the prevention of harm principles enshrined in codes under s.21.

The complaints received in 1994 alleged that two *Playboy* programmes breached the good taste and decency standard and the standard prohibiting discrimination against women.

The first decision (No: 62/94), released by the Authority in August 1994, upheld by a majority the complaint that the display of sex and provocative nudity in a *Playboy* programme broadcast by Sky at 10.25pm breached the good taste and decency standard. The Authority declined to uphold, by a majority, the complaint that it discriminated against women. However, at the time, the Authority signalled that it did not see the decision as its final view on the subject of adult entertainment, indicating that it did not have enough understanding of public views to gauge decisively opinion on the issue. The Authority noted that it would be a high priority to commission research to guide it.

Following that decision, Sky began to screen this genre of programme after midnight. A similar complaint received by the Authority in October 1994 alleged that a *Playboy* programme broadcast in August 1994 around midnight breached the same standards. In a decision released in February 1995, the Authority declined to determine the complaint, advising that it intended to undertake a major review of the Pay Television Code of Broadcasting Practice.

Early in 1995 the Authority received complaints about the screening of the R18 film *Basic Instinct* which was broadcast on Sky on a number of occasions in late December 1994, including one screening at 8.30pm and one at 9.45pm. The complaints alleged that the film breached standards of good taste and decency, discriminated against women and contained gratuitous violence. The Authority released a decision in which it decided to defer considering the complaints until the review of the Pay Code was completed.

After it had received 10 more complaints about subsequent broadcasts of *Basic Instinct*, the Authority concluded that it was appropriate to determine the complaints. In its decision Nos: 116/95 - 125/95 dated 9 November 1995, the Authority upheld the complaints that the good taste and decency standard was breached by broadcasts of *Basic Instinct* prior to 11.00pm. Sky has appealed those decisions. The appeals have yet to be heard.

This review, which began with a focus on adult erotic programming and violence, was expanded to include a review of all adult programmes, including mainstream R18 films, in light of these later complaints.

### 1.3.2 Community expectations

In order to gauge community expectations about good taste and decency and to determine the applicability of the existing Code of Practice for Pay Television, the Authority has sought information from the community.

In 1993, the Authority conducted a public opinion survey<sup>1</sup> which examined perceptions of good taste and decency. That survey provided important information about limits of tolerance of language and behaviour on radio and television programmes.

In 1997 the Authority commissioned another survey which sought attitudes about standards on pay television, about adult entertainment and its availability to children, about violence, and discrimination against women. The survey was completed in July 1997 and the key results are included in this report.

### 1.3.3 Review of Codes

Periodic reviews of the Codes of Practice are both necessary and inevitable in an environment where broadcast services, service providers and types of programming are changing and developing, and viewer expectations are also likely to be changing. In recent years, the Authority has reviewed the Code for Portrayal of Violence and the Code for the Promotion of Liquor.

The Review of the Pay Television Code has occurred at a time of an increase of pay broadcast services in New Zealand. The aim is to produce a code which is relevant, robust, and easily understood by broadcasters and viewers.

### 1.3.4 Focus of the Review

One of the characteristics of programming on pay television is that more adult material is screened than on free-to-air television. These programmes have included the late night adult erotic programmes broadcast after 10.00pm, as well as cinema-release R18 films, some of which are broadcast at 8.30pm. The scheduling of adult programmes on pay television focuses the Review on four aspects of the code of practice: good taste and decency, protection of children, portrayal of violence and discrimination against women.

#### i Good taste and decency

The concept of good taste and decency in s.4(1)(a) of the Act is not defined, but it is clear from the legislation that it requires reference to community standards (s.21(1)(h) and s.25).

Good taste and decency has a contextual element, and refers to propriety and what is considered to be in accord with generally-held values and expectations. Some images and language may be deemed to be unacceptable on television at any time or in any circumstances, while others may be appropriate only at certain times, or within certain programmes.

Guidelines about the limits of propriety are difficult to circumscribe since context, timing and audience expectations are variable factors which have to be taken into account when the Authority deals with complaints about breaches of the good taste and decency standard.

#### ii Protection of children

This is specifically identified under s.21(1)(e)(i) as being required to be included in a code, and is in any event likely to be an implicit component of s.4's requirement to observe standards of good taste and decency.

The Review takes into account existing initiatives to regulate access by children to adult programming, and examines the obligations of broadcasters in regulating and providing information about programmes which are intended for adult audiences.

The Authority is aware that children who have access to Sky Television are able to access R18 material, even though that material is considered by the OFLC to be "objectionable" in relation to those under the age of 18. The Authority is concerned about the apparent anomaly which exists between the system of classification regulated by the Classification Act with respect to films and videos,

<sup>1</sup> *Perceptions of Good Taste and Decency in Television and Radio Broadcasts* AGB McNair, July 1993

and the voluntary system which exists under the Broadcasting Act.

The Authority's research (conducted in 1997) shows that of a total of 1700 people surveyed in a national omnibus survey in April to June 1997, only 32% understood that the meaning of the movie classification R18 is that it is a legal prohibition. Almost half (47%) believed that the symbol R18 is a recommendation only, while 17% believed it is merely a guideline and that parents should decide for their own children whether they can watch such material. Under the existing classification regime, it is hardly surprising that consumers do not know what the classification symbols mean, especially as when R18 appears on Sky it cannot possibly have the same meaning as it does at the cinema.

The research also shows that people are generally aware of classification symbols (89% of a total of 1000 people who returned a self-completion questionnaire) and 75% of those who were parents of children under the age of 18 stated that they sometimes or frequently used classification information to help them decide whether their child should watch a particular programme.

Two important adjuncts to the theme of protection of children are first, providing reliable and accurate consumer information about the classification of programmes, and secondly, ensuring that programmes intended for adults are screened outside of children's normal viewing hours.

### iii Violence

The portrayal of violence is one of the matters expressly listed in s.21(1)(e)(ii) as being required to be included in the codes of practice. It is the subject of a separate Violence Code which is appended to the Free-to-air Television Code. That comprehensive Code is not part of the Pay Television Code. Violent/action movies are among the R18 films currently screened on Sky. In the existing Pay Television Code, standards P20 - P24 deal with the portrayal of violence. They read:

#### Sky accepts:

- P20 That it has a responsibility to ensure that when violence forms an integral part of drama or news coverage the content can be justified.
- P21 That the gratuitous use of violence for the purposes of heightened impact is to be avoided.
- P22 That devices and methods of inflicting pain or injury - particularly if capable of easy imitation - will not be shown without careful consideration.
- P23 That the combination of violence and sexuality designed to titillate will not be sanctioned.
- P24 That any portrayal designed to encourage anti-social behaviour, including violent and serious crime, and the abuse of drugs and liquor, will not be sanctioned.

The portrayal of violence may also be a breach of good taste and decency. An attitudinal study conducted by the Authority in 1993<sup>2</sup> indicates that the amount of violence shown on television is of concern in the community. When asked about concerns about what was shown on television,

43% (n=990) of respondents listed violence as a particular concern. The next greatest concern was too many advertisements (20%), followed by nudity/sex scenes (18%). When asked what offends good taste and decency, violence was the most often mentioned item (47% of respondents listed violence).

When asked why they were offended by violence, 49% said it was because the depiction of violence made acts of violence more acceptable, and 27% were concerned for children who might be watching.

### iv Discrimination against women

As noted above, Parliament has determined that some kinds of portrayals of women and minorities may cause harm and that therefore restrictions may be imposed through codes to prevent that harm. The ability to impose necessary restrictions is established by the Act. It is open to the Authority to decide what kinds of restrictions are necessary to give effect to the Act.

The Authority is aware that it is difficult to prove to scientific standards a link between pornography<sup>3</sup> and harm (in the sense of violence and rape) but notes that as the concept of harm is expanded to include the reinforcement of stereotypes and the perpetuation of sexism, Parliament and the courts in New Zealand (and in other countries) have been prepared to accept that link. And, most importantly, the fact of that link is implicit in s.21 of the Act as the basis upon which broadcasters are to be regulated through codes of practice.

When, in 1992, Women against Pornography applied to the Indecent Publications Tribunal to classify an edition of *People* magazine as conditionally indecent, the Tribunal accepted that material which demeans women or treats them as inherently unequal is harmful to women:<sup>4</sup>

This harm to women can be seen as hindering and undermining women's pursuit of equality in all facets of life, as promoting disrespect for women, and as condoning callous attitudes towards the experience of women which could manifest themselves in covert or overt acts of discrimination or worse. We may not have actual proof of a link between such demeaning or dehumanising material and harm to women, but there is sufficient authority both here and in Canada to the effect that we do not need any provided we have a reasonable basis for concluding that harm will result.

The Tribunal concluded that the edition of *People* would be injurious to the public good unless it was restricted to persons over the age of 18 years, labelled as such and its sale restricted to adults-only shops. Having made that decision, the Tribunal then addressed the issue of whether its Decision was in violation of s.5 of the New Zealand Bill of Rights Act 1990. In holding that it was not in breach, the Tribunal wrote:<sup>5</sup>

There is no doubt that this Decision attempts to reconcile the twin objectives of minimising injury to the public good by upholding the right to be free from exposure to conditionally indecent material, with the

<sup>2</sup> Ibid

<sup>3</sup> Generally speaking, that material which research agrees and courts have upheld causes harm to women comprises sexually explicit images, including those which are fused with violent images, and which is categorised as pornography. Hard core pornography includes acts of heterosexual intercourse and graphic depictions of a variety of sexual contacts, and soft core pornography, which is less explicit, features female nudity and implied sexual activity. Soft core pornography was screened on Sky daily in the late evening prior to the commencement of this Review. Other pay television operators have indicated they too wish to screen that kind of programming.

<sup>4</sup> *Women Against Pornography v Australian Consolidated Press Pty Ltd* [1992] 65/92, 75

<sup>5</sup> Ibid, 83

freedom to receive information and opinion of any kind in any form. This is consistent with censorship practices in most "free and democratic societies".

The Tribunal held that the provisions in its legislation to protect the public good overrode the provisions in the Bill of Rights Act upholding the right to freedom of expression.

It is clear that the proof of links between pornography and harm depends to a large extent on how "harm" is perceived. An early decision of the Authority, (No: 86/92), records:

The Authority has defined denigration as a "blackening" of a reputation of a group and has ruled that a high level of deprecation is necessary for a programme to encourage denigration. It has defined discrimination to mean any practice that makes distinctions between individuals or groups so as to disadvantage some and to advantage others.

In subsequent decisions on complaints about denigration of and discrimination against women, the Authority has applied only the lower threshold test of discrimination (eg Decision Nos: 75/93 and 62/94) which it interprets to mean that the activities portrayed encouraged different treatment of women.

In the United Nations Convention on the Elimination of all Forms of Discrimination Against Women, which was ratified by New Zealand in 1984, the concept of discrimination is dealt with in Article 5, which requires signatories to:

...take all appropriate measures:

a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

The Act authorises the Authority to impose restrictions on the broadcast material where such broadcasts contravene the statutory standards or those standards which have been properly incorporated into codes of practice. The Act expressly sets out, in s. 21, the basis for restrictions under codes of practice. Restrictions which are necessary to prevent the harm of denigration and discrimination are, in the Authority's view, clearly justifiable in a free and democratic society. In any event, such restrictions are clearly authorised by s.21. The restrictions may be in code provisions or applied when complaints about breaches of s.4 are dealt with.

### 1.3.5 The Existing Pay Television Code of Practice

The Act is not a penal regime, and minimal sanctions are available for breaches of the statutory codes. In that context, the Authority must work with broadcasters and community groups to develop a robust, responsive and flexible set of standards which best reflects the philosophy of the Act.

The present Pay Television Code was developed by Sky and approved by the Authority in 1992. At that time, Sky was the only pay television operator in New Zealand. Sky itself now seeks some minor changes to the code, arguing that it is more stringent in some respects (although it does not specify in what way) than the free-to-air code of practice and that, because of the unique differences to free-to-air broadcasting, Sky should be subject to fewer limits on what it may broadcast. It argues that its service does not reach uninvited into every home in New Zealand because its subscribers make a conscious and active decision to purchase a subscription. It also points out that subscribers are able to programme their sets to prevent access to all Sky channels by use of a PIN number system, or to block all R18 material by using an R18 restriction card. On that basis it concludes that a separate, less restrictive standards regime is justifiable.

The Authority agrees that changes are necessary to the Pay Television Code. However, it also takes into account the argument articulated by TV3 that mainstream subscription services, having positioned themselves to be viewed with the same ease as free-to-air, should be subject to the same standards and Codes of Practice. TV3 wrote:

The only effective way to ensure that the viewing public can have confidence in the concept of a Broadcasting Standards Authority is a consistent approach to the signals being transmitted to New Zealand's television sets. All of these signals must be treated in a fair and equal manner in a way the audience can easily follow and apply to their own viewing.

TV3 submitted that there was no distinction between pay and free-to-air broadcasts as far as the viewer was concerned because all channels were accessed by the same remote control system. It considered the only justification for a different set of standards existed when content was controlled by pay per view<sup>6</sup> or view on demand subscription services. These services are more comparable to going to a cinema or video hire service. An active choice must be made, and as well as the monthly subscription fee, an additional fee is paid to receive the specific programme requested.

Another subscription service provider (Saturn Communications Ltd) recommended excluding the service known as pay per view from the Act, and developing a Code of Practice specifically for cable operators. Its justification was that a pay per view service is significantly different from a service such as Sky offers because subscribers themselves select which programmes are broadcast to them. In that sense, Saturn argued, its service operated in the same way as a cinema or video hire service and should be specifically excluded from the definition of broadcasting.

## 1.4 TECHNOLOGICAL DEVELOPMENTS

Viewer choice will be greatly enhanced by the introduction of new broadcasting services. Not only will there be a wide variety of sources of broadcast material but the means of

<sup>6</sup> Pay per view is a system whereby subscribers purchase material which is being shown at a pre-determined time and date for a price. It is distinguishable from view on demand which is transmitted solely for that person, at a time and date to suit the person, and which is specifically excluded from the Broadcasting Act.

access and the ability to control and restrict it will change also. Blocking devices, including those which exist currently on pay television channels such as Sky, enable parents and caregivers to regulate their children's viewing on all channels, including free-to-air. Although the Authority notes that there is no evidence which shows that blocking devices are being widely used, its research indicates that parents believe they can be efficacious. More publicity about them and improvements in their use and application may well increase the uptake rate of parental control devices.

The Authority acknowledges that the expansion of internet services and other forms of communication will have an impact on the role of television, and that

television will have to compete with those services. There is a finite amount of leisure time to be spent on pursuits such as television viewing and internet use, and in New Zealand the viewer market will always be limited by the population size. Broadcasters therefore are likely to try to maximise viewer choice and variety in order to attract a significant market share.

The Authority recognises that future technological developments will affect the range and delivery of broadcast material. An increasing number of channels will be available through digital technology and satellite communication. The Authority is mindful that New Zealand needs a regulatory system which is able to respond to developing technology.

## 2 CENSORSHIP/CLASSIFICATION

### 2.1 INTRODUCTION

A censorship regime confers the power to examine material such as printed matter, films and videos before they are publicly released, to determine whether all or parts of the material should be suppressed or restricted. In New Zealand, censorship is most commonly associated with content that is sexually explicit, violent or anti-social.

### 2.2 BROADCASTING STANDARDS AUTHORITY

As noted above (para 1.2), the Authority has no powers of censorship, other than in one tightly restricted situation. Under the Act, broadcasters themselves exercise the judgment as to whether broadcast material complies with the Act and with the Codes of Practice. The Authority's role is to determine complaints which allege that there is a breach of broadcasting standards, but complaints can only be made **after** the broadcast.

### 2.3 OFFICE OF FILM AND LITERATURE CLASSIFICATION

The Office of Film and Literature Classification (OFLC) is set up under the Classification Act and has the power to preview and censor films and publications prior to their release. It is responsible for classifying films, videos and publications which have been submitted to that Office for labelling because they are likely to require restriction or may be objectionable. The criteria for classifying materials as objectionable are set out in s.3 of the Classification Act:

- 3(1) For the purposes of this Act, a publication 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 the availability of the publication is likely to be injurious to the public good.

The section then describes the kinds of acts which are deemed to be objectionable, the weight to be given to the extent and degree to which certain activities are promoted, and the circumstances relevant to the likely use of the publication. Having viewed a publication, the OFLC then classifies it according to s.23(2).

Thus, for example, films which are classified R18 under s.23(2)(c)(i) are regarded as being *injurious to the public good* if made available to the restricted class of people, ie those under the age of 18 years. Heavy penalties are incurred for breaches of the section (s.125).

Films which are identified by the classifier "R" are **restricted** to those over the specified age. The Classification is described in newspaper listings as:

"R" (age) Approved for exhibition **only** to persons stated years of age and over. [Emphasis added]

The Classification Act expressly excludes broadcasting (s.2). Broadcasters are subject only to the requirements of the Broadcasting Act.

### 2.4 SKY TELEVISION

Under the Pay Television Code of Practice, Sky's classification system is based on that of the (now repealed) Films Act 1983. It defines the restricted category of films as:

**R(age)** Approved for exhibition to persons of the advertised age and over.

With the implementation of the Classification Act in 1993, this description applies only to films and videos released before that time. In a recent *Skywatch* magazine, that description was further refined as:

**R16** Approved for viewing to persons 16 years and over.

**R18** Approved for viewing to persons 18 years and over.

The difference between the definition used by the Censor's Office and Sky is that the former is a **restriction** which carries penalties, whereas the latter is a **recommendation** only. In addition, while Sky employs the same classification symbols as the Censor's Office, the effect of the classification is different for Sky, since it is impossible to **restrict** broadcast material to under age viewers.

Sky's appraisers classify some material which is made for television only, and thus is not subject to the Classification Act regime. Although they use the same symbols as the OFLC, Sky's appraisers are not the same as the "expert body" set up under the Classification Act to make the judgment whether a publication is objectionable (s.4). That expert body is the OFLC, which has a staff of trained censors who make the classification decisions. In other words, when a programme such as the *Playboy* programme is classified R18 by Sky's appraiser, the R18 symbol does not signify that it is the decision of an expert body that the material is conditionally objectionable and "injurious to the public good", but merely conveys the broadcaster's advice that the programme is recommended to viewers aged 18 and over.

Sky's code of practice also notes that parents have the opportunity to lock out films they consider unsuitable for their children through an electronic coding device. In addition, R18 cards are available, which block all programmes on the HBO channel which are classified as R18.

The Authority observes that not all of Sky's programmes are given a classification in its advertising (for example, some of the programmes on Orange are not classified) and furthermore, that the R18 card operates only on the HBO channel.

After the review of the Pay Television Code was announced in early 1995, Sky reduced the number of broadcasts of adult programmes of the *Playboy* genre. In March 1997, there were three R18 titles listed in *Skywatch* on the HBO channel, all of which were thus classified because of violence. This contrasts with the March 1995 *Skywatch* which previewed seven films classified R18 by the Chief Censor, of which six had sexual content and one had violence, and 18 separate episodes of *Secret Confessions and Fantasies* (from *Playboy*) on the HBO channel, which were all classified by Sky's appraisers as R18. It is not clear to the Authority what Sky's rationale is for its programming change.

## 2.5 FREE-TO-AIR TELEVISION

Free-to-air television programmes are classified by in-house appraisers as to their suitability for different audiences. There is no blanket restriction on the broadcast of adult material except that it must comply with s.4 of the Act and the Television Code of Broadcasting Practice. The free-to-air appraisers make excisions, assign the appropriate classification symbol, and make recommendations as to the hour when the programme should be broadcast.

Adult films which are screened on free-to-air television are classified as AO (Adults Only). They are generally preceded by warnings identifying the content as being more suited to adults and indicating what aspect may be considered objectionable. If a complaint about such programmes is upheld by the Authority, the broadcaster may be liable to any of the sanctions in s.13 of the Act. Some films, such as *Basic Instinct* and *True Romance*, which have been given an AO classification when shown on free-to-air television, have been originally classified by the OFLC as R18 for cinema and video release. The versions of the films which were shown on free-to-air television had been modified for television and were therefore not the same as the versions which had been classified as R18 by the OFLC. However, when those same films were shown on Sky, they carried the OFLC's R18 classification and were apparently screened in an unedited form.

When the Authority deals with complaints about breaches of good taste in adult programmes, it takes into account the context, the hour of the broadcast, the information given in the warnings and the relevance of the scenes to the film. In its Decision Nos: 1996-078 - 1996-080, when it declined to uphold three complaints that the edited version of *Basic Instinct* screened on TV3 breached the good taste standard, the Authority wrote:

Nevertheless, before ruling on the good taste aspect of the complaint, the Authority, as it is required to do by the standards, refers to the context in which the film was shown. It was screened at 9.30pm - an

hour after the start of AO classification - and was preceded by a warning to ensure that viewers who were unfamiliar with the film would be well advised on the contents.

Taking these contextual matters into account, and although some members would have preferred to see further deletions to the sexual scenes, the Authority concludes that, overall, the broadcast did not breach the requirement for good taste and decency in context.

## 2.6 DOUBLE CENSORSHIP

An argument put forward by Sky in its submission to the Authority was that it was subject to double censorship because it had to comply with the Classification Act as well as the Broadcasting Act. It proposed an amendment to both pieces of legislation whereby it appeared it would be excluded from both jurisdictions.<sup>7</sup>

Sky is not required to submit films or other programmes to the OFLC for classification. In the case of films which have already been classified, Sky uses the same classification symbol which was given for the cinema release of the film. Where programmes have not been classified by the OFLC, Sky's appraiser decides upon the classification. However, as noted above (para 2.4), although Sky adopts the same classification symbol, the classification does not carry the same meaning when used by Sky. Further, Sky incurs no compliance costs for labelling and is not subject to the penalties for breaches of the Classification Act, since broadcasting is specifically exempt from that Act.

Sky's obligations under the Act include observing the standards under s.4, and developing (and complying with) a Code of Practice which encompasses the protections listed in s.21(1)(e).

The Authority rejects Sky's arguments that it is subject to double censorship. As a broadcaster, Sky is exempt from the Classification Act regime. Its only obligations are to comply with the Broadcasting Act.

<sup>7</sup> Sky recommends:

- (i) retaining the definition of "broadcasting" in the Classification Act to read as the current definition in the Broadcasting Act reads:

"Broadcasting means any transmission of programmes, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus but does not include any such transmission of programmes -

  - (a) Made on the demand of a particular person for reception only by that person; or
  - (b) Made solely for performance or display in a public place.
- and (ii), amending the current definition of "broadcasting" in the Broadcasting Act to read:

any transmission of programmes whether or not encrypted by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus **but does not include any such transmission of programmes -**

  - (a) **On a subscription television service;** or
  - (b) Made solely for performance or display in a public place.

[Emphasis added by Sky].

Thus, in (i), Sky is a broadcaster. Broadcasters are exempt from the Classification Act. In (ii) Sky is not a broadcaster. It is therefore expressly excluded from the Broadcasting Act.

## 3 THE REVIEW PROCESS

### 3.1 WRITTEN SUBMISSIONS

In a press release issued on 8 March 1995, the Authority announced that it intended to seek public views about the broadcast on pay television of R-classified material which featured female nudity, sexual content and violence.

The Authority also advised that it was seeking views on how much consideration should be given to the fact that pay services are received only by those who have paid for the service, and that there are ways of restricting access within a household if subscribers wish to do so.

The Authority contacted over 200 groups and individuals including broadcasters, former complainants, academics, political parties, church groups, women's organisations, MPs, the Ministry of Women's Affairs and the Office of Film and Literature Classification, seeking submissions on the review of the Pay Television Code of Broadcasting Practice.

Advertisements were placed in four national and 13 provincial newspapers advising that the review was to take place and that submissions were sought from interested parties before the closing date of 31 May 1995. In addition, staff appeared on two occasions as guests of talkback radio programmes (Radio Pacific and Radio Rhema).

In total, 255 submissions were received, as well as 16 petitions which contained a total of 3295 signatures. All of those who signed the petitions were opposed to the broadcast of R18 material on pay television and requested that the pay television code of practice be the same as the free-to-air code.

The written submissions are summarised in Appendix I.

### 3.2 ORAL SUBMISSIONS

Some submission writers were invited to present their submissions personally in Wellington and Auckland. A representative sample of writers was invited, and 33 were heard.

In addition, the Authority sought the views of some professionals who work with sex offenders, including Dr David Chaplow, Dr Steve Allnutt, and Dr Sandy Simpson, three clinicians from the Regional Forensic Service and the University of Auckland, Dr Peter McGeorge, a clinical psychiatrist of Auckland, and Dr David Wales, Senior Psychologist at Kia Marama Special Treatment Unit in Christchurch.

It also convened a meeting with members of the Pacific Island community in Wellington, attended by staff and one Authority member, and met with a group of Maori women to discuss issues surrounding the review.

### 3.3 LITERATURE REVIEW

The Authority commissioned a review of the literature on pornography, focusing in particular on the effects research. It reviewed a selection of literature available from a variety of sources. The material was analysed

thematically and was used to provide background information to the Authority members on the major issues. The review was released by the Authority in July 1995 and is available on request. A copy was provided to Sky Television when it was released. A synopsis of the literature review is found in Appendix IV.

### 3.4 RESEARCH PROJECT

The methodology for this Research project was designed by a Consultative Committee. The members of that committee comprised:

- Phillipa Ballard, Complaints Manager for the Broadcasting Standards Authority (Coordinator);
- Garry Dickinson, Chief Mathematical Advisor, Statistics New Zealand;
- Bill Hastings, Deputy Dean, Law Faculty, Victoria University and member of the Film and Literature Board of Review;
- Rosemary McLeod, Member, Broadcasting Standards Authority;
- Tony O'Brien, Business Manager, Sky Network Television;
- Linda Sheldon, Registered Psychologist, Research Consultant to the Authority; and
- Reece Walters, Institute of Criminology, Victoria University.

The Consultative Committee recommended that the research be conducted in two stages. It recommended that qualitative research using focus group discussions be undertaken first, followed by a nationwide public opinion research project.

#### 3.4.1 Focus Groups

The focus groups were conducted in Auckland, Napier, Christchurch and Invercargill, following a pilot group in Wellington. Participants were recruited on the basis of age, sex, ethnicity, location, parenting status, pay television subscriber and socio-economic status. There were ten different groups, each containing 10 or 11 people (there were 105 participants altogether). Two of the groups were Maori, and the other eight had an ethnic mix which corresponded with Statistics New Zealand's 1991 Census data. All but two groups were sex-segregated. Parenting status was identified as an important variable, given the mandate of the Authority to protect children, and since good taste and decency is an issue of concern to the Authority.

The groups were shown a compilation of clips from seven different films, varying in length from 2-7 minutes. Two of the films, *The Money Train* and *Copycat* had not been shown on Sky at the time of the focus groups.<sup>8</sup> Three of the films, *Disclosure*, *Kalifornia* and *Friday the 13th - The Final Chapter* were R16 movies which contained sex and nudity, violence, and horror. Three - *The Money Train*, *Basic Instinct* and *Copycat* - were R18 movies which contained offensive language, sexual violence and serial killing. The other clip was from *Playboy- Secret Confessions*

<sup>8</sup> Both were subsequently broadcast on Sky. *Copycat* was broadcast on 20 July 1997 at 8.30pm and *The Money Train* was broadcast on 17 and 19 August at 8.30pm.

which was classified by Sky as R18 and showed nudity and simulated consensual sex.

The purpose of the focus group stage of the research was to hear a range of opinions, feelings and attitudes about the topic, and to explore the vocabulary of a cross-section of society so that when the questionnaire was developed for the public opinion survey, it was couched in appropriate language and reliably reflected a range of views canvassed.

The major discussion themes of the focus groups are summarised in Appendix III.

### 3.4.2 Public Opinion Survey

The quantitative research was conducted by ACNielsen.McNair. The questionnaire was designed in consultation with the Consultative Committee and ACNielsen.McNair following the focus group work. The questions were finalised after a pre-test of the draft questionnaire.

The survey was administered to respondents as part of the McNair National Omnibus Survey. The sample distribution of participants reflects the geographic distribution of the population. Five questions were asked of the selected participants at the initial interview about rules for pay and free-to-air television, the meaning of the movie classification R18, and frequency of watching videos. Those selected were then asked to complete a Self-Completion Questionnaire which looked at various aspects of adult entertainment on television in New Zealand.

A total of 1700 participated in the initial survey and 1000 returned the Self-Completion Questionnaire. The demographic profiles of the two groups were found to be very similar. A comprehensive discussion of the results is reported in a separate publication, *Community Attitudes to Adult Material on Pay Television*, available from the Authority. The key findings include:

#### i Community Attitudes to Pay Television

The perceptions in the community of the acceptability of adult material on pay television were explored in the survey both by comparison with free-to-air television and in absolute terms.

Among the survey population as a whole (n=1000) a substantial majority (67%) thinks that a wide range of material, including R18 material, should be available on pay television. (Fig.1). Men (n=486) are more likely to accept this proposition, with 78% agreeing, while for women (n=514), the level of agreement drops to 57%. There is a strong trend in the age groups, with agreement running from 43% of those aged 60 and over (n=216), up to 84% of those between 18-29 (n=251).

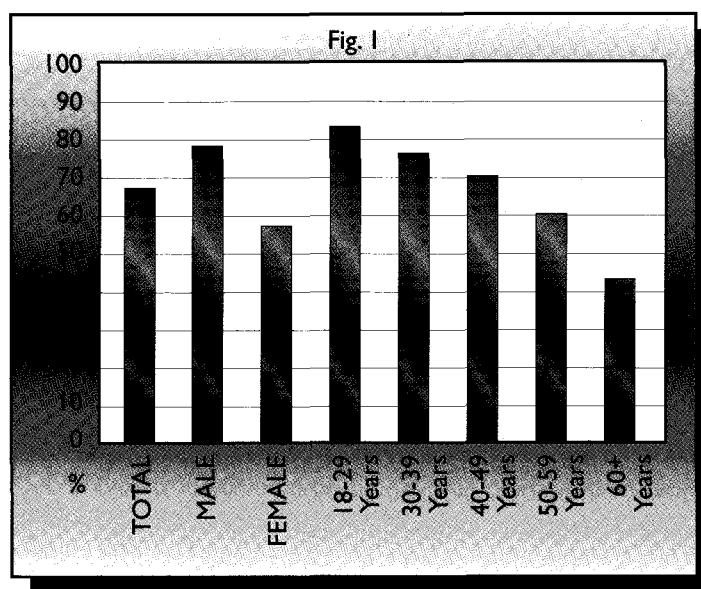


Fig. 1 Agreement with the statement that pay television should have a wide range of programmes, including R18 (n=1000)

When asked whether the rules for free-to-air and pay television should be exactly the same or different, just under half of the survey population (46%) said they should be the same and 40% said they should be different. (Fig. 2) Again there were differences between men (39% agreed) and women (52% agreed), and across the age groups (28% for 18-29 year olds, and 63% for those aged 60 and over). Sky subscribers (n=261) were much less in favour of the rules being the same, with only 33% agreeing, compared with 50% of non subscribers (n=739). Among subscribers there are clear gender differences.

Those who said the rules should be the same gave a variety of reasons. The most common ones were that they wanted to be sure that what comes into their homes is acceptable, that pay television comes into the home in the same way as free-to-air and is therefore readily accessed by children and young people, and that those who want to watch R18 films should go to the cinema where there

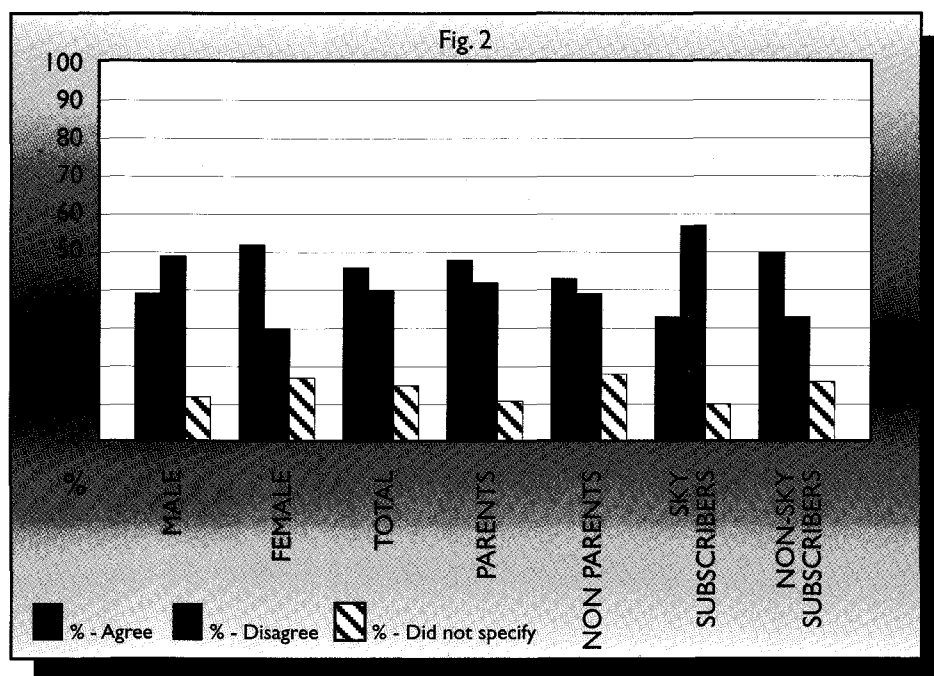


Fig. 2 Responses to the statement that the rules about what can be broadcast on pay television should be exactly the same as those for free-to-air television (n=1000)

are controls on who can enter. Men and women followed the same pattern in the frequency of their reasons.

The National Omnibus survey asked respondents (n=1700) their understanding of what the movie classification R18 means. Only 32% agreed with the correct statement that it is a legal prohibition, and 47% thought it is a recommendation only. Fewer women (n=873) knew that it is a legal prohibition (29%) than men (35%) and knowledge declined through the age groups from 37% of those aged 18-29 (n=426) to 23% of those 60 and over (n=364).

Among respondents who said that the rules should be different, (n=458), 79% considered that having paid a subscription fee, viewers were entitled to something more than was available on free-to-air television. They also noted that there were means (such as the R18 blocking card) to ensure that children could be prevented from watching unsuitable material on pay television.

## ii Attitudes to the access by children to adult material on pay television

Those respondents who said they were a parent or caregiver to one or more children under the age of 18 were asked a number of questions about the viewing habits of a child in their family chosen at random. Over 85% (n=390) of parents or caregivers said they had one or more viewing rules for this child. The most common rules were that the child was not allowed to view R18 material or adult themes including sex, violence, horror or bad language, or after a certain time at night.

There was little difference by gender of the respondent, but it was clear that rules were more likely to be enforced for children aged 5-12 years (99% of the parents with children in this group had rules) and

much less for the 0-4 (78%) and 13-17 (73%) year age groups.

These respondents were also asked whether they used classification information to help them make a decision as to whether their child could watch a particular programme. About 50% of parents and caregivers report they use such information frequently, and the information is most often used for 5-12 year old children.

About 12% of parents or caregivers admit that their child sometimes watches R18 material and 30% of those whose child was in the 13-17 year old age group say that that child sometimes watches R18 programmes.

The perceived effectiveness of parent control devices available to pay television subscribers was tested on all respondents. Of those surveyed, 73% (n=1000) thought that the R18 blocking card was an effective way of preventing children from watching R18 material in the home, and 63% said they would use such a card if they subscribed to pay television and had children living at home.<sup>9</sup>

## iii Community attitudes to R18 material

Respondents were asked to record their level of concern about types of scenes in movies which may result in R18 classifications. (Fig. 3) There is unanimity among all groups that the most concern is caused by scenes containing sexual violence, followed by serial killing and bondage. Least concern was registered about the portrayal of nudity, sex and offensive language.

More are prepared to allow violence (58%) and sexual intercourse (58%) to be shown if these aspects are important to the story, but only 43% consider scenes containing sexual violence are acceptable, even if they are important to the story.

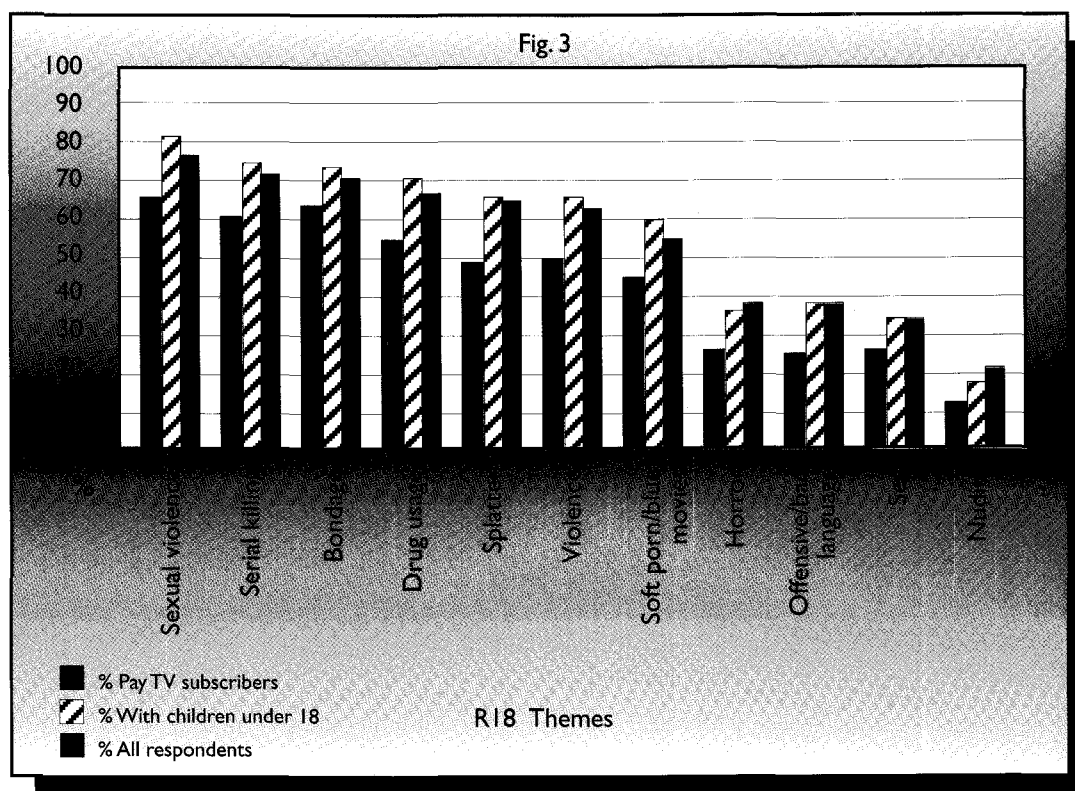


Fig. 3 Percentage of Respondents who expressed major to extreme concern about listed R18 themes

<sup>9</sup> Out of 305,000 Sky subscribers, 500 have an R18 blocking card.

Those who favour screening R18 material late at night were asked what they meant by "late". They had a distinct preference for 10pm as the threshold hour, as against the alternatives of 8pm and midnight.

Of those who think R18 violence should be on late, 63% (n=487) say 10pm is late, 18% say 8pm, and 18% say midnight. On the theme of sexual violence, of those who think it is permissible on television when it is on late, 56% (n=348) say late is 10pm, 17% say 8pm, and 25% say midnight. With respect to scenes of sexual intercourse, 62% (n=452) say 10pm is late, 16% say 8pm and 21% say after midnight.

Respondents were also asked their views on whether scenes containing violence, sexual violence, and sexual intercourse were acceptable on pay television. A minority (27%) want no R18 violence at all on pay television, about the same proportion want no scenes containing sexual intercourse, and 53% want no sexual violence.

Almost everyone surveyed (91%) thinks that adult material has a bad effect on children, and 73% think that it causes violence in society. (Fig.4) There is an

appreciable gender split on the effect of R18 material on society as a whole, with women generally thinking the material is more harmful. A similar tendency is shown for parents and caregivers as opposed to the rest of the sample.

The results of the survey are analysed in depth in a separate report. The important findings for this review are summarised above. When asked whether the rules should be the same for pay and free-to-air television, respondents are equivocal, although there is a slight preference for a single code of practice for all television broadcasters. Most respondents want to be able to watch adult programmes at home, but preferred them to be on late or able to be blocked out so that children could be prevented from seeing them.

There was little tolerance of sexual violence, serial killing, bondage and splatter movies, but sex and nudity are more readily tolerated, especially if the incidents are part of a story or broadcast late at night. Although many respondents say they use classification information to enable them to make decisions about their children's viewing, less than one third knew that R18 was a legal prohibition.

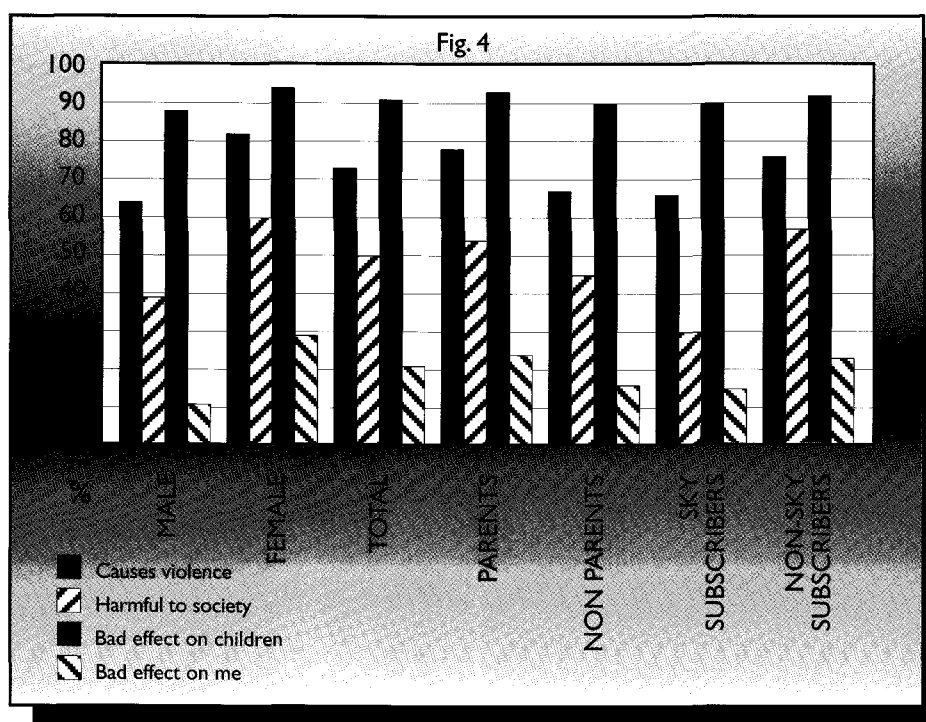


Fig. 4 Effect of R18 material on pay television

## 4 ISSUES

The review of the Pay Television Code raises the following issues:

### 4.1 WHAT IS BROADCASTING?

Broadcasting is defined in s.2 of the Act:

“Broadcasting” means any transmission of programmes, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus but does not include any such transmission of programmes -

- (a) Made on the demand of a particular person for reception only by that person; or
- (b) Made solely for performance or display in a public place.

Broadcasting therefore includes pay television services, including satellite and cable transmission.

### 4.2 THE LEGAL FRAMEWORK

The Act sets out the Authority’s powers and functions. It also sets out the obligations of broadcasters. They must observe the standards set out (a) in the Act itself and (b) in Codes of Practice developed and approved pursuant to the Act. These obligations are set out in s.4(1) which provides as follows:

- s.4(1) Every broadcaster is responsible for maintaining in its programmes and their presentation, standards which are consistent with -
- (a) The observance of good taste and decency; and
  - ..
  - (e) Any approved code of practice applying to the programmes.

In relation to the present review, the major provisions of importance are the “good taste and decency” standard in s.4(1)(a) and the provisions of s.21(1)(e) which relate to the content of codes of practice. These are examined in turn.

#### 4.2.1 The good taste and decency requirement

The obligation to maintain good taste and decency applies to broadcasters by virtue of s.4(1)(a) and therefore is independent of any code of practice which may exist pursuant to s.21. This standard relates to all broadcasters irrespective of the type of broadcasting.

A code of practice may serve to give clarity and guidance as to the standards of “good taste and decency”. But in the end, it must be s.4(1)(a) itself which is interpreted and applied whenever that section is invoked against a broadcaster.

#### 4.2.2 Codes of practice under s.21

The Authority is to encourage the development of codes. It also has the ability to develop and issue its own codes where it considers it appropriate to do so. The Act sets out matters to which the codes may relate. These are as follows:

s.21(1) The functions of the Authority shall be -

- ...
- (e) To encourage the development and observance by broadcasters of codes of broadcasting practice appropriate to the type of broadcasting undertaken by such broadcasters, in relation to -
    - (i) The protection of children
    - (ii) The portrayal of violence
    - (iii) Fair and accurate programmes and procedures for correcting errors and redressing unfairness
    - (iv) Safeguards against the portrayal of persons in programmes in a manner that encourages denigration of, or discrimination against, sections of the community on account of sex, race, age, disability, or occupational status or as a consequence of legitimate expression of religious, cultural, or political beliefs
    - (v) Restrictions on the promotion of liquor
    - (vi) Presentation of appropriate warnings in respect of programmes including programmes that have been classified as suitable only for particular audiences.

The common feature of these provisions is that they are concerned with the avoidance of harm or other adverse consequences of broadcast material, such as the perpetrating of error or unfairness. They reflect a legislative judgment that broadcast material may cause harm of the type referred to in the section, and that codes of practice should seek to prevent the occurrence of that harm or to mitigate it.

#### 4.2.3 The Authority’s role under the Act

The Authority’s functions and powers include the following specific matters which have a bearing on the present review:

- To encourage the development of codes of practice
- To develop and publish its own codes if judged appropriate
- To determine complaints brought to it under the Act
- To conduct research, including public opinion surveys

### 4.3 THE NEW ZEALAND BILL OF RIGHTS ACT 1990

The Bill of Rights is an important part of the legislative framework within which the review of the pay television code must be determined. Section 14 of the Bill of Rights Act provides:

- s.14 Everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form.

The Authority accepts that the term “freedom of expression” is broad enough to include expression which shows depictions of a sexual nature. It accepts that the right applies both to broadcasters and to viewers - to receive and to impart information.

Also of relevance is s.19(1) which sets out rights against discrimination and provides:

s.19(1) Everyone has the right to freedom from discrimination on the ground of colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief.

The Human Rights Act 1993 includes, amongst the prohibited grounds of discrimination, sex, race, age, religious belief, political opinion, and disability. These are also included amongst the grounds of discrimination and denigration against which s.21(1)(e)(iv) of the Broadcasting Act is expressly directed. That section can be seen as an implementation, in the area of broadcasting, of the general right to be free of discrimination as set out in s.19 of the Bill of Rights.

Section 6 of the Bill of Rights requires that where possible, every enactment be given a meaning which is consistent with the rights and freedoms set out in the Bill of Rights. Section 6 provides:

s.6 Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

Section 5 provides that the rights in the Bill of Rights may be subject to "reasonable limits prescribed by law" which are "demonstrably justifiable in a free and democratic society". Accordingly, to the extent that any law prescribes limits on freedom of expression which are reasonable, such limits are not inconsistent with the Bill of Rights and there can be no objection to them based upon the New Zealand Bill of Rights Act 1990.

In this regard the Authority notes that the requirement that limits be "prescribed by law" would be satisfied in the context of the Act. Limits arising through codes issued under the Act would satisfy the requirement of being "prescribed by law" since they would owe their existence to authorising legislation. So too, would limits which arise as a result of the interpretation and application by the Authority of the "good taste and decency" standard, applicable to all broadcasters under s.4 of the Act.

Section 4 of the Bill of Rights must also be noted. That section provides that, in the event that any enactment is held to be inconsistent with the Bill of Rights, no court is to decline to apply that enactment or to hold it in any way ineffective. This means that even if the Broadcasting Act were to set out or authorise limits on freedom of expression which the Authority (or a court) thought were unreasonable under the Bill of Rights, those limits would have to be applied nonetheless. Of course, the first step is, under s.6, to try to interpret the Act in a manner consistent with the Bill of Rights. But if the Act cannot bear an interpretation consistent with the Bill of Rights, it must prevail over the Bill of Rights.

The Bill of Rights is relevant to the Review and to the role of the Authority in the following ways:

#### 4.3.1 Developing and issuing a code

The Authority has a statutory power to approve, or to develop and issue, codes of practice for broadcasters. The relevant provisions of the Act which confer those powers (see s.21(1)) must be construed consistently with the Bill of Rights. The result should be a code which is consistent with the Bill of Rights. The only basis for the Authority developing a code which is *inconsistent* with the Bill of

Rights would be if the Act expressly or by necessary implication permitted an inconsistent code.

#### 4.3.2 Interpretation of the code and of s.4 in relation to complaints

The Bill of Rights is also applicable to the Authority when it interprets and applies provisions of the Act and codes of practice in relation to complaints. For example, in determining the meaning of "good taste and decency", which is a broad concept that must be applied to concrete factual situations, the Authority would need to have regard to the right to freedom of expression in the New Zealand Bill of Rights Act 1990. It must seek to apply the statutory provision in a manner which does not unreasonably limit that freedom. At the same time, the Authority must obviously strive to give the statutory provision its intended effect. A similar approach is necessary when the Authority interprets and applies standards in a code of practice.

#### 4.3.3 Interaction of the Broadcasting Act and the Bill of Rights in the development of codes of practice

Certain limits on freedom of expression are set out expressly in the Act, in s.4(1). Observation of the standard of good taste and decency is of particular relevance here. That standard must be applied even if it were thought inconsistent with the Bill of Rights. As noted by McGechan J in *TVNZ v Ministry of Agriculture and Fisheries* HC Wellington AP 89/65 13 February 1997, freedom of expression is the subject of "statutory override by the broadcasting legislation from [the] outset".

Therefore, restrictions arising out of the s.4(1) standards must be given their proper effect. This is the effect of s.4 of the Bill of Rights.

Further, limits on broadcasters will arise through the operation of codes dealing with the matters set out in s.21(1)(e). That provision must similarly be given its intended effect by the Authority. The Authority notes that the Bill of Rights expressly permits reasonable limits on freedom of expression and considers that in exercising its powers to approve or issue a code it must ensure that the Bill of Rights is complied with. This means that such codes must apply reasonable limits to freedom of expression or, to the extent that any limits are not reasonable, then they must be clearly authorised by legislation. As it happens, the Authority considers that the limits which should be imposed by codes to give effect to s.21(1)(e) will in fact be well within the concept of "reasonable limits" and it is unlikely that recourse would be necessary to s.4 of the Bill of Rights in this regard.

As Sky submits, the leading case in New Zealand to date as to the meaning of the phrase "reasonable limits" in s.5 of the Bill of Rights is *Ministry of Transport v Noort* [1992] 3 NZLR 260(CA). Richardson J there stated at p.284:

It is worth emphasising too that in principle an abridging inquiry under section 5 will properly involve consideration of all economic, administrative and social implications. In the end it is a matter of weighing:

- i) the significance in the particular case of the values underlying the Bill of Rights Act;
- ii) the importance in the public interest of the intrusion on the particular right protected by the Bill of Rights Act;

- iii) the limits sought to be placed on the application of the Act provision in the particular case; and
- iv) the effectiveness of the intrusion in protecting the interests put forward to justify those limits.

That approach reflects the approach taken in Canada to the similarly worded s.1 of the Canadian Charter of Rights and Freedoms. There is in Canada a two step test often referred to as the “Oakes test” after the case in which it was first articulated, *R v Oakes* (1985) 50 CR (3d) 1:

- (1) First, is there a sufficiently important objective for the law in question to justify the overriding of a constitutional right?
- (2) Second, are the means chosen to attain that objective *rational and proportionate*?

The requirement of rationality means that some rational link between the chosen means and the attainment of the law’s objective must be shown. The requirement of proportionality is taken to mean (a) that the measures taken should impair the right in question as little as reasonably possible (in practice, as indicated by cases subsequent to *Oakes*, a flexible approach is taken to this depending on the importance in context of the particular right involved) and (b) that the deleterious effects of the measures must be justifiable in light of the objective they are to serve.

That Canadian approach has to be modified in any application to New Zealand circumstances so as to reflect the fact that the New Zealand Bill of Rights is not entrenched as supreme law. The formulation of the s.5 inquiry by Richardson J in *Noort* therefore differs from that in the Canadian jurisprudence.

In particular, given that legislation cannot be invalidated in New Zealand, it does not fall to the courts or to statutory bodies such as the Authority to evaluate the legislature’s objective and ask whether it is sufficiently important. That legislative objective must be taken as given. It is noted that the formulation of the s.5 inquiry by Richardson J does not involve any assessment of the validity or cogency of the objective of the legislation.

So too, it will in most contexts be inappropriate for statutory bodies to determine that the legislative means chosen to attain the objective are not rational. Statutory bodies cannot deny legislation its intended effect. That said, there is still scope for the Bill of Rights to apply in ensuring that rights and freedoms are impaired as little as reasonably possible while still giving effect to the intention of the legislature.

Turning more specifically to the Broadcasting Act, the first point to make is that the relevant objective of the legislature is plainly to regulate broadcast material so as to avoid harm to children as well as the other types of harm to which reference is made in s.21. It serves also to establish “good taste and decency” as a baseline requirement for all broadcasting (see s.4(1)(a)). Those objectives and their rationales must be and are accepted at face value. It is not for the Authority to evaluate the importance of those objectives. They are enshrined in legislation which the Authority is required to interpret and apply. In any event, they are plainly compelling objectives.

As to the “rational connection” component, the Authority recognises that debate may be possible about whether harm is caused by viewing published material, including broadcast material of a sexual nature. Nevertheless, for the purposes of giving effect to the Act, the Authority accepts the legislature’s judgment that such a connection exists, for s.21 in particular is, in part,

predicated on there being such a connection. It permits restrictions on what may be broadcast in order to prevent the various types of harm there set out.

In any event, on the basis of its research, the Authority accepts (as did Sky, “provisionally”, in its submission: p.40 paras 97-99) that the harm to which codes of practice are to be addressed - including denigration of and discrimination against members of the community on account of sex, race, age, disability etc - may indeed be caused by certain types of broadcast material, including those of a sexual nature. The task is to formulate a code of practice which serves appropriately to prevent that harm.

The remaining part of the reasonable limits test under s.5 is that limits placed on rights must be proportionate to their objective. The Authority will take this into account in making its recommendations in this report, in the review of the code which will follow, and in determining complaints under the Act.

The Authority also notes that, in seeking to give appropriate weight to s.14 of the Bill of Rights and freedom of expression, it must simultaneously bear in mind s.19 of the Bill of Rights, the right to be free from discrimination. Both rights are affirmed by the Bill of Rights. Given that the right to be free of discrimination is largely reflected in the broadcasting context by s.21(1)(e)(iv), the Authority believes that its overall task should be to develop a code which limits the freedom of broadcasters only to the extent reasonably necessary to attain the objectives of the Act.

In determining the proportionality and hence the reasonableness of proposed limits on broadcasts, the Authority is required to take into account all relevant factors such as the time of day at which material is shown and the availability of blocking devices.

#### 4.3.4 The provisions of s.21(1)(e)(i) (ii) and (iv)

There are certain matters in s.21 which must be included in the codes of practice. These can be characterised as being concerned with avoidance of harm. In this review, three are of concern - s.21(1)(e)(i) - protection of children, s.21(1)(e)(ii) - portrayal of violence and s.21(1)(e)(iv) - prevention of discrimination.

##### i. Protection of Children

The protection of children rationale has particular relevance to questions of timing of programmes. There may be material which is contrary to good taste and decency whenever it is shown. Some may be acceptable for adults who knowingly and willingly view it, but not appropriate for children.

The Authority can fulfil its statutory obligation in relation to the protection of children by ensuring that there is a system of regulation which restricts programmes in this category to late night time slots, and that blocking technology is available by which parents can prevent access by children to predetermined programmes.

In the US, the protection of children has featured prominently as the rationale for regulation of erotic entertainment on television. The US Supreme Court has unequivocally accepted that the rationale of protecting children amply serves to justify some restriction of free speech and is, generally speaking, a legitimate basis for restricting expression. Litigation on this issue has resulted in a safe harbour period of 6am to 10pm so that adult entertainment must be after 10pm.

One judgment<sup>10</sup> observed that cable (pay) television was as accessible to children as free to air broadcasting. The court cited research showing the amount of channel surfing before a viewer settles down to watch a programme is higher among cable subscribers, who have more channels to choose from.

By this the court means that cable home viewers have not necessarily decided what to watch before they sit down in front of the television any more than someone in a non-cable home, but even if they have, they still will check what is offering on the other channels before they make their final decision.

It cannot be argued that pay subscribers are similar to those who order a video at a rental store, and that somehow they have “agreed” to see all they end up seeing on the pay channels. Rather, the decision to subscribe simply increases the range of channels they are able to surf every time they sit down to view. At that point it is immaterial that some channels may be free-to-air while others are paid for. The potential harm to children is there, no matter how the programme is transmitted.

## ii. Violence

Restrictions on the portrayal of violence reflect the community’s concern about violence on television. It is expressly included in s.21(1)(e)(ii) as a matter to be included in a code of practice.

When the Authority reviewed the violence standards in 1991, it developed a code which is appended to the existing free-to-air Television Code of Practice. The Violence Code contains explanatory notes and guidelines which assist in interpreting the standards pertaining to violence. The principles in the code are, in summary:

- a) Is the material centrally relevant?
- b) Is violence used for heightened impact or shock value, ie gratuitously?
- c) Who is watching and what is the likely impact?
- d) What is the cumulative impact?
- e) Is there a repetition of violence?
- f) What are the audience’s expectations?

The Pay Television Code includes five violence standards which, in an abbreviated form, embody most of these principles.

## iii. Safeguards against portrayals which encourage denigration of and discrimination against women

The requirement that a code address denigration and discrimination raises a different issue. It does not suffice to say that by screening them late, programmes are seen only by those wishing to see them, when Parliament has expressly stated that the Codes should impose restrictions to avoid the harm in s.21(1)(e)(iv).

Where the line is to be drawn is for the Authority to decide. The important point is that the legislature embodies the judgment that, as a matter of policy, broadcasting standards are to be employed to prevent discrimination and denigration.

Restricting such programmes to a particular time of day is not open to the Authority. They ought not to be broadcast at any time.

## 4.4 DIFFERENCES/SIMILARITIES BETWEEN PAY AND FREE-TO-AIR TELEVISION

It has been argued by Sky that a different set of standards should be applied to pay television broadcasters than to free-to-air.

Sky maintains that while for some of its services, such as sport, its competitors are free-to-air television broadcasters, in the case of the movie channel they are not. Sky considers that its movie channel operates like a home theatre or in-house video store where films are brought into the subscriber’s residence in the same sort of direct contractual relationship as when a person buys a ticket to the cinema, or hires a video.

Furthermore, it argues, if the policy reason for regulating broadcasting is that it is widely disseminated, since Sky does not reach uninvited into every home, it should not be subject to the same stringent approach to broadcasting standards. Sky points out that its subscribers have the ability to control not only what is viewed, but who views it, because parental control devices are available to enable parents to block unsuitable material from their children.

Sky submits that there is no compelling public interest in censoring R-classified adult entertainment on pay television. It points out that subscription to pay television is voluntary, and suggests that those who have elected not to receive the service define their interests as different from those who do exercise their choice to subscribe.

Sky also submits that its subscribers know exactly what kind of material they are going to see because it is previewed in the *Skywatch* magazine and advertised in newspapers, and therefore there is no element of surprise. Sky maintains that its subscribers do not need, and do not seek, the protection of an external supervisory body such as the Broadcasting Standards Authority. It argues that its subscribers constitute a completely different public from that of society as a whole, and therefore should not be subject to a common set of broadcasting standards.

The issue of whether pay television and free-to-air should be subject to the same standards is the most important the Authority has had to resolve in its review of the Pay Code.

The Act itself does not draw a distinction. The definition of broadcasting in s.2 includes cable and satellite transmission of programmes and encrypted services as well as mainstream free-to-air transmission. All broadcasters are subject to the good taste requirement and other matters listed in s.4. However in s.21(1)(e) the Authority is required to develop codes “appropriate to the type of broadcasting undertaken”. This has been interpreted by Sky as supporting the argument that a lesser degree of content regulation is required on Pay Television.

In the Parliamentary Debates at the time of the second reading of the Broadcasting Bill, the Minister of Broadcasting (Hon Jonathan Hunt) stated that the wording of phrase in s.21(1)(e):<sup>11</sup>

...will enable the Authority to develop separate provisions distinguishing between free-to-air broadcasting and other services such as pay television, which may have different characteristics.

<sup>10</sup> *Denver Area Educational Television v FCC* (1996) 135 L Ed 2d 888, 906

<sup>11</sup> 498 *New Zealand Parliamentary Debates* 10500 (1989)

The Authority notes that at the time when the Bill was introduced, pay television services had not been established in New Zealand, and there was little knowledge of what, if any, different characteristics would justify a separate code.

Sky developed a separate Pay Television Code of Practice in November 1992, based on the existing free-to-air code. The free-to-air code has had minor amendments since it was introduced in 1989, and the comprehensive Violence Code has been appended to it. However the Pay Television Code has not been reviewed since it was approved in 1992.

On a broad reading of s.21(1)(e), encouraging the development of "appropriate codes" requires ensuring that the codes pertain to the **type** of broadcasting - for instance, a code of practice for radio is not likely to be the same as one for television. This interpretation is supported by the Concise Oxford Dictionary definition of **type** as "a class of things...having common characteristics." In the context of broadcasting, radio and television are not in the same class of things because they do not have a large number of common characteristics.

So, is pay television in the same class as free-to-air television? The pay operators, as indicated earlier, would argue that they are not, and therefore should have a different code of practice. They maintain that subscription services are more akin to video rental than they are to free-to-air broadcasting and furthermore, that the availability of blocking technology on pay services ensures that children are prevented from watching adult programmes.

The Authority now turns to the points argued by Sky in support of a different code of practice. To Sky's argument that its movie channel competitors are cinemas and video stores, the Authority points out that for pay subscribers, there is no element of having "selected" an item, apart from having made the initial decision to subscribe. Pay subscribers do not have access to current release films as do cinema goers, or to the vast range of choice available to video hirers. Nor do they have a choice about when they will watch an item unless they video-record it for themselves (a feature which also applies to free-to-air television). The times and offerings are selected by broadcasters, and subscribers have no ability to "select" programmes on the basis of individual choice, other than in a highly restrictive sense, in that they can only choose from what is currently being transmitted on a particular channel at a particular time. A second major difference is that Sky is not subject to the penalties imposed under the Classification Act 1993 when **restricted** material is viewed by those in the restricted class. Cinema operators and video stores commit an offence (under s.125) if they exhibit or display a restricted publication to any person under the age of 18 years. No such penalty attaches to broadcasters who provide restricted material to those under 18, since broadcasting is exempt from the Classification Act regime.

In fact, the Authority believes there are just as many similarities as differences between pay and free-to-air broadcasters. Sky, as the principal subscription service, can be distinguished from free-to-air television in that it offers: a wider range of channels; specialised channels; less advertising; uncut films which are uninterrupted by advertising breaks; blocking devices to ensure that parents can prevent children from watching unsuitable material; recent release movies; and exclusive sports coverage, all for a monthly subscription charge.

However, Pay Television is similar to Free-to-air Television services in that: the customer has no control over the schedule (programme selection and placement is done by the broadcaster); the programmes are subject to time zone restrictions and warnings; both are subject to the requirements set down in s.4 and s.21 of the Act; access by subscribers to the different channels is by remote control; promos and commercials are screened during programme breaks; television guides are available to advise what programmes are scheduled; and the services are available in homes, motels, hotels and elsewhere.

Sky argues that those who elect not to receive their service define their interests as different from those who do. On that basis, it maintains, pay subscribers are a different public. The Authority notes that the subscriber base for Sky has grown from 180,000 when this Review was begun in 1995 to about 305,000 in mid 1997. It believes a substantial part of the increase in subscriber numbers can be attributed to Sky securing the exclusive rights to broadcast sport (especially rugby). It notes that there now exists an arrangement whereby subscribers (including those in rural areas which cannot receive the UHF feed) can receive the sports channel only via the satellite hook-up. Since April 1997, 8,000 new subscribers<sup>12</sup> have subscribed to that service<sup>13</sup>, from which the Authority considers it reasonable to conclude that for many viewers, sport may be an important attraction of the pay service.

The Authority does not believe that pay subscribers in general are a homogeneous group who share similar programming tastes and philosophical perspectives. Furthermore, and of major importance in its conclusions, the Authority does not consider that the Act provides for subscribers to pay television to purchase a right to different or lesser standards. The Act applies its standards in s.4 and s.21 to all forms of broadcasting.

The Authority is ultimately unpersuaded by the argument that pay television services have such different characteristics that a separate code of practice is justified.

## 4.5 CLASSIFICATION

### 4.5.1 Free-to-air Television Classification

Television programmes (except for news and current affairs) on free-to-air channels are classified by in-house appraisers as to their suitability for different audiences. Over half of the feature films purchased by free-to-air broadcasters are in an already modified-for-television form in order to comply with the requirements of regulators around the world. If necessary, the appraisers make further excisions. They also assign what they consider to be the appropriate classification symbol and the correct time zone. The classification symbols used by free-to-air broadcasters are listed in the Television Code of Broadcasting Practice. They read:

#### General - G

Programmes which exclude material likely to be unsuitable for children under 14 years of age, although they may not necessarily be designed for child viewers.

"G" programmes may be screened at any time.

#### Parental Guidance Recommended - PGR

Programmes containing material more suited to adult audiences but not necessarily unsuitable for

<sup>12</sup> "Media moguls shape up to fight for the pay tv market" *The Independent*, 11 July 1997, p.30

<sup>13</sup> "Sky's not the limit for pay TV in New Zealand" *The Dominion*, 5 July 1997, p.13

child viewers when subject to the guidance of a parent or adult.  
“PGR” programmes may be screened between 9 am and 4 pm and after 7 pm until 6 am.

#### **Adults Only - AO**

Programmes containing adult themes or those which, because of the way the material is handled, would be unsuitable for persons under 18 years of age.

“AO” programmes are restricted to screening between midday and 3 pm on weekdays (except during school and public holidays) and after 8.30 pm until 5 am.

In addition, the Violence Code contains the following explanatory notes about classification:

### **Classification Guidelines**

These guidelines should assist broadcasters in producing and scheduling programmes and assist the Authority in determining formal complaints. However a formal complaint must be based on a specific standard, not these guidelines.

#### **General - G**

Violence, in whatever physical, emotional or verbal form, is unacceptable if it is presented in a manner which is likely to disturb, alarm or distress children. Any portrayals of violence must be strictly in context with the story line. They may be scary but must not be of a nature capable of being unduly distressing to children.

#### **Parental Guidance Recommended - PGR**

Violence which results in realistic and particularly horrific or gory scenes is to be avoided. Hard action is best conveyed by implication and inexplicit representations.

Scenes depicting gross ill-treatment of people, especially children, and animals are unacceptable although should a story line require such happenings they may be conveyed by implication or very brief and discreet footage.

Strong and abusive language of a nature that would be regarded as offensive to viewers, and which may arise during violent incidents, should be excluded except on the rare occasion where the context and story line may serve to blunt its impact on the basis of credibility and realism.

#### **Adults Only - AO**

Realistic portrayals of incidents, where violence of a physical, psychological or verbal nature is called for in the context of the story line, are permitted provided they are not unduly prolonged, unduly bloody or horrific. Rape scenes should be insinuated in preference to explicit depiction. Gratuitous violence is not sanctioned except in so far as it may be farcical and is devised for comic or slapstick effect.

Scenes depicting in undue detail ill-treatment of people and animals are generally unacceptable. If a story line requires such scenes they must be conveyed with brevity.

Strong language in proper context with any story line calling for violent confrontations can only be acceptable if used sparingly. Expletives, when used in situations where there may be clear justification or in an historic context, may be sanctioned. However, usually they are capable of causing unnecessary viewer upset and should be avoided.

#### **Special Note**

There will be programmes containing stronger material or special elements which would fall outside the above AO guidelines. In such circumstances time designations such as “AO 9.30 pm or later” may be appropriate.

In such circumstances a greater degree of realism may be permitted than in basic AO rated programmes, although dwelling on explicit injury of victims should be avoided. Specific warning identifying content which may offend should be given. Graphic scenes of sexual violence and unduly bloody or horrific encounters should not be screened.

Classification symbols are used in television programme listings, although no explanation is given as to what the symbols mean. In the Authority’s 1993 survey about good taste and decency, respondents were asked to name any of the classifications used for television programmes.<sup>14</sup> A total of 53% were able to name G, 32% named PGR and 54% named AO. When asked what the classification initials shown on a card meant, 68% knew what G meant, 34% knew what PGR meant, and 83% knew what AO meant.

### **4.5.2 Pay Television Classification**

Films broadcast on pay television are generally the same as the cinema release version, and excisions are only made in order to comply with s.4(2) of the Act. Under that sub section, where a film has been submitted to the Chief Censor for classification, and approval has been refused or has been given subject to excisions, no broadcaster -

s.4 (2) ...

- (c) In the case of any film in respect of which such approval has been refused, shall broadcast the film or any part thereof; or
- (d) In the case of any film that has been approved for exhibition subject to excisions therefrom, shall broadcast the film or any part thereof if the film or, as the case may be, the part thereof, includes any part of the film required to be excised -

except with the consent of the Chief Censor of Films and subject to any conditions subject to which the Chief Censor has given consent.

Generally, the Authority understands, Sky’s films are not edited for broadcast.

<sup>14</sup> Above, n1, 24

Some films broadcast on pay television have already been classified by the OFLC for release at cinemas or through video outlets. Sky uses the same classification which has been assigned to the title by the OFLC, although it does not re-submit the broadcast version of the film for classification. Material which is made for television is not required to be classified at all by the OFLC, although Sky sometimes uses the same classification symbols as the Chief Censor. For example, the *Playboy* programmes are classified by Sky as R18, even though they have never been classified by the OFLC. In such a case, the R18 classification is merely a warning device, and does not signify that the content has been ruled by the Chief Censor as being conditionally objectionable.

The Pay Television Code of Practice lists the following classifications, which are the same as the now repealed Films Act 1983 classifications:

### Censorship Classification

- G** Approved for General Exhibition
- GY** Approved for General Exhibition - recommended as suitable for persons 13 years and over
- GA** Approved for General Exhibition - recommended as suitable for adults
- R(age)** Approved for exhibition to persons of the advertised age and over
- RP** Approved for exhibition only to persons of the advertised age and over and to any person under that age when agreed to by that person's parent or guardian

#### Note:

1. The decoding system employed by Sky gives parents the opportunity to lock-out films they consider unsuitable for children through an electronic coding device.
2. Whilst observing these safeguards, Sky reserves the right to schedule films in accordance with commercial requirements. This reservation does not, however, apply to time band 4 - 6 pm or to any period specifically designated for children.

These classification symbols have now been superseded by a new set of symbols, although the Code of Practice has not yet been amended to reflect that change.

### 4.5.3 Skywatch Classifications

Since the Pay Television Code of Practice was written in November 1992, Sky has modified its classification symbols. In the current *Skywatch* magazine (August 1997), the classifications listed were:

- G** Approved for general viewing
- PG** Approved for general viewing but recommend parental guidance for young viewers.
- M** Approved for mature viewers 16 years and over.
- RP16** Approved for viewing to persons 16 years and over, unless accompanied by a parent or guardian.
- R16** Approved for viewing to persons 16 years and over.
- R18** Approved for viewing to persons 18 years and over.

### WARNINGS

- C** Content may offend
- L** Language may offend
- V** Contains violence
- VL** Violence and language may offend
- S** Sexual content may offend

While the HBO movies have classification information recorded in the *Skywatch* magazine, not all of Sky's programmes include that information (for example, some of the late night programmes on the Orange channel are not assigned classifications or warnings). Furthermore, not all Sky subscribers elect to pay the additional fee to receive the *Skywatch* magazine.

### 4.5.4 Classifications made by the OFLC and the Films and Videos Labelling Body

Classifications for unrestricted films are issued by the Films and Videos Labelling Body. The Labelling Body is set up under the Classification Act to assign a rating to any film referred to it, and to issue a label containing the rating and description assigned to the film which gives advisory information about the suitability of its content. The Labelling Body can assign three ratings:

- G** Suitable for general audiences
- PG** Parental guidance recommended for younger viewers
- M** Suitable for mature audiences 16 years of age and over

The Labelling Body bases the ratings it assigns on classifications given to films by nominated overseas authorities. Where no overseas classification is available, the Labelling Body views the material itself.

Films which may warrant restriction or which may be objectionable are forwarded to the OFLC. The OFLC can classify a film unrestricted, restricted, or objectionable. It assigns the following classifications:

- G** Approved for general exhibition
- PG** Parental Guidance recommended for younger viewers
- M** Suitable for mature audiences 16 years and over
- R(age)** Approved for exhibition only to persons stated years of age and over

Some films which were classified before 1993 contain the following classifications:

- GY** Approved for general exhibition - recommended as more suitable for persons 13 years of age and over
- GA** Approved for general exhibition - recommended as more suitable for adults
- RP (followed by a specific age)** Approved for exhibition only to persons ...years of age and over and to any person under that age when accompanied by that person's parent or guardian.

These classifications are still used with respect to films classified prior to the implementation of the Classification Act, and are valid until 1999, when all films are required to be labelled under the system introduced by the Classification Act 1993.

Films which carry the R(age) classification are legally restricted to those who have attained the stated age. It is an offence to show them to people in the restricted class.

#### 4.6 INTERPRETATION OF EXISTING SYSTEMS OF CLASSIFICATION

It is hardly surprising that research shows consumers are confused about what the various symbols mean when R18 films, which are restricted to those over 18 years of age at cinemas and video stores, are freely available to all subscribers from 8.30pm, on two of Sky's channels - HBO and Orange.

Broadcasters which show R18 films are not subject to the penalties imposed on cinema operators and video stores which permit those under 18 to view R18 material. The only sanctions available against broadcasters are through the formal complaints process as set out in the Broadcasting Act.

Sky maintains that it protects subscribers who do not wish to access R18 material by providing them with the option of obtaining an R18 card, which enables them to block out all R18 material. It also points out that viewers are advised of the classification of programmes in its *Skywatch* magazine and are therefore forewarned as to whether the content is unsuitable for younger viewers. However, the Authority notes, fewer than 500 Sky subscribers (out of about 305,000) have requested the R18 card.

Furthermore, the R18 card does not operate on the Orange channel. Orange is a channel which at present is dedicated to broadcasting cartoons from 6.00am until 4.00pm every day. From 4.00pm until 8.30pm, its listings include popular half-hour long series which have been screened in the past 15 - 20 years. As well as these programmes which have obvious appeal to younger viewers, Orange schedules adult films and programmes after 8.30pm. Recent examples of R18 films being shown on Orange are *Night Fire* on 24 May 1997 at 8.30pm, *The Punisher* on 31 July 1997 at 8.30pm, *Bikini Drive-in* on 13 May 1997 at 9.30pm, and a two-part film *Degree of Guilt* on 30 and 31 March 1997 at 8.30pm, which was classified in *Skywatch* as AO.<sup>15</sup> The films shown on the HBO channel are previewed in *Skywatch*, but only a small selection of Orange films are previewed, and the classification guidelines and warnings are not always included in the preview information. Furthermore, 20% of Sky subscribers do not take the option of subscribing to *Skywatch*, which is available only when an additional monthly cost is paid.

The April 1997 *Skywatch* announces, under the heading "Too Hot for the Networks", the arrival of three new shows on Orange:

One of the joys of being a Sky subscriber is that you don't have to endure unwelcome cuts to your favourite television shows. In fact three of the most popular series on Orange are made especially for Pay TV in the States, where the content is deemed "too hot" for network television. All three are critically acclaimed and venture into areas that the play-it-safe network shows are too scared to visit.

The shows are scheduled late in the evening (10.00 and 10.30pm), thus signalling clearly that they are intended for adult audiences. They carry no classification information.<sup>16</sup>

In the Authority's view, R18 on television and R18 at the cinema are not the same thing and should not be identified in the same way. Broadcasters of R18 programmes on television are not subject to the penal regime that the cinema operator or the video store owner is, and the films are not necessarily classified according to the same principles as those which have been classified by the OFLC. Research shows that it is confusing to viewers that broadcasters use the same classification symbols as the OFLC when they cannot have the same meaning. The R-classification can only serve as a **recommendation** when associated with television, whereas it is a **restriction** when used to classify films and videos.

AO, which signifies adult viewing on free-to-air television, may well be applied to material which has received a restricted classification from the OFLC for its cinema/video release, but which is presented in a modified for television form, either because of the cuts made by appraisers or because a television version of the film was available from the distributors. AO is also used by free-to-air broadcasters for made-for-television programmes.

A recent example of a film containing adult themes which was not modified for television is *Once Were Warriors* which was classified R16 by the Chief Censor and was broadcast in its entirety on two different occasions by TV3 at 8.30pm with an AO classification. To date, no formal complaints about the film have been referred to the Authority. In the Authority's view, the lack of complaints demonstrates the public's tolerance of material which, in context, was seen to be relevant and within the bounds of good taste and decency, in spite of its R16 classification and the scenes of realistic violence and other adult themes.

#### 4.7 WATERSHEDS

In tandem with the classifications there are restrictions on when particular types of programmes may be broadcast. Generally, the classification symbols are related to a particular time zone.

Sky notes that the Pay Television Code of Practice permits the showing of adult programmes at 8.00pm, but that it has voluntarily undertaken not to broadcast adult material until 8.30pm. The Authority also notes that it has undertaken to show some programmes with adult themes even later in the evening (after 10.00pm).

The Pay Television Code of Practice states that Sky undertakes in the preparation and presentation of programmes:

**P8** To abide by the classification codes and their appropriate time bands as outlined in the following programme classifications.

12.00 - 4.00pm	R13, R16, R18 & GA
4.00 - 6.00pm	G & GY
6.00 - 8.00pm	R13, G, GY and GA
8.00 - 12.00pm	All categories

Unlike the free-to-air code, the Pay Television Code has no restriction on daytime screening of adult programmes during school and public holidays.

<sup>15</sup> Since AO is not one of the classifications officially listed as being used by Sky, it is unclear whether it refers to R18 material.

<sup>16</sup> Although the Authority uses Orange as an example, it recognises that its programming emphasis may change in the future.

## 4.8 WARNINGS

Broadcasters are expected to advise viewers if the programme content is likely to be disturbing, either because it contains scenes of violence, nudity and sexual scenes or bad language. That is an obligation imposed pursuant to s.21(1)(e)(vi). The Free-to-air Television Code of Broadcasting Practice contains the following standards which relate to warnings:

- G18** News flashes prepared for screening outside regular news bulletins, particularly if during children's viewing hours, should avoid causing unnecessary distress or alarm. If, for compelling reasons, news flashes contain distressing footage, prior warning should be given.
- V3** Warnings should be given, at least at the beginning of a programme, when a programme contains material which is likely to be disturbing to the average viewer or which is unexpectedly violent for that programme genre.
- V12** The treatment in news, current affairs and documentary programmes of violent and distressing material calls for careful editorial discernment as to the extent of graphic detail carried. Should the use of violent and distressing material be considered relevant and essential to the proper understanding of the incident or event being portrayed, an appropriate prior warning must be considered.
- ...
- Material shown in late evening may be more graphic than that shown during general viewing times.

There are no comparable provisions in the Pay Television Code of Practice, although Sky advertises in *Skywatch* a series of symbols which it uses in its publicity about its HBO programmes. They read:

### WARNINGS

- C** Content may offend  
**L** Language may offend  
**V** Contains violence  
**VL** Violence and Language may offend  
**S** Sexual content may offend

The symbols are used only in Sky's own publication and not in general newspaper programme listings. They are included on-screen at the beginning of the programme and in the promos.

## 4.9 PROMOS

Previewing forthcoming programmes is an important part of the business of broadcasting. However, it is equally important to ensure that children are not exposed to scenes and themes which are inappropriate during their normally accepted viewing times.

The Free-to-air Television Code of Broadcasting Practice contains the following standards which relate to the broadcast of promos:

### Programmes Trailers and Promotions

- G22** Promotions (promos) for AO programmes may be screened during PGR or G time bands provided the promo is made in such a way that it

can be classified as PGR or G, as appropriate. Promotions which carry an AO classification may only be screened within AO time bands.

**G23** Discretion should be used in the placement of AO classified promotions screened during PGR programmes which are broadcast in AO time bands. If the PGR programme is one which is aimed at the family audience, and it commences at or continues transmission beyond 8.30pm, then it should carry only PGR classified promos. PGR programmes screening during daytime weekday AO time bands and those which commence at 9pm or after may carry AO promotions.

**G24** Broadcasters must be mindful that scenes containing incidents of violence or other explicit material may be acceptable when seen in the total context of a programme, but when extracted for promotion purposes such incidents will be seen out of context and may thereby be unacceptable, not only in terms of the codes but also for the time band during which the trailer is placed.

**V16** Broadcasters must be mindful of the effect any programme, including trailers, may have on children during their generally accepted viewing periods, usually up to 8.30pm, and avoid screening material which could unnecessarily disturb or alarm children.

There are no similar provisions in the Pay Television Code of Practice.

The broadcast of promos which contain material unsuitable for broadcast during G or PGR time gives rise to a large number of informal complaints to the Authority, and a few which become formal complaints. The Authority shares the concern of parents that when promos show sensational scenes out of their context there is a high risk that they will breach one or more of the free-to-air broadcasting standards, in particular those aimed at the protection of children. It is a matter on which the Authority intends to make recommendations.

## 4.10 WHAT IS GOOD TASTE AND DECENCY?

The Act's requirement that broadcasters observe standards of good taste and decency is repeated in the codes of practice, where contextual considerations are identified as being relevant. The Pay Television Code of Practice reads:

Sky undertakes in the preparation and presentation of programmes

- P2** To take into consideration currently accepted norms of decency and taste in language and behaviour, bearing in mind the context in which such language or behaviour occurs.

### 4.10.1 Currently accepted norms of decency and taste

When it makes decisions about alleged breaches of good taste and decency, the Authority is obliged to reflect community standards.

The Authority's responsibility is to be informed about community attitudes and to reflect generally-held views and attitudes in New Zealand society. The Act provides for the Authority to conduct research (s.21(1)(h)), and to commission surveys in order to obtain information necessary for the performance of its functions (s.25).

In July 1993, as noted above, the Authority commissioned a survey which investigated perceptions of good taste and decency in television and radio broadcasting. Respondents were asked their general concerns about television, about what offends good taste and decency on both radio and television, and were probed about their attitudes to violence on television. They were also asked to rank 20 commonly used swear words, blasphemies and other expletives, and to identify their reasons for being offended about offensive language. Questions were asked about perceived offensiveness of selected items depicting sex and nudity on television, and about the reasons for being offended about depictions of sexual intercourse on television.

The results of the 1993 survey continue to provide helpful guidance to the Authority, especially when interpreted in conjunction with the context in which the incident occurs.

In its second decision (Decision No: 2/90) dated 19 January 1990, in which Patricia Bartlett, on behalf of the Society for Protection of Community Standards, complained about a documentary entitled "The Nightworkers", which examined the strip scene in Wellington, the Authority declined to uphold the complaint that the good taste standard was breached. Its reasoning, in part, read:

In the Authority's view the concept of good taste and decency in a given situation or context pertains to conformity with such standards of propriety as the Authority considers to be in accord with generally accepted attitudes, values and expectations in New Zealand society.

Much depends on the viewer's expectations surrounding a particular programme and the time when that particular programme is screened. In the Authority's view, this documentary is of such a nature that viewers who chose to watch this late evening programme would expect that it might contain material that would be controversial and, in another context, possibly inconsistent with the standards of good taste and decency.

#### 4.10.2 Context

In the Authority's considered view, the elements which comprise context include:

- the time of the broadcast;
- the day of the broadcast (was it during the school holidays, or on a public holiday; on a week day or weekend?);
- the type of programme;
- whether warnings were provided in publications advertising the programme or on-screen at the start of the programme;
- the classification of the programme;
- the availability of blocking devices;
- prior publicity given to the programme or existing knowledge about it;
- the context in which the incident occurred within the programme; and
- topicality of issues covered.

The Introduction to the Pay Television Code of Practice identifies some additional contextual matters which, it is argued, justify different interpretation of standards, including the good taste standard. The Introduction reads in part:

Pay TV is a discretionary service and subscribers make a decision whether or not to view each of the programmes available at any particular time. Consequently the subscriber personally exercises control over the type and nature of the programming which they view. In subscribing to the service, subscribers are aware of the general nature of the programming each channel provides, together with the more specific information provided in the programme guides. There is therefore, we believe, a case for a lesser degree of programme content regulation on Pay TV since it is a discretionary service to particular subscribers rather than a broadcast service to the community at large.

Sky, in its submission to the Authority, also argues that the technology of pay television empowers subscribers with the ability to control not only what is viewed, but who views it. It notes that in addition to a PIN number system which blocks out selected programmes, an R18 card is available which restricts access to all R18 programmes. Sky also argues that unlike free-to-air broadcasting, pay television is a discretionary service, that subscribers themselves exercise control over the type and nature of programming and that it does not reach uninvited into every home in New Zealand. In addition it considers that pay television operators are given a mandate by their subscribers to provide them with what they want, and the fact that R18 adult entertainment programmes feature on pay television is a direct response to the wishes of viewers. These factors, it maintains, justify a lesser degree of programme content regulation.

As indicated earlier, the Authority is not convinced that these arguments establish sufficient differences between pay and free-to-air television. It discusses this point in the next chapter.

#### 4.10.3 Reflecting Community standards

The Authority deals with good taste and decency complaints on a case by case basis. On each occasion, it reviews the tape of the programme or item and then makes an assessment as to whether, in its context, there was a breach of the standard. When it dealt with its second complaint about the late-night *Playboy* programmes on Sky, the Authority wrote in Decision No: 11/95:

In a previous decision (Decision No: 62/94) about *Playboy* programmes on Sky Television, the Authority signalled that it intended to seek public views about R-rated adult entertainment featuring the display of female nudity and simulated sexual activity on pay television when it wrote:

[The minority] noted that the Authority may commission public opinion research to guide it on what the public thinks about soft porn on pay television.

The majority also acknowledged that it had difficulty in making its decision without research to guide it and agreed that it would be a high priority for it to commission research which would enable it to gauge decisively public opinion on this issue.

The results from the research project which was commissioned by the Authority in 1997, and which are reported briefly above, and in full in a separate publication, provide the Authority with a clearer definition of the community's expectations as to what is meant by good taste and decency. Notwithstanding that information however, the Authority is still obliged to assess each complaint on its own merits, and establish from its own context whether the standard was breached. The research provides guidance, but not rigid guidelines. Each complaint is unique to its own set of facts.

## 5 THE AUTHORITY'S FINDINGS

### 5.1 Differences between Pay and Free-to-Air Television

When the Broadcasting Bill was debated at its second reading in 1989, it was made clear by government speakers that the freedoms of a deregulated broadcasting industry came with responsibilities on the part of broadcasters and viewers. Criticism about the severity of the penalties which could be imposed by the Broadcasting Standards Authority was dealt with by Peter Simpson, then MP for Lyttleton, who said:<sup>17</sup>

...it seems to me that it is entirely appropriate that, if the Government is moving towards the deregulation of the broadcasting industry and the introduction of commercial criteria, given the special character of broadcasting a stringent regulatory regime in that circumstance is entirely appropriate. The severity of the regime is in balance with the amount of commercial freedom allowed for in the establishment of separate commercial structures.

At the time the Bill was introduced, pay television services had not become established. Sky began its service in 1992, and since then other operators such as Saturn Communications Ltd and First Media Ltd have begun transmission.

The first question for the Authority is whether any or all of these services are sufficiently unique and different from free-to-air television to justify a different code of practice.

Having examined the range and variety of programming offered by pay television services, the Authority has concluded that the differences are neither substantial nor significant. The principal attribute of subscriber services is that there are specialty channels - for example, Sky offers dedicated Sports, Movies and News channels; Saturn offers a large variety of mainstream channels plus pay per view channels which may include adult programming; and First Media Ltd, which aims to reach 400,000 homes with 50 channels including movies, Kids' TV, documentaries, news and entertainment, intends to provide a service whereby subscribers can work out their viewing purchases on a daily basis.<sup>18</sup>

Sky also submitted that the availability of the R18 blocking card to prevent access by children was a significant distinguishing feature of its service. The Authority notes that fewer than 500 out of the 305,000 Sky subscribers have taken up that option. Because of the low uptake, the Authority concludes that this is an insubstantial difference.

### 5.2 Education

The Authority is not involved in censorship. It is reactive, because it only deals with complaints about programmes after they are broadcast.

The Authority considers that an important aspect of its work as a regulatory body is to ensure that consumers are provided with reliable, comprehensive and easily

understood information about broadcasting standards, including classification, watershed times, and the difference between the regime established under the Broadcasting Act to deal with programmes which are broadcast on television, and that under the Classification Act which deals with films, literature and other publications.

In fulfilling its s.21 obligation to protect children, the Authority takes seriously its duty to provide comprehensible and relevant information for the guidance of parents and caregivers to help them ensure that children are not subjected to content which is unsuitable.

Television is not a babysitter; the Broadcasting Standards Authority is not a moral guardian. The Authority expects parents to be involved in a partnership with broadcasters and with the Authority to monitor children's viewing. Each has responsibilities in that partnership: broadcasters must ensure that time zone restrictions are conscientiously adhered to, that the content of promos is suitable for the time they are shown, that unambiguous classification information is publicised on screen and supplied for in television guides and daily newspaper listings, that programmes are correctly classified, and that warnings are provided where appropriate. For its part, the Authority will provide information to parents about classification symbols and what they mean, and will encourage broadcasters to make that information available, will work with broadcasters to establish clear time zones relating to classifications, and will deal judiciously with complaints about standards breaches. With adequate, relevant information about standards matters, the complaints process and the whole philosophy which governs the broadcasting regime, parents can be sufficiently well informed to exercise judgment about what is appropriate viewing for children in their care, can understand and use classification symbols, and will be encouraged to make use of the complaints process to highlight breaches of broadcasting standards.

Clear, comprehensible classification advice is of benefit to all consumers, not just those who are responsible for children. At present, free-to-air broadcasters use the classification symbols and time zone restrictions which are set out in the Television Code of Broadcasting Practice. Sky, on the other hand, has adopted the classifications from the now repealed Films Act 1983, and those used under the Classification Act 1993. Sky has voluntarily agreed to abide by similar time zone restrictions as free-to-air broadcasters, most notably the restriction on the broadcast of adult material before 8.30pm.

In addition, broadcasters themselves place programmes more suited to adults in late evening time slots and, provide on-screen warnings advising viewers of the content, if it is deemed likely to offend.

In the Authority's view, it is confusing for viewers first, that different classification symbols exist, especially when those used by Sky look the same as those used for films and videos, and secondly, that there are some discrepancies in the time zone restrictions between the pay and free-to-air Codes of Practice. There are also some substantive differences in the Codes which, according to Sky, means

<sup>17</sup> Above n10, 10513

<sup>18</sup> "Daily Choice" *The Dominion* 7 July 1997

that the Pay Television Code "is actually more stringent in some respects" than the code for free-to-air television.

A single code applying to all television broadcasters will eliminate the confusion and uncertainty which exists.

### 5.3 One Broadcasting Code for Television

On the basis of its conclusion that there is no substantive difference between pay and free-to-air television which justifies pay television having a separate code of practice, the Authority considers that a single code is appropriate. It has come to this view for the following reasons.

The marketing strategy for pay television operators is to provide product which is not available on free-to-air. For example, Sky has made the commercial decision to position itself as provider of sport and recent release movies. In 1996, Sky outbid the free-to-air providers for the exclusive rights to show certain rugby and rugby league games. At the time, an outcry erupted from sports fans, incensed that some sport would not be available at all on free-to-air television. A compromise was reached whereby free-to-air broadcasters competed for the rights to a delayed telecast of the event.

New Zealand does not have anti-siphoning legislation such as that which exists in Australia or the United Kingdom which prohibits exclusive deals whereby pay operators get rights to broadcast sports fixtures of national significance. The issue of exclusive coverage of key sports events remains controversial, but undoubtedly accounts in large part for the surge in Sky subscribers between 1995 and mid 1997 from about 180,000 to around 305,000.<sup>19</sup>

Sky has now successfully positioned itself as the dominant pay television operator in New Zealand. It argues for a less restrictive code of practice than free-to-air television so that it can more fairly compete with what it perceives to be its major competitors - cinemas and video stores.

However, the Authority does not agree that the differences between pay and free-to-air broadcasters as articulated by Sky demonstrate that it should be subject to a different regulatory regime. In the Authority's view, there are, on balance, more similarities than differences. These include:

- (1) Once a decision has been made to subscribe, the consumer accesses all programmes on Sky and the free-to-air channels in the same manner - by using a remote control - and there is only a minor distinction, as far as the viewer is concerned, between the free-to-air channels and the pay channels. Indeed, some programmes are found on both. Those subscribers who have chosen to implement the R18 card (fewer than 500 out of about 305,000 subscribers) are denied access to R18 material on the HBO channel but all other subscribers have ready access to any and all programmes being offered.

- (2) Sky maintains that there are sound policy reasons for ensuring that free-to-air television is more strictly regulated than pay television, because it is extremely pervasive and reaches uninvited into every home where there is a television set. But in total, there are over 305,000 pay television subscribers in New Zealand (the majority being Sky subscribers), and in the areas Sky covers with its UHF broadcast, 30% of homes are subscribers.<sup>20</sup> The Authority considers that the significant number of homes which have access to pay television nullifies Sky's argument that the exclusivity of pay television warrants a lesser degree of restriction than that which applies to free-to-air broadcasters.
- (3) Sky also argues that by making a decision to subscribe, its subscribers have in some way chosen the programmes it offers. The Authority accepts that consumers make a decision to purchase a television set, and make a further decision to subscribe, but this cannot be interpreted as a choice and an endorsement of all of the programmes provided. Pay subscribers have no more control or choice about what they watch than do free-to-air viewers: all broadcasters are driven by ratings and public opinion to show the most popular programmes, and viewers must select from what they are offered by the broadcaster.
- (4) The Authority understands that even in a mature pay television market such as the United States, about 60% of all programmes watched are on free-to-air channels, even if they are transmitted by a cable system. It recognises that because the market for pay television is small, pay television will never be as pervasive as free-to-air television. However, the Authority considers that its strong representation across all demographic groups in New Zealand justifies similar treatment to free-to-air television as far as standards are concerned.<sup>21</sup>

The justification for proposing a single code of practice for both types of broadcasters is found in the first instance in the Act. As noted above, the definition of broadcasting in s.2 includes pay television broadcasters. *The s.4 requirement that broadcasters observe standards of good taste and decency applies to all broadcasters equally.* It is prescribed in the legislation. The Authority's interpretation of good taste and decency is informed by reference to community standards, and includes a consideration of contextual elements. The Authority's research indicates that there is greater tolerance of adult themes in programmes screened after 10.00pm because the lateness of the hour gives a clear signal that the programmes are intended for adult audiences. However, it is clear from the Authority's research, and from the long consultation process which has preceded this Review, that the community believes there are limits to what may be broadcast, even at a late hour. Complaints about breaches of the good taste standard will be dealt with on a case by case basis. The Authority expects broadcasters to classify programmes

<sup>19</sup> Above n11

<sup>20</sup> Ibid

<sup>21</sup> Similar reasoning was adopted in a proposed ruling made by the Federal Communications Commission in the US (FCC 96-84, 4 March 1996) regarding adopting a rule prohibiting sexually oriented programming or other indecent programmes between 6am and 10pm unless it is fully scrambled for non-subscribers. The Commission wrote at page 5: We tentatively conclude there are no relevant differences between broadcast and non broadcast delivery of programming that justify adoption of a different rule. While at one time there may have been differences in the demographics regarding those who receive cable and those who watch broadcast television over the air, MVPDs [multichannel video programming distributors], in some form, are available to a majority of homes.

correctly, place them in appropriate time zones, and to avoid showing material which is offensive to the majority of the community.

Further justification for a single code is found in s.21 of the Act, which requires broadcasters to develop and observe codes of practice which relate to the protection of children, the portrayal of violence, and providing safeguards against discrimination. These codes must be appropriate to the "type of broadcasting" undertaken. While the technical definition of broadcasting is included in the Act in s.2 and refers to the different methods of transmission of programmes, the Concise Oxford Dictionary defines the verb broadcast as: transmit (programmes or information) by radio or television.

On that definition, there are two types of broadcasting - radio and television - and developing a separate code for

radio and a separate code for television satisfies s.21's requirement for a code "appropriate to the type of broadcasting". Furthermore there are sufficient differences between radio and television which warrant separate codes, the most obvious being that the codes must distinguish between the visual medium of television in which images are combined with sound, and the sound alone medium of radio. There are no such significant differences between free-to-air and pay television broadcasters which would in the present context justify developing different codes.

The Authority also refers to its public opinion research, conducted between April and June 1997, which shows that more respondents agreed that there should be a single code of practice for all television broadcasters. It considers that the reasoning put forward for a separate code for pay and free-to-air television relies on an artificial distinction between the two which is no longer supportable.

## 6 THE AUTHORITY'S RECOMMENDATIONS

### 6.1 Introduction

This Review was begun in March 1995 and has taken over two years to complete. During that time, the Authority has devoted a great deal of time and resources to an examination of all of the issues. It has funded a major public opinion research project; it has consulted widely, read extensively and discussed the issues thoroughly.

The Authority has read the written submissions, listened to oral submissions, heard presentations by experts and has also examined practices in other countries, notably Australia, and has read widely and debated the issues.

Its conclusions and recommendations are a culmination of the lengthy review process, and take account of the views of individuals, groups and a cross section of the public. The recommendations are made acknowledging the principles of freedom of expression, and balancing the rights under the Bill of Rights Act with the responsibilities of the Authority to administer and give effect to the regulatory regime set down in the Broadcasting Act.

### 6.2 A single Code of Practice for Television

The Authority considers that a single Code of Practice for all television broadcasters benefits both viewers and broadcasters and is consistent with the principles of the Act. It will consult with all television broadcasters to develop a single code.

By aligning the free-to-air and pay television codes, the existing anomalies between them which cause confusion for viewers will be eliminated. The development of a single code also provides an opportunity to refine the wording and language of the existing codes. Sky supports revision of the pay television code, which it regards as more stringent in some respects than the free-to-air code. The Authority takes account of Sky's submission on this point.

### 6.3 Classification Symbols

The interpretation and application of the standards in the two existing television codes is confusing to viewers. The confusion is exacerbated by having classification symbols which apply to films and videos being used by pay television when they cannot have the same meaning, since it is impossible to apply the Classification Act restrictions to a broadcast medium.

The Authority proposes one system of classification which applies to all television broadcasters and which uses symbols which are distinct from those used for films and videos. Each classification category will be clearly defined and consumers will be given advice as to what each classification symbol signifies, and whether restrictions are recommended.

The Authority recommends developing classification symbols for television which are different from those used for films and videos. Broadcasters will be responsible for appropriately classifying all broadcast material, except for news, current affairs and sport, which, as now, will be exempt from classification. Classification advice will

accompany all press advertising of programmes. The Authority recommends adopting the following guidelines, which are used in Australia:

An appropriate classification symbol must be displayed as close as practicable to the start of those programmes which are required to be classified, and within any promotion for the programme. The classification symbol must also be broadcast as soon as is practicable when the programme recommences after each break.

The Authority proposes adopting the following symbols:

- |                |  |
|----------------|--|
| <b>TVG</b>     | Programmes which are suitable for children to watch without the supervision of a parent or adult.  |
| <b>TVPG</b>    | Programmes which may contain adult themes or concepts but which are suitable for children to watch when subject to the guidance of a parent or adult.                        |
| <b>TV16</b>    | Programmes which are unsuitable for viewing by people under the age of 16 years and which may contain violence, sexual depictions or coarse language.                        |
| <b>TVAdult</b> | Programmes containing adult themes which are unsuitable for people under the age of 18 years. (This may include films which have been classified as R18 by the Chief Censor) |

As at present, broadcasters will be responsible for making any necessary modifications to adult films to ensure they are suitable for broadcast and that they are classified appropriately.

The Authority recognises that news, current affairs and serious presentations of moral or social issues must not be unreasonably restricted. However, they must be presented with appropriate sensitivity to the classification zone in which they are broadcast.

The Authority recommends that all material, including non-programme matter, such as programme promotions, community service announcements and station identifications be classified appropriately, and broadcast only in designated classification time bands. It emphasises that classification information is provided for consumers' information, not for broadcasters' protection, and reminds broadcasters that there may be material which, even if correctly classified as **TVAdult**, may not be suitable for broadcast at any time.

### 6.4 Watersheds

Classification symbols are linked with time band restrictions. Recognising its responsibility to protect children, the Authority recommends the following time restrictions:

- |                |  |
|----------------|--|
| <b>TVG</b>     | Any time   |
| <b>TVPG</b>    | 9.00am-3.00pm; 7.00pm-6.00am   |
| <b>TV16</b>    | 8.30pm - 6.00am; noon to 3.00pm, except during school holidays and public holidays |
| <b>TVAdult</b> | 10.00pm - 6.00am   |

## 6.5 Warnings

Under s. 21(1)(e)(vi) of the Act the Authority is required to encourage broadcasters to present appropriate warnings on programmes, including programmes which have been classified as suitable only for particular audiences. The existing Free-to-air Television Code contains such a provision in standard G18 and standards V3 and V12 of the Violence Code. There are no comparable provisions in the Pay Television Code. However, the Authority notes, Sky has voluntarily undertaken to publicise warnings in its *Skywatch* magazine, and includes them in on-screen promos and at the beginning of the relevant programmes on both the HBO and Orange channels.

The Authority recommends a system such as that used by Sky in its promotional material to give advice to viewers about programme content. As recorded above, Sky's warnings read:

C	Content may offend
L	Language may offend
V	Contains violence
VL	Violence and Language may offend
S	Sexual content may offend

The Authority recommends such warnings on all promotional material for all television broadcasters. It also recommends on-screen warnings which give a brief indication of the nature of the material for programmes which deal with adult themes, by a verbal warning, an on-screen warning or both, and by using warning symbols on-screen. Such warnings would be used for all **TVAdult** programmes and, at the broadcaster's discretion, before **TV16** programmes, and would be placed at the start of the programme and after each programme break. The Authority also recommends the use of on-screen warnings before certain news, current affairs and other programmes where, in the broadcaster's opinion, the content is likely to distress or offend a substantial number of viewers. The warnings must precede the relevant segment in news and current affairs programmes and precede the programme itself for other programmes.

A warning preceding a programme will not, of course, permit broadcasters to broadcast anything they choose: they are still subject to the standards listed in the codes of practice, and to the complaints regime set up under the Act. If broadcasters do not comply with standards, they can expect to be penalised in terms of the Act.

## 6.6 Promos

Promotions relating to forthcoming programmes are also required to comply with the classification guidelines. The Authority recommends that promos for **TVAdult** programmes be broadcast only during **TVAdult** and **TV16** time; promos for **TV16** programmes only during **TVAdult**, **TV16** and **TVPGR** time; while promos for **TVPGR** and **TVG** may be broadcast at any time.

In addition, the content of the promos must comply with the time zone in which they are shown.

## 6.7 Implementation of Recommendations

The Authority proposes that the recommendations in paragraphs 6.3, 6.4, 6.5, and 6.6 above be incorporated in the Code of Practice for Television recommended in paragraph 6.2, after consultation with broadcasters.

## 6.8 An informed public

The Authority considers that a simplified classification system which has been developed specifically for television will be of benefit to the public because it will eliminate the confusion which presently exists about what the classification symbols actually mean. Clear guidelines about time zones, and the provision of specific warnings will enable parents to monitor their children's viewing.

While s.6(1)(ba) of the Act requires broadcasters to publicise the procedure for making complaints, the Authority believes that the public is still not well informed about the complaints process. The Authority will endeavour to increase public awareness of the role that viewers can play in monitoring programme content by making formal complaints to broadcasters.

The Authority recognises that any changes to a regulatory regime are potentially contentious. It also understands that a liberal regime which is based on self-regulation carries certain risks.

However, it is confident that it can work with broadcasters to develop a single Code of Practice for television. The Authority intends to produce a draft code as a basis for consultation with broadcasters.

## APPENDIX I — WRITTEN SUBMISSIONS

In a press release issued on 8 March 1995, the Authority announced that it intended to seek public views about the broadcast on pay television of R-classified material which featured female nudity, sexual content and violence.

In total, 255 submissions were received, as well as 16 petitions which contained a total of 3295 signatures. All of those who signed the petitions were opposed to the broadcast of R-classified material on pay television, and contended that the pay television code of practice should be the same as the free-to-air code.

The submissions of this self-selected group are not a representative sample of views of all New Zealanders, and the themes are not generalisable to the whole community. The range of views of the respondents are demonstrated in the summary following.

### I. SUBMISSIONS IN SUPPORT OF LIBERALISATION OF STANDARDS

#### a. Summary

1. Of the 255 submissions, 13 (5.1%) expressed the view that pay television, because of its special characteristics, ought not be subject to the same regime as free-to-air television.

2. These submissions endorsed the view in the introduction to the current Pay Code that the contractual relationship which exists between a subscriber and the pay broadcaster allows "a lesser degree of programme content regulation ...since it is a discretionary service to particular subscribers rather than a broadcast service to the community at large."

#### b. Impracticality of Regulation

3. Several submissions asserted that it is unrealistic to expect to be able to regulate international communications when digital technology becomes the norm. (95, 103, 246)

4. The Council for Civil Liberties accepts the need for some control, but argued that the boundaries should be liberalised.

5. It suggested that child porn, relished acts of sexual violence, and coercive sex be deemed unacceptable unless they were part of a work which had social, cultural, scientific, educational or artistic merit. Otherwise viewing would be at the discretion of the customer. It suggested appropriate classification in the programme listing and restricting until after 10.30pm. (80, 246)

6. The Council suggested that controls be superseded by public education.

#### c. Ability to Restrict Access

7. The availability of smart cards and other technology ensures that children did not have access to unsuitable programmes. (4, 72, 80, 86, 95, 115, 127, 199, 213, 254)

8. Programmes are clearly labelled in television listings and visual or audio warnings are given. (80, 127)

#### d. Subscription

9. Pay Television should have less prescriptive standards because people had made an active choice to subscribe. (4, 72, 80, 115, 127)

10. The main reason viewers subscribed to Pay Television is so that they can watch programmes which are not on free-to-air television. (60, 127)

#### e. Freedom of Choice

11. Banning soft porn removes freedom of choice. (95) As long as the programmes are correctly classified, there is nothing wrong with broadcasting them. (5, 95)

12. An individual's right is restricted if limitations are put on what sort of material can be broadcast, and those freedoms are protected under the Bill of Rights Act. (127) Personal views are important in deciding what is watched, and this freedom cannot be taken away. (72)

13. There is no rationale for banning material which can be legally borrowed from video libraries. (60)

#### f. Community Views

14. The fact that out of over 100,000 subscribers (in 1995) there have only been two complaints about Sky's programming shows that its subscribers do not object to the programming choices. (80, 127)

15. The programmes should not be censored, having been passed by the Chief Censor. (72)

16. Censoring programmes in a democracy is necessarily problematic. Society accepts that there must be a balance in what is allowed. (86, 213)

17. In a thesis written in 1995, the author questioned whether the government should protect adults from allowing themselves to be corrupted, and challenged the idea that all paternalistic measures were justified in order to prevent children from harming themselves. She concluded that there were good grounds for restricting pornography, while still protecting the value of freedom of speech, but that none of the arguments examined justified complete suppression. (154)

#### g. Pay Television Operators' Submissions

##### i) Sky Network Television (127)

18. Changes need to be made to the Pay Television Code of Practice in light of:

- a) the right to freedom of expression by pay broadcasters and their subscribers;
- b) the limitations the Classification Act places on television programming; and
- c) the double censorship regime that pay TV is subject to.

19. Pay TV is readily distinguishable from free-to-air as it does not reach uninvited into every home.

20. Adult programmes have already been classified under the Classification Act. Moreover adult material is already available in video stores and movie theatres.

21. Sky's objective is to provide a mainstream service in movie entertainment. Its competitors are video shops and cinemas.
22. Tighter censorship on adult programmes is not necessary because:
  - a) Viewers have made an active decision to subscribe;
  - b) Blocking devices (PIN numbers and R18 control cards) are available to subscribers free of charge;
  - c) Adult programmes are only screened after 8.30pm and before 6.00am;
  - d) Sky offers a *Skywatch* magazine previewing the next month's movies so that viewers can select what they want to watch.
23. Tighter censorship cannot be justified under s.5 of the Bill of Rights Act.
24. The Pay Television Code of Broadcasting Practice must be amended to render it at least as broad as the free-to-air code. (Standards P23 and P25)
25. Sky is subject to a double censorship regime (the Broadcasting Act and the Classification Act). This makes it difficult for Sky to compete with its competitors such as video stores and cinemas which are not subject to a dual regime.
26. Pay TV's unique differences from free-to-air should mean that it is subject to less rigorous censorship.
  - ii) **Saturn Communications (199)**
27. "Pay per view" television is a system which permits subscribers to purchase material at a predetermined date and time for a price. It is different from "view on demand" which is transmitted solely for that person. Pay per view services should not be covered by the Broadcasting Act. The Broadcasting Act is not intended to regulate such services.
28. Saturn plans to establish a range of services under pay per view, which may include adult programming. Only authorised subscribers would be able to choose programmes on that service.
29. Pay per view would operate the same as a cinema or video store.
30. According to Saturn's market research, there is a significant amount of interest in the adult product.
31. Saturn advised that while the review of the code was in progress it had decided to remove all X-rated material from its service.
32. Subscribers are able to restrict the viewing of pay per view. Adult programmes will only be accessible when the subscriber makes an active choice to access the programme.
33. Saturn acknowledged that it had a responsibility to educate parents about the availability of parental control devices.
34. Pay per view should be regulated by the Films, Videos and Publications Classification Act.
35. A separate set of standards should be developed for cable operators. The availability of pay per view will give viewers better options and offer a better protection against children viewing.
  - iii) **Telecom (now First Media Ltd) (213)**
36. A Pay Television Code should reflect society's interest in balancing "destructive" activity with the individual rights of citizens and the need to promote informed debate on social issues.

37. Pay television differs from free-to-air television in a number of ways:
  - a) There is more scope for diverse programming eg the availability of channels for children renders the concept of children's viewing hours less relevant.
  - b) It provides programmes for more diverse interests.
  - c) The ability to block access to channels or specific programmes.

## II. SUBMISSIONS SUPPORTING STRICTER STANDARDS ON PAY TELEVISION

The 242 submissions which supported imposing the same standards on Pay Television as on Free-to-air were uniformly opposed to permitting adult material on pay television. The following were the main reasons given for requiring pay broadcasters to observe the same standards as free-to-air broadcasters:

### HARM TO CHILDREN

#### a. Summary

1. A large proportion of submissions mentioned that children could be harmed by the broadcast of soft pornography. A total of 161 (63.1%) argued that the availability of adult material, including soft pornography and violence, was harmful to children. Many noted that although controls are available, few subscribers have them and children had the ability to tape and replay AO and R-classified programmes. (203, 243) Testimony from teachers implicated the watching of pornography on children's inappropriate sexual behaviour. (3, 200, 205, 218, 227)

#### b. State as Watchdog

2. The Authority was reminded that its obligations extended to observing the principles in Articles 13 and 17 of the UN Convention on the Rights of the Child where, in Article 17, signatories undertake to develop appropriate guidelines for the protection of children from information and materials injurious to their well-being. (40, 240)
3. The responsibility for sound censorship starts first with the Authority enforcing broadcasting standards, secondly with broadcasters complying with standards and finally with parents or guardians enforcing home censorship. The argument was made that the pay code should be such that where parents fail in their responsibility to restrict access to children a degree of protection is provided. (108, 110, 111, 114, 115, 201, 216, 236)
4. One writer, who was in favour of more freedom for pay television operators accepted that the state had some role to play in establishing minimum guidelines to protect children where their parents had abdicated responsibility, but argued that had to be balanced against freedom of choice for individuals. (80)
5. Whether one pays for it or not, television influences behaviour (134), otherwise why would advertisers spend millions of dollars on advertising? (35, 42, 62, 78) Furthermore, adult material is produced with the intention that it will make a profit. (75, 250)
6. One submission noted that the huge public consultation before the Classification Act was passed

showed that the public viewed censorship as important. The submission acknowledged that it could be argued on the grounds of customer preference and freedom of expression that a pay subscriber is entitled to view what they like. However, it noted, this argument is inconsistent with government policy and legislative provisions. The application of the harm principle removes the justification for any distinction between public and private use. (232)

7. The Children's Television Foundation argued that all rights are subject to responsibilities and that the responsibilities of decision makers sometimes mean the curtailment of some rights for the sake of children. (240) The Foundation suggested that it is important that New Zealand decided what is acceptable for its cultures and people rather than adopt ready-made solutions from countries like France and the Netherlands, where issues like violence and sexuality are treated differently. (240)

### c. Community Responsibility

8. A common theme was that the protection of children was a community responsibility as well as a parental responsibility (6, 20, 81, 89, 179, 197) and that standards should be set with children in mind. (53, 55, 109, 141, 143, 145, 201, 214, 221, 239, 250) Many noted that young people could tune into adult programmes, with or without their parents' consent. (143) It was suggested that the harm to children from watching adult material, particularly soft porn, was lasting and demonstrable, so it should be as difficult as possible for children to access it. (132, 152, 216, 236) Parents had no right to expose children to pornography. (218)
9. R18 material is anti-relationship and has negative effects on society. (107) Because children are more susceptible, delegating responsibility to parents alone is shirking responsibility. (179) It was argued that the suggestion that adult programmes would only be watched by the target audience could not be substantiated. (138)
10. The point was made in almost all submissions that it is illogical and unfair to permit different standards for pay and free-to-air television since they are both competing for the same market. Individual choice must be balanced against the impact such choices have on society as a whole. (109, 134, 240)
11. Just as society had taken away people's free choice and insisted they wear seat belts or cycle helmets for their own protection, so too must pay television be regulated. (90, 106)
12. The fact that it has a different funding base is no reason for a pay broadcaster to be permitted to broadcast adult material. (156, 201) The issue of payment is irrelevant. People should not be able to buy the right to denigrate others or place them at risk of harm. (218)
13. Parents need better advice about suitability of material for their children. (231, 240) People should have to make a special effort to see R18 material. (1, 2) Pornography is easily normalised when it comes into the home on television. (107, 133, 250)
14. Pornography should be made socially unacceptable because it represents an attitude to human beings which, like racism, can no longer be tolerated. (179) It denigrates society as a whole and there is no positive contribution it can make to society. (75)

### d. Availability of "objectionable" material

15. The purpose of s.21(1)(e)(iv) of the Broadcasting Act 1989 is to protect vulnerable groups in society. Not all members of a household would have chosen to bring adult material into the home. (118, 148) R18 material has been classified by the Chief Censor under the Classification Act as being conditionally objectionable, and it follows therefore that such material should not be broadcast because it is impossible for broadcasters to restrict access of R18 material to children. (161, 167, 218, 188)
16. In its submission, the OFLC pointed out that the Classification Act makes a presumption that some material is harmful. The OFLC is empowered to identify such content and limit public access to those publications so that the likely harm is minimised. It was of the view that:
 

...where harm exists, it exists in the content of the material concerned and in the availability of that content to the public. The method of service delivery has no bearing on this matter. It is therefore our opinion that once a restriction is applied it should apply to all cases in all mediums, including broadcasting. (209)
17. Under the Classification Act, the Chief Censor has the power to initiate action against objectionable material, whereas the Authority can only act on complaints after the material has been shown. (160, 234) This was regarded as a serious weakness in regulating broadcasting.

18. As one submission observed:

An R-rating under the Films, Videos and Publications Classification Act 1993 is intended to restrict "availability". In *Re "People"* [1993] NZAR 543 at 569, the Tribunal summarised the evidence of an expert on the meaning of "availability" in this context. Firstly he said that a publication is injurious to the public good to the degree that many individuals are exposed to it. "The more people exposed to a possibly dangerous depiction the greater the likelihood that any one person will be adversely affected." Secondly he said that "Materials may be harmful to the extent that their availability spills over to unintended or undesirable recipients" such as children or other protected groups. Therefore, since the purpose of R-rating is to ensure that only small numbers of people are exposed to the material, and to minimise spillover, it completely undermines this to broadcast such material directly into the homes of thousands of men, women and children. (218)

19. The OFLC pointed out:

Restricted publications are not simply "approved" or "passed" by the OFLC, they are classified as **conditionally objectionable**. Restricted publications are "objectionable" **unless** they are restricted in a specified way or ways. **When "restricted" publications are made available to persons of for purposes outside of the persons or purposes specified in the classification, they are "objectionable" publications.**

Under the Act, people may be prosecuted for breaching the conditions of the classification of the publication.

### e. Effect on Children

20. In its submission, NZEI (the primary school teachers' union) noted that teachers had reported the increasing

incidence of children watching pornography or violent material on television (both Sky and free-to-air) and exhibiting disturbed behaviour or acting out what they had seen. Some teachers reported that a quarter to half of their pupils had seen pornography on Sky television. NZEI noted that there were no effective controls to prevent children from watching or taping material that the Chief Censor had classified as conditionally objectionable. (231)

21. A high school guidance teacher had no doubt that even soft pornography had adverse effects on students she worked with. (210)

22. A teacher of 12 and 13 year olds stated that some of her students had shown signs of problems associated with viewing pornographic material. Citing one student who said he didn't want to get married because sex was too yucky, she wrote:

He then went on to say that his father had laughed when he told him that, and had responded by saying "You used to like it when you were little." The child is now exhibiting behavioural problems consistent with abuse.

This situation indicates two things to me. The first is that pornography has a serious effect on children. This child is confused about how to relate to others, particularly to girls and women. He has drawn his own very graphic, pornographic pictures, with the women in submissive or degrading positions. He is also emotionally disturbed by what he has seen, indicating that he wants to get the images out of his head.

Also, she argued, exposure to pornography can prevent people from seeing its effects. In this case, the father was unable to see the detrimental effects on his son. (216)

23. NCW quoted a Board member who reported that a Deputy Principal at a co-ed school advised that in a 3rd form sexuality class, the most commonly asked question was about anal sex, then oral sex. Students said they had heard about these things on Sky television. (234)

24. Limiting the availability of R18 material on television does not restrict the rights of those who wish to watch it because they can still rent R18 videos or see R18 films at the cinema. (2, 122) Furthermore, because it is easily accessible elsewhere, it is unnecessary to have it on television. (166)

25. Children are at risk when their fragile minds are polluted or tempted. They are bombarded enough by images in the media. (43)

#### **f. Availability of Control Devices**

26. Cynicism was expressed about the effectiveness of control devices. A number of submissions pointed out that children would watch adult material no matter how careful their parents were, if it was available on pay television. (88) The effectiveness of the control devices was questioned, given that they rely on the active intervention of adults who may not consider restricting access to be important or necessary. (160, 228, 241, 255)

27. Other R18 material is not available to children, but when it is on television, it is readily accessible. (91, 133) Even when R18 programming is restricted to late night viewing, there is no certainty that children would be denied access, since they have the ability to record the programmes (14, 34, 101, 120, 122, 160, 165, 166, 222, 228, 229, 243, 136), and those children

who did not have access at home could access it away from home. (136) Late night screenings and control devices are only limited safeguards. The problem lies with the attitudes of parents. (117)

28. The adult watershed time should be pushed back to 9.30pm (106, 195, 222), 10.00pm (163), or even 11.00pm (98) and AO time during the day be reduced from 12 - 4.00pm to 12 - 3.00pm. AO material should not be shown during day time in the school holidays. (128, 180, 201, 206, 222, 232, 234, 230) The earlier the hour that adult material is screened, the more readily available it is and the more it signals that it is mainstream. (134)

## **HARM TO WOMEN**

### **a. Summary**

1. The effect of pornography on attitudes to women was given as a reason for limiting the broadcast of soft pornography by 94 (36.8%) of the submissions. The arguments were that pornography is discriminatory to women because it objectifies them, reduces them to sexual objects and encourages discrimination against them.

### **b. Discrimination against women**

2. Attitudes about women are both shaped and reinforced by pornography, and the standard which prevents discrimination against women should be applied equally on all channels. (218, 232, 250) Pornography is offensive and degrading to women and children whether it is shown at 1.00pm or 1.00am and whether it is free or paid for by subscription. (238)

3. New Zealand has ratified the UN Convention on Elimination of Discrimination Against Women and there is a duty on the government to ensure that its principles are upheld. (208)

4. Women must be listened to when it comes to deciding issues involving pornography because it is they whose lives are constrained by the existence of sexual violence. (208) Any relaxation in the interpretation of the code relating to discrimination against women could be in breach of s.19 of the Bill of Rights Act. (234)

5. Programmes such as *Playboy* foster the image of women as objects of, and available for, sexual gratification. (6, 14, 17, 19, 22, 24, 25, 55, 67, 96, 111, 138, 139, 134, 135, 157, 158, 159, 160, 162, 163, 188, 190, 202, 206, 209, 218, 219, 222, 223, 231, 236, 243, 252)

6. According to one submission:

Pornography is propaganda against women. It is a practice which perpetuates sexism, sex discrimination and sexual violence. It is therefore one of the basic means of maintaining the sexual status quo. Sexual equality depends on the elimination of pornography as part of the elimination of sex discrimination. (179)

That view was shared by others, who contended that pornography is about hatred and contempt for women (204) and that it promotes and condones violence against women. (71, 126, 192, 198)

7. There are no valid reasons to screen material which discriminates against women. (153) There is an increasing body of research evidence which supports the association between pornography and violence and discrimination against women. Pornography is addictive and can affect men to the extent that they are unable to form relationships with women. (232)

8. If denigration is acceptable when people pay for it and watch it late at night, then why should other instances of social denigration be treated differently? (218)
9. "The research indicates that the harm to women is achieved in several ways. Firstly men's attitudes to all women can be shaped by what they observe and internalise from watching TV. They expect their sexual encounters to produce the same results that they have witnessed on screen. Secondly it has been found that some men compare their own partner(s) to the screen image and find them lacking. This sets up a chain of inadequacy which can lower women's self worth". (232)
10. Women against Pornography wrote:

Pornography is certainly not the only factor contributing to women hatred, but it plays an increasingly dangerous part in promoting, condoning and reinforcing anti-women ideas and behaviour. (160)

#### c. Case Law

10. In the Canadian case *R v Butler* (1992) DLR (4th) 449 at 467, the Supreme Court held:

This type of material would, apparently, fail the community standards test not because it offends against morals but because it is perceived by public opinion to be harmful to society, particularly to women. While the accuracy of this perception is not susceptible of exact proof, there is a substantial body of opinion that holds that the portrayal of persons being subjected to degrading or dehumanising sexual treatment results in harm, particularly to women and therefore to society as a whole... It would be reasonable to conclude that there is an appreciable risk of harm to society in the portrayal of such material.

11. In a New Zealand decision, the Indecent Publications Tribunal in *Re "People"* [1993] NZAR 543 at 567-568 decided that proof of harm was not necessary:

Our basis for these findings is our growing conviction, based on evidence heard in the Penthouse proceedings, and on the very personal and intense testimony of WAP's witnesses, that material which demeans women or treats them as inherently unequal is harmful to women. This harm to women can be seen as hindering and undermining women's pursuit of equality in all facets of life, as promoting disrespect for women, and as condoning callous attitudes towards the experience of women which could manifest themselves in covert or overt acts of discrimination or worse. We may not have actual proof of a link between such demeaning or dehumanising material and harm to women, but there is sufficient authority both in and in Canada to the effect that we do not need any, provided we have a reasonable basis for concluding that harm will result... "Injury may occur in the province of attitudes of perceptions, particularly if these are widely shared, and consistently suggest that one class is inferior to another." This statement is amply supported by research applied by the Tribunal in Penthouse, by the testimony of the applicant's witnesses, by public perception that harm may indeed be caused by some material in the "province of attitudes", and now by recognition both of the existence of such harm and of its use as a criterion against which to measure any given depiction by the Supreme Court of Canada. (218)

12. Two submissions also argued that soft pornography discriminated against men. (207, 251)

## HARM TO SOCIETY

1. The largest number of submissions - 174 (68.2%) - argued that pornography has a detrimental effect on society because it undermines the family, is responsible for family violence and other aberrant behaviour, and has a negative impact on both men and women.

2. According to one writer:

We need to act upon research evidence conducted by people suitably experienced or qualified in their field. My criticism of censorship bodies, the public media and the public at large is that to a large degree research evidence has been ignored. Commonsense should dictate that any doubt as to the harm of sexually explicit adult entertainment should err on the side of safety and concern for the good of the community. There is however, an overwhelming amount of evidence which confirms that sexually explicit material is harmful. (236)

3. It is socially irresponsible to permit R18 material on television. (243)

4. Another submission observed:

...it is the effect of the material on those watching it and the harm on society that is the issue. There is evidence that paedophiles and rapists are consumers of pornography and that pornography can become addictive. This is one area in which so-called "public" demand should be denied in favour of the public good. (157)

5. Pornography should not be available on television at all (206). It is addictive and destructive to family relationships. (227, 232, 236)
6. The National Council of Women, having sought the views of its members, reported that they wanted the same standards for pay television as for free-to-air because the majority of the community sought the protection of standards. NCW argued that viewing R-classified adult entertainment was desensitising and encouraged acceptance of the sort of behaviour viewed as normal when it was not. It also suggested that there were links between soft pornography and crime and that it was known that sex offenders reported a high rate of viewing of pornography. (234)
7. More important than an individual's preferences is what is good for society overall. (244)

## BREACH OF GOOD TASTE AND DECENCY

### a. Summary

1. Almost half of the submissions mentioned that the broadcast of soft pornography was a breach of the standard requiring good taste and decency. A total of 126 (49.4%) maintained that the broadcast of adult material, including soft pornography, even during AO time was a breach of the standard.
2. As one writer argued, some standards can be interpreted differently but not decency and good taste. (224)

### b. Subscription

3. The idea that the purchase of a subscription enabled subscribers to view anything was addressed by a number of submissions. (133, 134, 209, 232, 234, 241) It was

argued that there was no justification for having lower standards just because it was paid for. (101, 133, 209, 241) It was suggested that if pay television broadcasters were permitted to drop their standards then free-to-air channels would be under pressure to do likewise. (133)

4. Since all members of a household can view the material, the subscription element is irrelevant (244), and the person who opted to subscribe was rarely the only one who accessed the service. (190, 209) Furthermore, it was argued, the relative cost of subscribing was insignificant for most families. (255, 102)

#### c. Classification Act v Broadcasting Act

5. Regulation of broadcasters requires different criteria from the regulation of books, films and videos under the Classification Act. Under the Broadcasting Act broadcasters must comply with standards of good taste and decency. Pay broadcasters are not exempt from that requirement. The limitations on broadcasters' freedom of expression is justifiable on the grounds that harm is caused, and because of the nature and pervasiveness of the medium. (242)
6. Yesterday's hard porn has become today's soft porn - as witnessed by the change in *Playboy* magazine over the last three decades. Similarly the term "adult entertainment" lulls people into thinking it is benign. There is no justification for adopting a lesser standard, and pay broadcasters cannot justify broadcasting pornography on the grounds of audience expectation. (117)

#### d. Contextual considerations

7. Many argued that when taking contextual considerations into account, the fact that a programme is on pay television is irrelevant. NCW in its submission argued:

In our opinion the word "context" is here intended to allow for an appropriate range of details of language and behaviour within a single programme ie it refers to the dramatic context, which might allow for normally unacceptable language and the portrayal of anti-social behaviour in the interests of accuracy and character. (234)

It did not believe there was any context which justified the screening of soft pornography on pay television.

### MORAL VIEW

#### a. Summary

1. A clear moral or Christian view that pornography is harmful was expressed by 86 of the submissions (33%). These submissions emphasised the sanctity of the family, the desirability of monogamous relationships and Christian ethics.

#### b. Erosion of Standards

2. A common theme was that standards in all media are eroding through the depiction of violence, use of obscene language, and explicit and suggestive sexual content. As a result, society is becoming increasingly desensitised to what standards are acceptable. (9, 11, 16, 28, 32, 33, 37, 38, 40, 44, 45, 46, 47, 48, 50, 56, 57, 62, 64, 65, 69, 73, 76, 77, 83, 84, 85, 87, 88, 91, 92, 97, 99, 100, 102, 105, 107, 112, 113, 117, 119, 121, 122, 123, 130, 131, 132, 133, 134, 135, 140, 142, 144, 146, 147, 149, 153, 155, 168, 169, 172, 173, 174, 175, 177, 180, 181, 182, 183, 184, 185, 187, 194, 211, 213, 224, 225, 227, 233, 234, 235, 237, 245, 248, 249, 253)

3. A warning was given that if we do not take a stand now, in a few years' time hard pornography will be available on television (117) and if pay television is permitted to drop its standards, so will free-to-air (133, 170, 186) It was argued that commonsense should dictate that any doubt as to the harm or otherwise of sexually explicit adult behaviour should err on the side of safety and concern for the good of the community. (236)

4. The *Playboy* type programmes are degrading to society and lead to the breakdown of the family unit. (58, 82) They contribute to an increase in crime. (8, 10, 12, 15, 21, 23, 26, 27, 29, 30, 31, 79, 134, 164, 176, 189, 217, 243) The National Collective of Rape Crisis and Related Groups of Aotearoa quoted a study which showed that 74% of men who sexually abused children used pornography as a regular part of their sexual behaviour. (208) It can also be dangerous in a flattening situation. (63)

5. Pornography is addictive. (7, 9, 13, 65, 66, 73, 74, 75, 83, 93, 137, 171, 226, 236, 255)

6. What people watch has a flow-on effect on society (193, 243) and there is a potential for harming the minds of young people (222)

7. It was asserted that New Zealand's record of rape, domestic and public violence, marriage breakups, sexually transmitted disease, macho images, drunkenness, child molestations is a testimony of the degradation pervading our society today. (40, 133)

#### d. Nudity and sexuality

8. It is a breach of good taste to broadcast material which contains nudity and sexuality into people's homes. (41, 42, 51, 52, 54)

#### e. Pervasiveness of Television

9. Much is mimicked from television, particularly violence against women and children (49), and television is widely available in most people's homes. (238) [Note that according to the March 1996 census, 96.7% of households had television.]

10. Although it is meant for adults, children have ready access to pay television. (161, 151)

11. There should be a consistent application of a united philosophy of non-violence and positive images of all people. (252)

12. Having pornography made more readily available through television would be detrimental to the stability of future generations and recognition needs to be given to the fact that there are many single parent and dysfunctional families. (134)

13. The average New Zealander would not consider R18 material to be appropriate viewing on television, regardless of the time of day it is screened. (61)

14. Policy and regulations should be upgraded to meet the available technology. (129)

#### f. Victims

15. Women whose partners had been affected by pornography and men who themselves had been affected argued strongly against proliferation of soft pornography on television. A total of 18 submissions were from people who had been victims of pornography, either as users, as rape victims, or abused children. It was argued that it is already easy to get access to pornographic literature and videos, and that making it available on television makes it too easy.

16. Court reports frequently refer to violent or bizarre behaviour having its origin in films viewed by the defendant. (101) It was asserted that the majority of violent sexual crimes are committed by those who regularly used pornography. (116)

## CONCLUSION

The main theme of the submissions which were opposed to permitting adult material on pay television was that society would be harmed by the broadcast of such material because it causes harm to children, to women, to families, and to relationships. There was a consistent view that the standards for pay television should be the same as for free-to-air. It was pointed out that it made no difference who the provider was when the material was brought into the home, and that payment of a subscription should not enable viewers to purchase lower standards.

Of the submissions which argued that pay services were different and therefore entitled to a different threshold of standards, the view was that adults had a right to access adult entertainment and that the controls which already existed to prevent children from watching unsuitable material were sufficient.

Some submissions suggested that a separate channel be devoted to adult material, while others were adamant that such material should not be so easily accessed into the home where there were unlikely to be controls over what children watched. A common theme was that the material was available legally from other sources so there was no denial of adults' rights of access by restricting it from television.

The Authority was reminded that its task was to reflect community standards. The majority of the submissions argued that the standards should be the same on pay television as on free-to-air.

## APPENDIX II — SUBMISSION WRITERS

1. Richard England
2. RD & TG Stewart
3. Kathryn & Glen Weir
4. Trevor W A Morley
5. Derek Treeby
6. Lance and Sandra Thomas
7. Chris Malone
8. Miss J L Banks
9. Helen Walker
10. Mary Lee
11. R & T Hansel
12. Barbara Rossiter
13. J L Dean
14. Beth Arrowsmith
15. Mrs S J Gatfield
16. Mrs D E Shieffellier
17. Mr J G Watson
18. I C Sargent
19. Mrs Lesley Taylor
20. Mrs A Morcom
21. Guy Steward
22. Mr & Mrs P M Mitchell
23. J D Turner
24. Mrs D I Ross
25. Mrs M Sara
26. Mrs Kate Cox
27. Tony McCall
28. Paul Martin
29. Sharon E Marks
30. Ron & Anne Harrington
31. Mr & Mrs G McLauchlan
32. Mrs J C Anderton
33. Mrs J Reid
34. I A Larcom
35. David Troop
36. Te Puke Baptist Church
37. Mrs Jones
38. Spirit and Life Centre
39. Miss Dorothy Thompson
40. M L & E A Benson
41. Alida Duncan
42. Tim Symington
43. C I Barnes
44. Mrs M Papalii
45. Scott Dennison
46. Mrs Pauline Hall
47. M S Tattley
48. Sam Wadham
49. Jane Duncan
50. Mrs R Dymond
51. Daniel Crowe
52. Mrs I Cumming
53. Julie Wickins
54. Beverley Rae Finlay
55. Mrs D P Billington
56. Mrs G Williams
57. Mrs B Wilson
58. John Williams
59. Mrs E Ryan
60. TVNZ Group
61. Daria Sadler
62. Sarah Reed
63. N F Gregory
64. Mrs Rose Webby
65. Terry O'Hagan
66. Pam Marcotte
67. Trish Laughton
68. Mrs N Stanton
69. L Huxford
70. Miss E Ashforth
71. Russell Abbot
72. Mike MacDonald
73. Nancy Oliver
74. T Jessa
75. Mrs Ruth Cleaver
76. NZ Organisation for Moral Education
77. Mr J Goodwill
78. Linda Beebe
79. Lincoln Moffat
80. R & L Henderson
81. Jim Black
82. Cindy D Pointon
83. Mike Pointon
84. Lyn Crawley
85. P. Tito
86. Catholic Communications
87. Barbara Law
88. Mrs L J Cowan
89. Mrs Pamela A Gilmour
90. Catherine Johnstone
91. K A Harang
92. Elizabeth
93. K Varsanyi
94. Jamie Strahan
95. Frank Macskasy
96. Women Against Pornography (Auckland)
97. Merle Grace
98. Linda Moltzen
99. Miss B Stratton
100. Mrs L Hobden
101. John Jamieson CBE
102. Juanita Johnson
103. P F Johnson
104. Ms Diana Gardner
105. Ann Jarry
106. Frances Burt
107. Neil & Sally Hunter
108. Vic Francis
109. Dr G Bishop
110. Karen Low
111. Phillip Smits
112. Mrs J Harris
113. T P Lidgard
114. Maureen Wilson
115. Jillian Davey
116. James Evans
117. Steve O'Hagan
118. Winsome Cross
119. Bev Longmore
120. Mrs R P Warren
121. Peter Sturm
122. R W Orange
123. A Tait
124. S P Brown
125. Cliff Turner
126. Eileen O'Halloran
127. Michael Webb
128. Knights of the Southern Cross (Hutt Valley)
129. H H Ngati
130. W A & P M Roughley
131. Consie C Whyte
132. D M Cooper
133. Mr T J Kavanagh
134. Christian Heritage Party of NZ

135. The Congregational Union of NZ
136. Marion Moyle
137. Sarah Williams
138. Andrew Macfarlane
139. Ms Katrina Morrison
140. R Olsen
141. Frances Piper
142. Nick J Lawrence
143. S R Lane
144. Jennifer L Payne
145. Tessa Lane
146. Anthony Payne
147. Susanna Nilson
148. Richard & Pam Davy
149. Richard Hulbert
150. Kiwi Viewer
151. Philip Brock
152. Hannah Smith
153. Gerard L Bowden
154. Diana Gardner
155. John Grant
156. David Kitchen
157. The Salvation Army
158. Laurie Sanders
159. The Hamilton Methodist Parish
160. Women Against Pornography (Wellington)
161. TV3 Network Services
162. Rosemary McElroy
163. Joint Methodist-Presbyterian Committee
164. Claire Fuller
165. Mrs H King
166. Margaret Skelton
167. Mrs M Knox
168. John & Linda Grigg
169. J H Devlin
170. Richard & Nicola Gerritsen
171. Nigel Russell
172. Alan & Gaye Anderson
173. Rose May Aitkenhead
174. A Concerning Mother
175. Mrs J Leota
176. John & Merlene Gliddon
177. K Laing
178. I Biggs
179. Miranda Koster
180. Justine Ashton
181. Women's Division Federated Farmers
182. Mr & Mrs T A Fraser
183. Craig McDowall
184. Joyce Gregory
185. Mr & Mrs R W Weaver
186. Leila Corban
187. Heather Lawrence
188. John G Fabrin
189. Mrs Elena Hood
190. J & G Leggatt & J N Brock
191. Women Against Pornography (Chch)
192. Linda Raffills
193. Anne Gilbert
194. Catholic Women's League of NZ
195. Frances Burt
196. Shirley Cranch
197. Mrs Raelene Dyer
198. Anne Wells
199. Saturn Communications
200. Myra Francis & family
201. Childrens Media Watch
202. Susan Biggar
203. Grant Rothville
204. Christine Lesley
205. Katie Potten
206. Rape Prevention Group Inc. (Christchurch)
207. New Zealand Men's Rights Association
208. National Collective of Rape Crisis and Related Groups of Aotearoa Inc
209. Office of Film & Literature Classification
210. Prof W, Mrs C & Mr P Monteith
211. Clinton McClean
212. Peter Wilson
213. Telecom NZ Ltd
214. Students, Shalom House
215. A J Austin
216. Teresa Wood
217. Ron Pellow
218. Grant & Elizabeth Paton-Simpson
219. Mrs Jane Carter
220. Miss Barbara Cozens
221. Mrs Joyce Young
222. Society for Promotion of Community Standards Inc
223. Women Unlimited
224. Colin Whitehead
225. Stephen Tetley-Jones
226. Phillip Prior
227. Mrs Margaret Buckton
228. Mrs Wendy Matthews
229. Social Justice Committee,  
St Patrick's Catholic Church, Palmerston Nth
230. E Welch
- 231.. New Zealand Educational Institute
232. Ministry of Womens Affairs
233. Karen Evans
234. National Council of Women
235. Mrs Betty Harvey
236. Russell D Fredric
237. D Thomas
238. Mrs Dianne Head
239. Churches Broadcasting Commission
240. Children's Television Foundation
241. Labour Women's Council
242. Minister of Women's Affairs
243. John Shields
244. Nick Smith MP
245. Anon
246. Council for Civil Liberties
247. I B Jah
248. Miss S J Ashby
249. Mrs Elizabeth Moselen
250. Beulah Wood
251. Michael Bott
252. Wellington South Community Law Centre
253. Balmoral Baptist Church
254. John Lowe
255. Dennis Walker

In addition, 16 petitions were received, containing 3295 signatures

## APPENDIX III — FOCUS GROUPS

The first stage of the public opinion survey was a qualitative research project, conducted using focus groups. The composition of the groups was decided by a Consultative Committee, which recommended that the groups be recruited on the basis of gender, age, ethnicity, location, parenting status and Sky subscriber status. The groups were facilitated by a Registered Psychologist.

To stimulate the discussion in each group, the participants were shown a compilation of clips from seven current or recent R16 or R18 films, all but two of which had been shown on Sky. Participants were also shown a demonstration tape which explained how the parental control card operates on Sky. Each clip was introduced by the facilitator who explained its context within the film. Wide-ranging discussion about the themes followed.

The following were the major themes of the discussions in the focus groups. This information is not generalisable about the population in New Zealand as a whole, but does provide a descriptive account of the views of 105 respondents in various parts of the country. The themes discussed and the language used were helpful in developing the questionnaire for the second stage of the research.

### i. Children

The most consistent theme was a concern about the effects of adult material on children. It was recognised that in many families the television was used as a babysitter, and that many children were exposed to a large number of hours of daily television viewing. It was reported that in some families children were allowed to stay up till after midnight and watch television unsupervised, while other families had rules about the amount of viewing and what types of programmes their children watched. It was conceded however that even if parents had rules for their children, they could still access adult material if they wished to, either at home when the parents were not there or did not notice, or at their friends' homes.

Concern was expressed about the effects of violent movies (particularly the black rap Los Angeles gang movie genre), on which some young people modelled their own behaviour.

### ii. Pay Television

Some participants suggested that there should be a separate channel for R18 material which would be subscribed to separately and would be able to be blocked off to children, and also that adult material should be subject to time zone controls.

Others considered that having paid the subscription for pay television, subscribers could expect to have access to a whole range of material, including adult material. Some did not see a difference between pay television and free-to-air since it was all accessed the same way. Even if they had made a decision to become a subscriber, once it was in the home, people could only accept those programmes offered and not choose when they watched them. Because viewers were limited in their choice to what the pay television provider offered, it was argued, it

is therefore very different from going to a video shop where people could hire any video that they wanted to watch.

### iii. Violence

Strong views were heard about the effects of needless violence and how some people would be affected by it. In particular, concern was felt about showing violence which does not result in any consequences for the perpetrator and where no remorse or regret is felt for the actions. (An example of this was the film *Kalifornia* in which the main character was a serial killer whose victims were random victims, and where the murders were shown very graphically, and the violence of the attacks was excessive, prolonged and explicit.) Another example was *The Money Train* in which the behaviour of the two main characters was seen as anti-social and aberrant, yet they were not punished for it. People called this "senseless violence" or "gratuitous violence" which glorified violence for its own sake, and distinguished it from the violence seen, for example, in *Once Were Warriors* which portrayed something closer to real life.

*Once Were Warriors* generated a lot of discussion in almost all of the groups, and was raised without prompting. One Maori man described the film as "a wake-up call for Maori" and many agreed that it mirrored life for many people. Almost all of the participants appeared to have seen the film. In the group of Maori women in Napier who were mothers of children aged 0-12 years, discussion of the film was the catalyst to discuss some of their own experiences. All agreed that the film should be seen by children who could learn a great deal, especially if they watched it with their families and had an opportunity to discuss it afterwards. The violence was permissible, it was felt, because it was not glorified, and because those who were violent suffered serious consequences. In addition, the violence was perceived to be real, and the film showed the effects of violence on a family.

### iv. Sex

Generally, women did not mind sex scenes so long as they were in the context of the story. Almost all the women did not like the *Playboy* clip, although no one articulated clear reasons (some did not mind their husbands watching it, but would not watch it themselves). Some expressed surprise that it had been shown on television. Some of the men noted that it was aimed at them.

The degree of violence combined with sex in the opening scene of *Basic Instinct* came as a surprise to some participants, especially to those who had seen the edited TV3 version. Most seemed to agree that when it was part of the story, it was all right to have sex scenes.

### v. Parent Education

Parents wanted to know the classification of films, although they did not always understand what the symbols meant. Many did not know that viewers under the age of 18 were legally forbidden to watch R18 material. Some thought they were the best judge of what was suitable for their own children and paid little heed to the classifier's symbols. Most agreed that adult material should be on later at night to let children know it was not suitable for them.

Some considered that children should be exposed to the real world via television and that there was no

point in protecting them from everything. Most seemed to know that 8.30pm was the watershed time and took notice of information given at the beginning of a film which indicated the reasons for its classification as AO. Some thought more detail would be helpful (an example was given of an explicit rape scene in the film *Rob Roy* which came unexpectedly and without warning).

When the R18 blocking device was demonstrated, most agreed they would not use it as it would mean adults could not watch that material either. Only one person had the R18 card and she also had a regular Sky card so could choose which one to use.

Most agreed that parents were responsible for what their children watched, although they still had to have sufficient information about what the film contained to make a decision. One group suggested that parents needed to be better educated about the classification system and the effects of certain types of material on children.

Some of the younger people, who had no children, thought that much would go over children's heads and so it did not matter that they watched some adult material.

General trends were commented upon, and there was consensus that standards had been relaxed in recent years, which many believed had a negative effect on society.

## APPENDIX IV — LITERATURE REVIEW

When it began the review of the Pay Television Code, the Authority commissioned a review of the literature on the subject of adult entertainment, particularly soft pornography. Its report, published in 1995, concentrated on material published since the *Report of the Ministerial Inquiry into Pornography in New Zealand* in 1989. The report contained an overview of the reviews undertaken in the United States, Canada, Britain and New Zealand, and examined the effects research and philosophical and judicial perspectives on soft pornography. It is available on request from the Authority. Following is an overview of the major themes in the Literature Review.

### What is Pornography?

The Ministerial Committee observed that the meaning of pornography has been changing rapidly. The dictionary definition<sup>22</sup> is:

Explicit description or exhibition of sexual activity in literature, films etc, intended to stimulate erotic rather than aesthetic feelings.

The Committee chose to adopt a more comprehensive definition which it derived from feminist writings<sup>23</sup>:

*Pornography* refers, therefore, to sexually explicit material which is demeaning or degrading to women (and sometimes to children or men). It eroticises the sexual subordination of women, perpetuating myths about women's sexuality and objectifying women for the pleasure of men. Thus defined, pornography can be seen as having a role in perpetuating sexism in our society; in fact it can be seen as a form of sex discrimination against women since it dehumanises them, presenting them as creatures whose role is to gratify men.

The Authority's literature review focused on sexually explicit images, including those which are fused with violent images, and examined the research on the effects of those images on the attitudes and behaviours of people exposed to them.

### The Availability and Consumption of Pornography

According to the New Zealand Committee of Inquiry, about 90% of the pornography trade comprises:<sup>24</sup>

...film sequences of heterosexual acts of intercourse... however, mainstream pornography also features - as a matter of routine - lesbianism, group sex, anal intercourse, oral-genital contact and visible ejaculation.

As the Committee notes, this material is known as "hard core" pornography, while "soft core" refers to less explicit

pornography which emphasises female nudity and **implies** sexual activity rather than filming it happening in close up. Soft core R-18 material was being broadcast daily in the late evening and early hours of the morning on Sky television in 1995 when this review was commenced.

In the USA, pornography is a \$10 billion a year enterprise, which clearly underscores the fact that many Americans use and enjoy sexual materials. In 1989, Americans bought 9 million copies of *Playboy*, *Penthouse* and *Hustler* each month. Nadine Strossen<sup>25</sup> suggests that pornographic videos are widely credited with helping to make the VCR a household appliance and cites recent surveys which indicate that "adult videos" constitute 30% of all video rentals. She notes that between 1991 and 1993 adult video sales and rentals in general-interest video stores soared 75% to reach \$2.1 billion while the adult-only video outlets were estimated to take in hundreds of millions of dollars more. In addition, sexual words and images are burgeoning on computers via the Internet.

While there are no figures to show the extent of usage in New Zealand, pornographic materials, including books, magazines and videos are readily available from neighbourhood stores as well as general video outlets and adult only stores. The availability of computer pornography is of concern. However, the Authority is only interested in pornography in respect to television services.

### The Report of the Ministerial Committee of Inquiry

The report produced by the New Zealand Ministerial Committee of Inquiry in 1989 was the starting point for the Authority's investigation. Its terms of reference included an examination of the relevant legislation governing films, videos and printed materials with special emphasis on the criteria for determining whether material should be restricted or prohibited and what bodies should be responsible. In making its recommendations, the Committee acknowledged the major impact that feminist thinking had had on its deliberations and agreed with the principles that were central to the Fraser report in Canada. It identified five principles which had been significant in shaping its recommendations:<sup>26</sup>

- 1) *Equality* is a fundamental social principle in our society. Pornography is a symptom of unequal views and attitudes.
- 2) *Responsibility*. Adults are responsible for their actions.
- 3) *Individual liberty*. People have a right to freedom of expression, although that right has to be balanced with the rights of others.
- 4) *Human dignity*. Social policies should foster and enhance human dignity.
- 5) *Appreciation of sexuality*. Adults should be able to enjoy open, caring sexual relationships of mutuality and respect.

<sup>22</sup> Concise Oxford Dictionary, 8th edn, Oxford: OUP 1990

<sup>23</sup> *Pornography*, Report of the Ministerial Committee of Inquiry into Pornography, Wellington, (1989), 28

<sup>24</sup> Ibid, 32

<sup>25</sup> Nadine Strossen, *Defending Pornography: Free Speech, Sex and the Fight for Women's Rights* New York: Scribner (1995), 159

<sup>26</sup> Above n 3, 79

Based on these five principles, the Committee considered that since pornography is one expression of deep-seated sexism, it had to confront both pornography and sexism. It concluded that pornography could be subject to some control through the classification system but that:<sup>27</sup>

sexism is susceptible only to sustained educational and social policies and to community action, all of which are designed to redress social, economic and political inequalities between women and men.

It has been suggested that to effectively address the problems constituted by pornography, society should investigate the reasons why sexist interpretations appeal to certain audiences, thus addressing the antisocial proclivities which create the market for pornography. The real problem is that the cultural climate supports a desire for pornography. Media-related sexism is widespread and it would be useful to learn how much television plays a part in the formation of social attitudes and behaviours in much greater depth.

In making its recommendations to Parliament, the Ministerial Committee suggested that material be classified either as suitable for general use, prohibited, or restricted to certain persons or purposes. It then listed factors to be taken into account when deciding whether a work possesses such overriding merit that its availability would not be likely to be injurious to the public good. Among those considerations were: the dominant effect of the work as a whole; the way in which the work depicts certain themes; the way in which it demeans any class of people; the way in which it depends upon the demeaning portrayal of any person; the extent to which the work has merit; the persons to whom and the circumstances under which the work is most likely to be available and the impact of the medium in which the work is presented. It is relevant to note that many of the Committee's recommendations, including this, were incorporated into the Films, Videos, and Publications Classification Act 1993.

#### **Discrimination against women**

Section 19 of the Bill of Rights Act concerns the right to be free from discrimination on the grounds of sex. It has been argued that the unrestricted showing of certain types of programmes would constitute discrimination since harmful attitudes to women would be encouraged in the community.

The Broadcasting Act itself assumes that some portrayals of women would encourage denigration of them. If the legislature has made that judgment it is not for the Authority to say the link between sexually explicit programmes and discrimination is irrational and unproven. There is sufficient evidence, even if not scientifically compelling, of the link between pornography and "harm" to women, especially when harm is conceived of as the suffering of discrimination rather than violence.

According to Cass Sunstein,<sup>28</sup> there is good reason for regulating some pornographic materials. She identified three harms which she considered justified

regulation: many young women are coerced into the industry; there is a causal connection between pornography and violence against women; and finally, pornography fosters behaviour against women which is degrading and dehumanising and includes illegal conduct.

Diana Russell<sup>29</sup> suggests that pornography predisposes men to want to rape women or intensifies the predisposition in others and undermines some men's internal and social inhibitions against acting out their desire to rape. Her research concluded that both violence and non violent pornography caused rape and other sexual assault.

While it is simplistic to suggest that the watching of pornography causes men to go out and rape women, there is a clear link between pornography and anti-women behaviour. Pornography is a form of sex discrimination which is part of the process of women's inequality because it endorses and reinforces the existing power imbalance between men and women.

The Courts in New Zealand and in Canada and the US have been prepared to make a link between pornography and harm. The Broadcasting Act sets out a low threshold of harm (denigration and discrimination) and the Authority can make restrictions on material because it breaches s.21(1)(e)(iv). Restrictions on adult entertainment are not ruled out because of the Bill of Rights. Since the Act specifically identifies harm to women as a matter to be included in a code of practice, the Authority is obliged to apply the code and to implement the Act.

#### **Recent Research**

Over the last 25 years, there has been a great deal of research into the effects of pornography. In part, this has been in response to the proliferation of materials and easy access to pornography, and in part due to a concern that the association of violence with sexuality influences the way we as individuals deal with aggression. The subject is controversial and arguments on all sides are compelling.

Researchers in the USA have examined the links between attitudes to women and sexual aggression and the media. According to Malamuth and Donnerstein,<sup>30</sup> there is now considerable evidence to indicate that exposure to pornography affects perceptions and interpretations of rape and rape victims. Other studies have shown that aggressive pornography decreases sympathy towards rape victims, increases stereotypes about women's sexuality and promotes negative attitudes to women. The material seems to reinforce and legitimate already held beliefs about sexuality and power.

In their research on sexually explicit materials and aggressive behaviour, Malamuth and others concluded that violent pornography is likely to influence viewers because they are more likely to become desensitised to violence when it is presented in a sexual context. Furthermore, it

<sup>27</sup> Above n 23, 81

<sup>28</sup> Cass Sunstein, *Democracy and the Problem of Free Speech* New York: The Free Press (1993), 215

<sup>29</sup> Diana Russell, "Pornography and Rape: A Causal Model" in Itzin, Catherine ed *Pornography: Women, Violence and Civil Liberties*, Oxford: OUP (1992) 321

<sup>30</sup> Neil Malamuth and Edward Donnerstein *Pornography and Sexual Aggression* Orlando: Academic Press (1984)

may result in a conditioning process which results in viewers being sexually aroused by violence. The findings of these and other researchers supports the theory that the aggressive content of pornography is a major contributor to subsequent aggression to women and that this is particularly true when the aggression is coupled with positive consequences for the aggressor.

While certain preconditions must exist, repeated exposure to violent pornography increases the likelihood that it will foster rape and sexual abuse fantasies and desires in some who view it. Pornography plays a role in overcoming internal barriers by seeing the women portrayed as either “enjoying” or “deserving” rape or sexual abuse and the behaviour is further legitimised by its distribution on film or video.

Cass Sunstein<sup>31</sup> identifies three harms which she considers justify the regulation of pornography. First, many young women are coerced into the industry, second, a review of the literature suggests that there is a causal connection between pornography and violence towards women, and finally, that pornography fosters behaviour toward women which is degrading and dehumanising and includes illegal conduct.

Other researchers<sup>32</sup> who investigated R-classified videos discovered that they contained a higher percentage of aggressive scenes and more severe and graphic forms of aggression than X-classified videos. They expressed concern about the availability of such material to children and noted that with pay television, children had the opportunity to view problematic films several times in a given month, and that with video recorders they are able to view movies repeatedly and to select and replay scenes. This is in contrast with adult films at the cinema, where children are barred from entry. The research concludes that because of the widespread availability of R-classified movies on video and on pay television, young viewers are more likely than ever to encounter violence, especially sexual violence, on the television screen at home.

A review of the research published in 1986<sup>33</sup> concluded that there are no harmful effects from non-violent, sexually explicit materials. although there may be harmful effects from aggressive materials. Sexually explicit material in itself is not implicated in fostering negative attitudes or behaviour, unless it is combined with violent images

Some of the conclusions of the US Surgeon General's Report entitled Pornography and Public Health were:

- Children and adolescents who participated in the production of pornography experience adverse enduring effects.
- Prolonged use of pornography increases beliefs that less common sexual practices are common.
- Pornography which displays sexual aggression as pleasurable for the victim increases the acceptance of the use of coercion in sexual relations.
- Acceptance of coercive sexuality appears to be related to sexual aggression.
- In laboratory studies measuring short term effects, exposure to pornography increases punitive behaviour towards women.

Philosophical perspectives on pornography are divided. Some argue that it should be outlawed entirely, while others, opposed to censorship in principle, consider that an educational strategy should be developed which combines sex education and the development of positive alternatives to aggressive pornography. Even among those who oppose censorship, there is an acknowledgment that restraints on the production of child pornography and the protection of children from pornography are justified limits on freedom of speech.

The Authority's task is to interpret the Broadcasting Act and to develop a code which limits the freedom of broadcasters only to the extent reasonably necessary to attain the objectives of the Act.

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<sup>31</sup> n 28

<sup>32</sup> Ni Yang and Daniel Linz “Movie Ratings and the content of adult videos: The Sex-Violence Ratio” *Journal of Communications* (1990) 28-42

<sup>33</sup> Edward Donnerstein and Daniel Linz “Mass Media Sexual Violence and Male Viewers: Current Theory and Research” *American Behavioral Scientist* (1986) Vol 29(5) 601-618

## APPENDIX V — INTERNATIONAL EXPERIENCE

Systems concerned with the regulation of R-classified or equivalent material on pay television internationally are as diverse as the measures seeking to classify media content. Modes of regulation vary, and include the no regulation, free market approach to censorship, imposition of watershed hours and labelling systems and use of disabling devices. While regulation is secured in some countries by way of legislation, self-regulation remains the most common form of management of this material.

### United States

The US pay television system functions under a relatively free market approach. In recent times however, pressure has been brought to bear on pay TV companies to reduce excessive levels of televised violence and sex, with national surveys showing that nearly two thirds of American adults find violence and sex themes on television offensive.

There have been initiatives to introduce legislation to enforce the provision of disabling devices to give parents power to block access to children (V-chip and other technologies) but while many groups supported those initiatives, they leaned towards self-regulation through the establishment of voluntary guidelines. It appears that pay operators are responding to public concerns by voluntarily offering control devices, better labelling and more information to subscribers.

Criticism of disabling devices - either to block out whole channels or particular programmes - are that they are expensive, difficult to use and unlikely to be used.

### Canada

Licensees are responsible for ensuring that no material shall be selected that is contrary to law or offensive to general community standards. They appear to be making every effort to adhere to this industry code. Programme advice to viewers includes: warnings in programme guides; simple letter classifications in pay television guides for all programmes; and on-air warnings at the beginning of programmes, where appropriate.

Self-regulation appears to be working successfully in Canada.

### France

Satellite broadcasting complicates the regulation of R-classified material on television in Europe.

In France, there is a balance between freedom of expression and the imperative of safeguarding children and adolescents which, along with the concept of "compliance with the dignity of the human being" are the only grounds on which the authorities can intervene over the content of programmes. A landmark decision in 1989 ruled that a film forbidden to children under 16 had to be moved from its 8.30pm timeslot to 10.30pm. When that decision was appealed, the Court ruled that because of the nature of the countless scenes of sexual perversion, the broadcaster was given the ultimatum not to screen the film before 10.30pm or pay a fine of 1

million francs. The decision was significant because it made the 10.30pm time slot virtually the official watershed; and although the law could impose a particular transmission time, it could not ban or censor the material.

The CSA (Conseil Supérieur de l'Audiovisuel) regulates French broadcasting and ruled that the film classification categories were to be the same on television. Hence, films forbidden to under 12s were not to be shown before 10.00pm and those forbidden to under 16s not before 10.30pm. The showing of X-rated films and cinema films banned to the under 18s is only permitted on an encrypted service which has additional access limitations (PIN code or card) and there are very precise scheduling restrictions (midnight to 5.00am).

### United Kingdom

Watershed hours on pay television differ from on terrestrial broadcasts. More lenient regulations allow films suitable for those 15 years and over to be screened on pay television at 8.00pm rather than 9.00pm as on free-to-air. This concession is subject to such factors as the degree of violence and sex depicted.

Films given an R18 classification (materials deemed pornographic and relegated to licensed sex shops) are banned from screening at any time. However these materials can be beamed into the UK via satellite, by-passing government regulations (eg Red Hot Dutch).

Satellite subscribers are able to use a smart card which has the capacity to block out various channels. That safeguard is unavailable to cable subscribers (at time of report in 1991).

### Australia

Research conducted by the Australian Broadcasting Authority prior to the introduction of pay television services there found that 82% of Australians who participated in the national survey thought that R-classified material should be allowed on pay television in the home. There was strong support for restrictions and controls on R-classified material, including restricting the times and making available effective disabling devices to prevent children and teenagers from watching R-classified material.

The Senate Select Committee expressed concerns about aspects of the project and decided that the conclusions were flawed because of problems with the design of the survey. It recommended that R-classified material not be allowed on pay television. It wrote:

The matters of greatest concern to the Committee related to the depictions of violence and sexual violence which negatively reinforce in males that women are mere possessions on whom violent behaviour is acceptable. The Committee is also concerned about exploitative sexual material which, while physically non-violent, is degrading, demeaning and treats women as sexual commodities, which engenders in men the attitude that women are always sexually available. Such attitudes reinforce stereotypes which may lead to anti-social behaviour. They are therefore a matter

of concern to society and the resolution of the problem properly involves the government.

Recently, the pay television company Galaxy began transmission of adult programmes in Australia. It is limited to late night transmission of R-rated programmes (X-rated programmes are banned completely) which can only be accessed by using a PIN number. Open (free-to-air) narrowcasting services (such as community access television) is subject to the same regulations that apply to commercial television services.

## **Conclusion**

Most countries similar to New Zealand have some controls on R-classified material on pay television services. Usually, such material is not permitted on free-to-air services, but is permitted on pay television, often at second tier level, and at prescribed times (after 10.30pm or after midnight). Mandatory child protection devices and warnings seem to be required in most countries. Comprehensive consumer advice and parent education are important adjuncts.

