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Freedom of expression and good taste and decency in television: Blurring the line between
offence and harm

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**FREEDOM OF EXPRESSION AND GOOD TASTE
AND DECENCY IN TELEVISION:
BLURRING THE LINE BETWEEN OFFENCE AND
HARM**

LLB (HONS) RESEARCH PAPER

LAWS 520 CENSORSHIP AND THE FREEDOM OF EXPRESSION

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ABSTRACT

Freedom of expression is regarded as a fundamental right in a free and democratic society. Freedom of expression in broadcasting media is often subject to stricter forms of regulation than other media of communication. In New Zealand, the Broadcasting Act 1989 still imposes a good taste and decency standard on freedom of expression, which in today's pluralistic society appears to be an outmoded and overly paternalistic restriction. This paper analyses and evaluates the standard and its shortcomings in the context of television. The practical application of the standard is analysed as well as how the standard operates in the broader broadcasting environment. The paper recommends replacing the good taste and decency standard with a standard of avoiding offensive and harmful material. A harm and offence standard overcomes the practical and inherent flaws of a good taste and decency standard while enabling the underlying justifications of freedom of expression to be better fulfilled for the benefit of a diverse and liberal democracy.

Word count: The text of this paper (excluding abstract, table of contents, footnotes, bibliography and appendices) comprises approximately 14,660 words.

Freedom of expression - good taste and decency - harm and offence - television

Freedom of expression in broadcasting media is often subject to stricter forms of regulation than other media of communication. In New Zealand, the Broadcasting Act 1989 still imposes a good taste and decency standard on freedom of expression which a pluralistic society argues to be an outdated and overly prescriptive restriction. This paper analyses and evaluates the standard and its consequences in the context of television. The practical application of the standard is analysed as well as how the standard operates in the broader broadcasting environment. The paper recommends replacing the good taste and decency standard with a standard of avoiding offensiveness and harmful material. A limited offence standard overcomes the practical and abstract flaws of a good taste and decency standard while enabling the upholding of the right of freedom of expression to be better fulfilled for the benefit of a diverse and liberal democracy.

Word count: The text of this paper including abstract table of contents footnotes bibliography and appendices comprises approximately 14,000 words.

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I INTRODUCTION

Freedom of expression is regarded as a fundamental right in a free and democratic society. The right is exercised through numerous forms of media, but the most pervasive is arguably that of television. Television has become a member of the family home, making it an outlet for freedom of expression 24 hours a day. However, while broadcasters have a right to freedom of expression, the right is not unlimited. The Broadcasting Act 1989 imposes content-based restrictions on broadcasters limiting their freedom of expression.¹ This paper focuses on the responsibility of broadcasters to maintain standards of good taste and decency.²

It has been said that we live in what is generally regarded as a crass culture.³ In today's media marketplace, in which consumers choose from an expanding array of entertainment options, the need to stand out drives programming decisions and "the climb to the top of the ratings is turning into a race to the bottom of the barrel."⁴ In this light, the standard of good taste and decency might be viewed by some as having a role of particular importance in today's society. On the other hand, some might hold the view that broadcasters have a right to broadcast programmes that may be considered to be crass or crude, but that are nevertheless popular and profitable, as long as they are not harming anyone. On this view, imposing a standard of good taste and decency arguably places too great a restriction on broadcasters' freedom of expression.

Generally, issues of taste and decency concern the portrayal of sex and nudity, the use of bad language, and the depiction of violence. The core of the good taste and decency standard is to avoid causing offence rather than avoiding harm, but this paper

¹ Broadcasting Act 1989, s 4(1). "Broadcasting" in the Broadcasting Act 1989 refers to both television and radio broadcasting. However, as this paper focuses on television, references to "broadcasting" and "broadcaster" will be used in respect of television only, specifically, free-to-air television.

² Broadcasting Act 1989, s 4(1)(a); Broadcasting Standards Authority "Free-to-air Television Code of Broadcasting Practice" (Wellington, 2006) standard 1.

³ Hillard, Robert and Michael Keith *Dirty Discourse: Sex and Indecency in Broadcasting* (2 ed, Blackwell Publishing, Malden, USA, 2007) 117.

⁴ *Ibid*, 124-125.

questions whether offence-avoidance is an appropriate basis on which to restrict freedom of expression in today's broadcasting environment.

The paper begins with a brief introduction to television as a medium of communication in New Zealand and then provides an overview of freedom of expression theories and their application and regulation in the broadcasting context. The paper then looks at the good taste and decency standard and the issues surrounding its application in New Zealand's broadcasting environment. Using guidance from the United Kingdom broadcasting legislation and New Zealand's censorship regime the paper proposes that a harm and offence standard be enacted to replace the good taste and decency standard. The final part of the paper takes a theoretical turn and analyses the two standards in the framework of whether the law should intervene to protect morality or to prevent causing harm to others.

The paper concludes that the good taste and decency standard is difficult to apply as well as being inherently flawed: the ability of broadcasters to influence the boundaries of the standard undermines its purpose of acting as a check on broadcasters' freedom of expression. The objectivity of a harm and offence standard overcomes these problems and represents the smallest restriction on freedom of expression necessary to justifiably protect viewers. Moreover, in a diverse and liberal society freedom of expression in television should be regulated on the basis of preventing harm rather than preventing offence. Ultimately, the paper proposes that the standard of good taste and decency be replaced with a standard of avoiding offensive and harmful material.

II TELEVISION

Television reaches 99 per cent of New Zealand households.⁵ The main free-to-air television networks are Television New Zealand, MediaWorks, Maori Television Service, and Freeview. In a national survey carried out by the Broadcasting Standards Authority

⁵ Ministry of Culture and Heritage *Digital Broadcasting: Review of Regulation Volume 1* (Wellington, 2008) para 3.2.2.

("BSA") in 2005 only three per cent of respondents did not watch television.⁶ On average per week, 51 per cent of respondents watched up to 15 hours of television, 23 per cent watched between 15 to 21 hours, and the remaining 23 per cent watched over 21 hours.⁷ Television has become another member of the family; people watch television for purposes of entertainment, education, or even companionship.

With the amount of time spent watching television people often feel that it must have some kind of effect on the audience and as such it has tended to be the scapegoat for the social ills of society.⁸ The effects of television are often debated, though it has been described as a "heated rather than an enlightened one."⁹ Nevertheless, there exists a large body of research to indicate that television does exert a persuasive influence over its viewers.¹⁰ However, it must also be recognised that television operates in complex social settings and it is not the only source of influence over individuals.¹¹ Ultimately, even if television does exert a persuasive influence on its viewers, people are not forced to watch television – the 'off' switch is always available.¹²

III FREEDOM OF EXPRESSION IN BROADCASTING

The right to freedom of expression is enshrined in section 14 of the New Zealand Bill of Rights Act 1990. It provides that "[e]veryone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions

⁶ Broadcasting Standards Authority *Freedoms and Fetters: Broadcasting Standards in New Zealand* (Dunmore Publishing, Wellington, 2006) 90.

⁷ *Ibid.*

⁸ Halloran, James "Introduction: Studying the Effects of Television" in Halloran, James (ed) *The Effects of Television* (Panther Books Limited, London, 1970) 9.

⁹ *Ibid.*, 12.

¹⁰ See generally, Barwise, Patrick and Andrew Ehrenberg *Television and its Audience* (Sage Publications Limited, London, 1988); Groombridge, Brian *Television and the People: A Programme for Democratic Participation* (Penguin Books Ltd, Middlesex, England, 1972); Halloran, James (ed) *The Effects of Television* (Panther Books Limited, London, 1970); Hawkins, Robert P and Suzanne Pingee "Using Television to Construct Social Reality" (1981) 25 *Journal of Broadcasting* 347; Lemish, Dafna *Children and Television: A Global Perspective* (Blackwell Publishing Ltd, Oxford, 1997); Pfau, Michael "A Channel Approach to Television Influence" (1980) 34(2) *Journal of Broadcasting & Electronic Media* 195.

¹¹ Halloran, James "The Social Effects of Television" in Halloran, James (ed) *The Effects of Television* (Panther Books Limited, London, 1970) 55.

¹² But see "Introduction: Studying the Effects of Television", above n 8, 9: Halloran notes that television is often painted as "an all-powerful, all pervasive, manipulating force which is entirely outside their control."

of any kind of any form.” This definition recognises that freedom of expression is a right of both the speaker and of the audience. Sometimes, punishing expression violates the right of the audience without necessarily violating the right of the speaker and so it is important to recognise that the speaker’s and the audience’s rights are separate to ensure that each can be afforded adequate protection.¹³ The section 14 definition, however, does not explain why the right to freedom of expression deserves protection.

A Justifications of Freedom of Expression

Not all philosophers and lawyers agree about the justifications of free speech, but there are four arguments commonly put forward in support of it. These are self-fulfilment and autonomy, discovery of truth, contribution to the democratic process, and distrust of government.¹⁴ The free speech justifications apply to individual speakers as well as to the media,¹⁵ including broadcasters.¹⁶ As a type of mass media, expression in television is very powerful and has the ability to satisfy all of the free speech theories.

The theories of self-fulfilment and autonomy are interrelated though not necessarily identical.¹⁷ The justification of autonomy asserts that matters of moral choice must be left to the individual; individuals must be free to weigh the arguments put before them.¹⁸ Under self-fulfilment, individuals must be free to air views and ideas in free debate with each other to be able to develop morally and intellectually.¹⁹ These theories

¹³ See Alexander, Larry *Is there a Right of Freedom of Expression?* (Cambridge University Press, New York, 2005) 8. See also Barendt, Eric *Freedom of Speech* (2 ed, Oxford University Press, New York, 2005) 25.

¹⁴ These theories are not absolute but a full analysis of free speech theories is beyond the scope of this paper and so only the essence of the theories will be discussed. For further discussion about free speech theories, see Alexander, Larry, above n 13, ch 7; *Freedom of Speech*, above n 13, ch 1; Fenwick, Helen and Gavin Phillipson *Media Freedom under the Human Rights Act* (Oxford University Press, New York, 2006) 12-19; Greenwalt, K “Free Speech Justifications” (1989) 89 *Columbia L Rev* 119; Raz, Joseph “Free Expression and Personal Identification” (1991) 11 *OJLS* 303.

¹⁵ Fenwick, Helen and Gavin Phillipson, above n 14, 20-32; Hitchens, Lesley *Broadcasting Pluralism and Diversity: A Comparative Study of Policy and Regulation* (Hart Publishing, Portland, Oregon, 2006) 32.

¹⁶ Alexander, Larry, above n 13, 8. See generally Barendt, Eric *Broadcasting Law: A Comparative Study* (Oxford University Press, New York, 1993), ch 2.

¹⁷ Fenwick and Phillipson discuss the two theories separately: above n 14, 13 & 18. But see Alexander, Larry, above n 13, 130-132, *Freedom of Speech*, above n 13, 13-18.

¹⁸ Fenwick, Helen and Gavin Phillipson, above n 14, 13.

¹⁹ *Ibid*, 18.

view free speech as an integral aspect of each individual's right to self-development by empowering them to make their own decisions in respect of the information put before them.²⁰ Programme genres such as dramas and soap operas often incorporate moral issues into their storylines. These issues, though presented in a fictional setting for the purpose of entertainment, enable viewers to exercise their own judgement as to what they believe to be the correct outcome or decision. Current affairs programmes educate viewers on contemporary social issues and enable them to become reflective individuals in society. In other words, television can empower viewers to become autonomous decision-makers in pursuit of self-fulfilment.

Another justification of free speech is the importance of open discussion to the discovery of truth. This theory sees the freedom to disseminate new information and to criticise prevailing views as necessary for the elimination of misconceptions of fact and value.²¹ Linked to the discovery or promotion of truth is the 'marketplace of ideas' argument, that is, that the truth would emerge in a free trade of ideas or intellectual competition.²² The vast reach of television assists in disseminating ideas, information, and opinions in the search for truth.

The third theory is the contribution to democracy. The argument is that citizens cannot participate fully in a democracy unless they have a reasonable understanding of political issues. Therefore, access to information bearing upon the performance of government and open debate on such matters is essential.²³ Notwithstanding its entertainment role, television has an important function in providing information and facilitating and promoting public debate, which is seen as essential to the proper functioning of a democracy.²⁴ The news, documentaries, and other investigative journalism programmes highlight social issues in a factual setting that might question the actions of government and raise accountability issues. Even programmes intended purely

²⁰ *Freedom of Speech*, above n 13, 13.

²¹ Alexander, Larry, above n 13, 128-130. See also *Freedom of Speech*, above n 13, 7-13.

²² *Ibid.*, 11.

²³ Fenwick, Helen and Gavin Phillipson, above n 14, 16.

²⁴ Hitchens, Lesley, above n 15, 31-32. See generally Groombridge, Brian, above n 10.

for entertainment purposes might reflect social and political issues, such as the treatment of minorities, which turn viewers' minds to the issues and to the actions of government.²⁵

Finally, the distrust of government is another common justification for free speech. This theory is based on the premise that the government cannot be trusted to regulate expression, either because it is error-prone in assessing the harms and benefits of expression or because it has motives for regulating that render it untrustworthy in doing so.²⁶ The theory of distrust of government is a negative argument for free speech in that it highlights the evils of regulation, rather than the good of free speech.²⁷ Thus, this theory promotes free speech in television simply because the government cannot be trusted with its regulation.

These theories, though persuasive, are not absolute and sometimes restrictions and regulation are necessary. For example, regulation might be needed where messages cause harm to others.²⁸ Sometimes regulation can even promote the free speech theories. The positive theories of free speech depend on speakers gaining access to broadcasters to transmit their information, ideas, and opinions. However, the right to freedom of expression does not generally carry a right of access to the broadcast media.²⁹ Sometimes the broadcast market is dominated by the agenda of a few powerful corporate players, creating a 'false' marketplace.³⁰ Regulation can prevent the dominance of the market by such players to create a real market place of ideas: a true market place that fosters diversity by exposing the audience to a range of ideas in public interest debates.³¹ Regulation can be structural, that is, regulation that attempts to engineer the environment within which broadcasting operates to ensure a certain number and range of voices in the market.³² Alternatively, regulation can be content-based, that is, regulatory measures

²⁵ See Hitchens, Lesley, above n 15, 32 & 152.

²⁶ Alexander, Larry, above n 13, 145.

²⁷ *Freedom of Speech*, above n 13, 21.

²⁸ See generally, Alexander, Larry, above n 13, ch 4.

²⁹ See Hare, Ivan "Debating Abortion – the Right to Offend Gratuitously" (2003) 62(3) CLJ 525, 527.

³⁰ Fenwick, Helen and Gavin Phillipson, above n 14, 560.

³¹ *Ibid.* See also Feintuck, Mike and Mike Varney *Media Regulation, Public Interest and the Law* (2 ed, Edinburgh University Press Ltd, Edinburgh, 2006); Hitchens, Lesley, above n 15.

³² *Ibid.*, ch 2.

focused on what is offered by individual broadcasters in respect of programming generally or the presentation of content in particular situations.³³

B Regulation of Broadcasting in New Zealand

The Broadcasting Act 1989 (“the Act”) contains content-based regulations that impose certain responsibilities on broadcasters regarding programmes and their presentation. These responsibilities represent limitations on broadcasters’ freedom of expression³⁴ and are set out in section 4 of the Act:

- (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
 - (b) The maintenance of law and order; and
 - (c) The privacy of the individual; and
 - (d) The principle that when controversial issues of public importance are discussed, reasonable efforts are made, or reasonable opportunities are given, to present significant points of view either in the same programme or in other programmes within the period of current interest; and
 - (e) Any approved code of broadcasting practice applying to the programmes.

An example of a code made pursuant to section 4(1)(e) of the Act is the Free-to-air Television Code of Broadcasting Practice (“the Free-to-air Television Code”).³⁵ The New Zealand Television Broadcasters’ Council on behalf of TV One, TV2, TV3, C4, Prime, Maori Television, and other free-to-air services prepared the code. It contains 11 standards; the public may bring complaints alleging that a broadcaster has failed to maintain one or more of the standards in their programmes.³⁶

³³ Ibid, ch 4.

³⁴ *Browne v CanWest TV Works Ltd* [2008] 1 NZLR 654, para 27 Wild J (HC).

³⁵ “Free-to-air Television Code of Broadcasting Practice”, above n 2.

³⁶ See appendix 1 for a full list of the Free-to-air Television Code’s standards.

The Act established the BSA, which is responsible for administering and enforcing programming standards.³⁷ Complaints must first be made to the broadcaster concerned, with recourse to the BSA if the complainant is dissatisfied.³⁸ The one exception is an allegation of breach of privacy, which can be made directly to the BSA.³⁹ The board of the BSA comprises four people responsible for hearing and determining complaints and it can impose various orders if a complaint is upheld.⁴⁰

The New Zealand broadcasting regime operates a post-release complaints system. The BSA may make a determination about a programme only if it receives a complaint;⁴¹ it does not have the power to investigate a programme on its own instigation.⁴² Thus, the BSA relies on the community to be proactive in helping to maintain broadcasting standards. However, a post-release complaints system might be seen as undesirable in that by the time a complaint is made the harm or reason for bringing the complaint has already occurred.⁴³ For example, if the complaint concerned an invasion of privacy,⁴⁴ bringing the complaint would be too late to prevent that particular invasion of privacy. Nevertheless, the system of post-release complaints has been retained.

The BSA also conducts research and surveys to gauge society's attitudes towards certain broadcasting issues.⁴⁵ The BSA's national survey in 2005 revealed that New Zealanders' most frequently cited concerns in respect of television content are violence, sex, and bad language.⁴⁶ In other words, issues of good taste and decency are high on the

³⁷ Broadcasting Act 1989, ss 20-21. For more information about the BSA visit www.bsa.govt.nz.

³⁸ Broadcasting Act 1989, ss 5(a) and 8.

³⁹ *Ibid*, s 8(1A).

⁴⁰ *Ibid*, s 13 & 26.

⁴¹ See *ibid*, s 10.

⁴² There was a question as to whether in order for the BSA to be more proficient it ought to have greater powers of investigation but the post-release complaints system was retained: Broadcasting Bill (13 December 1988) 495 NZPD 8826, 8831.

⁴³ Compare with the pre-release censorship regime in respect of films under Part 2 of the Films, Videos, and Publications Classification Act 1993.

⁴⁴ Broadcasting Act 1989, s 4(1)(c).

⁴⁵ See *ibid*, s 21(1)(h). For example see *Freedoms and Fetters: Broadcasting Standards in New Zealand*, above n 6; Dickinson, Garry, Michael Hill and Wiebe Zwaga *Monitoring Community Attitudes in Changing Mediascapes* (Dunmore Press Ltd, Palmerston North, 2000).

⁴⁶ *Freedoms and Fetters: Broadcasting Standards in New Zealand*, above n 6, 93. These concerns consistently appear in the top-ranked concerns. For example see Broadcasting Standards Authority *Annual Report 1993* (Wellington, 1993) 13.

list of concerns for the New Zealand public. The next part of this paper looks at the good taste and decency standard and how it operates in the New Zealand broadcasting environment.

IV GOOD TASTE AND DECENCY

As the Broadcasting Bill progressed through Parliament little was mentioned of the good taste and decency standard and there was no specific reason given for its inclusion.⁴⁷ There were concerns, however, that deregulation would bring about a drop in standards and that "cheap films containing sex and violence" would be introduced.⁴⁸ It is likely that the standard was introduced to deal with concerns along these lines. Generally, issues of good taste and decency concern the use of language, the portrayal of sex and nudity, violence, and other material that is considered to be offensive to the complainant.⁴⁹

A What is Good Taste and Decency?

Good taste and decency is a fluid and subjective concept.⁵⁰ The standard is difficult to conceptualise because it depends on society's changing attitudes.⁵¹ While good taste and decency appears as a single concept, it does not necessarily represent a single phenomenon.⁵² Taste is ephemeral and a matter of manners and fashion, which by its nature is capable of rapid change.⁵³ It follows that good taste has an elusive quality; it

⁴⁷ See Broadcasting Bill (13 December 1988) 495 NZPD 8830; (4 May 1989) 497 NZPD 10404; (16 May 1989) 498 NZPD 10498.

⁴⁸ *Ibid.*, 10522.

⁴⁹ See *Freedoms and Fetters: Broadcasting Standards in New Zealand*, above n 6, 76. See Robertson, Geoffrey and Andrew Nicol *Robertson & Nicol on Media Law* (4 ed, Sweet & Maxwell, London, 2002) 805-806 in respect of the type of content that the good taste and decency standard regulated under the United Kingdom broadcasting legislation. See also Shaw, Colin *Deciding What We Watch: Taste, Decency, and Media Ethics in the UK and the USA* (Oxford University Press, New York, 1999) 40-42.

⁵⁰ Hargrave, Andrea and Sonia Livingstone *Harm and Offence in Media Content* (Intellect Books, Bristol, 2006) 24.

⁵¹ See *Freedoms and Fetters: Broadcasting Standards in New Zealand*, above n 6, ch 5. See also "Free-to-air Television Code of Broadcasting Practice", above n 2, 4.

⁵² Shaw, Colin, above n 49, 32. See generally, *ibid.*, ch 3.

⁵³ *Ibid.*

has been described as being easier to recognise by its absence than its presence.⁵⁴ Decency, on the other hand, touches on something more profound and permanent – it is recognition of common humanity. Decency has been described as:⁵⁵

... the preservation of individual human dignity through the regard owed by one human being to another. A sense of decency, giving us an understanding of the moral worth of an action, provides the rules by which most of us, in every society, try to live.

The definition of 'indecent' as used in the criminal law provides some assistance. Indecency is not concerned with harm in any demonstrable sense, but rather is concerned with the outrage to public susceptibilities.⁵⁶ Indecency is an unnecessary affront to people's sense of propriety and relates to what is likely to shock, disgust, or revolt ordinary people.⁵⁷

In essence, notions of morality underpin the standard of good taste and decency. The standard expects broadcasters to operate in a manner that upholds community standards pertaining to moral conduct and behaviour.⁵⁸ It follows that standards of taste and decency in any society do not exist in isolation from the prevailing morality in that society.⁵⁹ Thus, the purpose of the standard is to avoid causing offence, rather than avoid causing harm, by broadcasting content that falls below the prevailing level of morality in society.

It is thus understandable why good taste and decency complaints often concern the portrayal of sex, bad language, and violence: these issues engage some individuals' moral conscience. Some viewers are offended by certain depictions of such conduct because they find it to be immoral. Many viewers find bad language to be personally offensive and are also concerned about the harm caused to young people by the use of

⁵⁴ Ibid, 33.

⁵⁵ Ibid.

⁵⁶ *Robertson & Nicol on Media Law* (2002), above n 49, 199.

⁵⁷ Ibid.

⁵⁸ Hillard, Robert and Michael Keith, above n 3, IX.

⁵⁹ Shaw, Colin, above n 49, 1.

offensive language.⁶⁰ For example, some people hold the view that the inability to control language could cause children problems in social and professional situations later in life.⁶¹ The portrayal of sex on television also receives a lot of criticism.⁶² The portrayal of sex, which each family member might find quite bland if seen alone, can become upsetting or embarrassing when viewed together by the family, especially if it includes much younger or much older viewers.⁶³ Sex is perceived generally to be a private and intimate matter and its portrayal on television can thus be offensive to some viewers.⁶⁴

B The Guidelines

The Free-to-air Television Code contains guidelines to assist viewers, broadcasters, and the BSA in applying its standards to specific complaints. The good taste and decency standard's guidelines in the code state that "broadcasters must take into consideration current norms of decency and taste in language and behaviour."⁶⁵ The flexibility in the standard and its ability to change according to community attitudes is a necessary feature of the standard since what constitutes good taste and decency depends entirely on community attitudes. In other words, the standard is measured against a dynamic setting. The BSA is the arbiter of taste in respect of whether broadcasters have complied with the standard.⁶⁶ To ensure that its decisions represent community values the BSA draws on its research in making its decisions.

⁶⁰ *Freedoms and Fetters: Broadcasting Standards in New Zealand*, above n 6, 100; Office of Film & Literature Classification "Public Perceptions of Highly Offensive Language" (2007) 10 www.censorship.govt.nz (accessed 19 September 2008); Office of Communications "Language and Sexual Imagery in Broadcasting: A Contextual Investigation" (2005) 11 www.ofcom.gov.uk (accessed 19 September 2008); Hargrave, Andrea "Delete Expletives?" (2002) www.ofcom.org.uk (accessed 19 September 2008); Broadcasting Standards Commission "Bad Language – what are the limits?" (1998) www.ofcom.org.uk (accessed 19 September 2008). See generally, Shaw, Colin, above n 49, ch 4 & 6.

⁶¹ "Public Perceptions of Highly Offensive Language", above n 60, 10.

⁶² "Language and Sexual Imagery in Broadcasting: A Contextual Investigation", above n 60, 49-69. Broadcasting Standards Authority *Annual Report 1993* (Wellington, 1993) 12. See generally, Shaw, Colin, above n 49, ch 5.

⁶³ Barwise, Patrick and Andrew Ehrenberg, above n 10, 143.

⁶⁴ *Ibid.*, 50.

⁶⁵ "Free-to-air Television Code of Broadcasting Practice", above n 2, 4.

⁶⁶ See Broadcasting Bill (13 December 1988) 495 NZPD 8830.

Another tier to the decision-making process involves the consideration of context. The context of the broadcast is crucial because conduct is not a priori offensive or inoffensive. The context includes the time of the broadcast, type of programme, target audience, use of warnings, and the programme's classification.⁶⁷ For example, a complaint about the use of expletives in a programme rated G at 7:30pm would be treated differently to if it were used in a programme rated AO at 9:30pm.⁶⁸ The contextual considerations make each programme a somewhat defined and unique package, making comparisons between good taste and decency decisions difficult.

Generally, a relatively high threshold is placed on the enforcement of the standard.⁶⁹ The BSA justifies this approach by the need to give effect to freedom of expression under the New Zealand Bill of Rights Act 1990.⁷⁰ This approach places a degree of responsibility on viewers as to what they decide to watch. The purpose of the good taste and decency standard is not to prohibit any challenging material or material that may merely offend some people. Rather, it is to ensure that sufficient care is taken so that challenging material is played only in an appropriate context.⁷¹ However, there will be material that the BSA deems to be so offensive that it is unacceptable regardless of context. That is, there are bottom lines that the BSA will not allow to be crossed.⁷² For example, scenes containing explicit sex, gratuitous violence, or highly offensive language will test those boundaries.⁷³

The programme *Eating Media Lunch* is an example of where the BSA held that the content fell below the bottom line limits. *Eating Media Lunch* is a series that lampoons aspects of both the New Zealand and overseas media. In *TVNZ v Morrish and Valenta*⁷⁴ the complaint concerned an item on the show that presented the "Fuck News".

⁶⁷ "Free-to-air Television Code of Broadcasting Practice", above n 2, 4.

⁶⁸ See *Freedoms and Fetters: Broadcasting Standards in New Zealand*, above n 6, 77.

⁶⁹ *Ibid.*, 73.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.* The BSA has also discussed these bottom lines in a number of decisions, for example *TVNZ v Payne et al* (2004-015-018) para 35; *TVNZ v Morrish and Valenta* (2005-137) paras 27-29; *CanWest TVWorks v 35 Complainants* (2006-022) para 109.

⁷³ *Freedoms and Fetters: Broadcasting Standards in New Zealand*, above n 6, 74-75.

⁷⁴ *TVNZ v Morrish and Valenta*, above n 72.

The item showed two partly dressed presenters who seemed to be having sexual intercourse while reading the news and who then went on to perform other explicit sexual acts. The BSA accepted that a number of contextual factors favoured the broadcaster's position, such as the time of broadcast at 10:00pm and its AO classification. However, the BSA acknowledged that the context will not always be sufficient to prevent a programme breaching standards of good taste and decency, even in a satirical context.⁷⁵ The BSA held that on this occasion the bottom line had been overstepped. In particular, the masturbation sequence, which lasted 30 seconds, was "gratuitously explicit, drawn out and clearly designed to shock."⁷⁶ Accordingly, the scenes were held to have breached the good taste and decency standard.⁷⁷

C Changes in Community Norms of Taste and Decency

Even though the good taste and decency standard is flexible and can change to reflect the changing views in society, a problem nevertheless arises where the views become so diverse that it is difficult to discern any meaningful homogeneity in opinions. This problem stems from the good taste and decency standard being a subjective concept. As the BSA has noted, "New Zealanders' views about taste and decency differ; what is outrageous to one, passes unnoticed by another."⁷⁸ However, if there is a shared community subjectivity towards issues of taste and decency it introduces an element of objectivity, which makes the standard easier to apply.

Over time society has become more liberal and more diverse in its attitudes towards issues of taste and decency.⁷⁹ Merely alluding to sexual conduct in television

⁷⁵ Ibid, para 27.

⁷⁶ Ibid, para 29.

⁷⁷ See also *TVWorks Ltd v Miller* (2008-037). The BSA upheld a complaint in respect of the programme *Californication*, which also contained explicit and gratuitous sex scenes that crossed the bottom line.

⁷⁸ *Freedoms and Fetters: Broadcasting Standards in New Zealand*, above n 6, 85.

⁷⁹ These changes can be tracked through the various surveys and research carried out by the BSA. For example, Broadcasting Standards Authority *Survey of Community Attitudes and Perceptions of Violence on Television* (1990), results summarised in Dickinson, Garry, Michael Hill and Wiebe Zwaga, above n 45, 19-21; Broadcasting Standards Authority *Perceptions of "Good Taste and Decency" in Television and Radio Broadcasting* (1993), results summarised in Dickinson, Garry, Michael Hill and Wiebe Zwaga,

programmes used to be considered indecent and obscene,⁸⁰ whereas today, programmes acceptably contain much more explicit references to sex.⁸¹ The pluralistic nature of citizenry in today's society often precludes a common definition of what is indecent, or even of what is profane or obscene.⁸² In other words, in today's society the prevailing level of morality in respect of issues of taste and decency is not easy to determine. Even the bottom lines are able to change.⁸³ What may appear to be "dirty discourse" to some may be considered to be laudable satire to others.⁸⁴

Attitudes toward bad language serve as an illustration. The BSA national survey in 2005 asked respondents to rate the unacceptability of a list of 23 words. The context given was a scene in a television movie screened after 8:30pm where a criminal who had just been caught is swearing at the police.⁸⁵ There were six words that half or more of the respondents found to be unacceptable.⁸⁶ Aside from those six words, however, the others were considered to be acceptable by more than half of the respondents. These statistics make it difficult to uphold complaints concerning the use of "bad" language when more than half of the respondents, representative of the New Zealand public, find the words to be acceptable. Moreover, different contexts will affect the acceptability of words. For example, while some people would find the use of the word "fuck" to always be inappropriate regardless of context, others, though they do not like the word, recognise that it is a common word and are prepared to ignore it in certain circumstances.⁸⁷

above n 45, 22-26; Dickinson, Garry, Michael Hill and Wiebe Zwaga, above n 45, ch 3; *Freedoms and Fetters: Broadcasting Standards in New Zealand*, above n 6, ch 6.

⁸⁰ See Hillard, Robert and Michael Keith, above n 3, 8-9.

⁸¹ For example see *Baker, McCoskrie, Taylor, O'Leary, Kinney v TVWorks Ltd (2007-12) (BSA)*.

⁸² Hillard, Robert and Michael Keith, above n 3, XI.

⁸³ *Freedoms and Fetters: Broadcasting Standards in New Zealand*, above n 6, 74-75.

⁸⁴ Hillard, Robert and Michael Keith, above n 3, XI. See *Freedoms and Fetters: Broadcasting Standards in New Zealand*, above n 6, ch 6.

⁸⁵ *Ibid*, 95-98. For the full list of words see *ibid*, 97.

⁸⁶ *Ibid*.

⁸⁷ Office of Film & Literature Classification "Public Perceptions of Highly Offensive Language", above n 60, 11. See also "Language and Sexual Imagery in Broadcasting: A Contextual Investigation", above n 60, 3-4.

For example, *Phillip v TVNZ*⁸⁸ a viewer complained about the use of the word “fuck” in the film, *The Last Boy Scout*. The research at the time revealed that 70 per cent of respondents thought that the word “fuck” was unacceptable.⁸⁹ The BSA considered the context of the programme, namely, the time of broadcast (at 9:25pm), the type of film (an “action” movie), the target audience (a mature audience), the pre-broadcast warning, and the programme’s AO classification.⁹⁰ Further, the BSA said that “it is not uncommon for films of this genre to seek realism through the characterisation and language that is the subject of this complaint”.⁹¹ Accordingly, the BSA held that the use of the word “fuck” in that context did not breach current norms of taste and decency.⁹²

The bad language example illustrates that in practice it is difficult to ascertain in a particular situation where the threshold of good taste and decency standard lies. Even if the community agreed that television should maintain standards of good taste and decency, individuals are unlikely to agree as to what exactly that standard is. Essentially, good taste and decency has come to mean different things to different people. In that situation, whose standards of good taste and decency should be followed? The difficulty in ascertaining the standard has contributed to the high threshold imposed by the BSA on good taste and decency complaints,⁹³ and as a result, few good taste and decency complaints in respect of television programmes are upheld.

In 2004, 2006, and 2007 less than five per cent of all good taste and decency complaints were upheld. There was a 14 per cent success rate in 2005 and in all other years approximately 20 to 25 per cent of good taste and decency complaints were upheld.⁹⁴ It appears that the approach of the BSA is to consider whether the target

⁸⁸ (2002-183) (BSA).

⁸⁹ Dickinson, Garry, Michael Hill and Wiebe Zwaga, above n 45, 72.

⁹⁰ *Phillip v TVNZ*, above n 88, para 24.

⁹¹ *Ibid.*

⁹² *Ibid.* See also *Lawrence v TVNZ* (2000-104) (BSA) and *Francis v TVNZ* (2004-068) (BSA). The BSA did not uphold these language complaints because it felt that the use of swear words was important to the storyline.

⁹³ See *Freedoms and Fetters: Broadcasting Standards in New Zealand*, above n 6, 73.

⁹⁴ Broadcasting Standards Authority *Annual Report* (Wellington, 1993 to 2007). It should be noted that these statistics include complaints in respect of both television and radio programmes and that complaints

audience would find the programme to have breached the standard of good taste and decency and, if they would not, the complaint is not upheld.⁹⁵ The BSA's approach is understandable because some programmes are designed to appeal to a specific section of the audience. If the BSA upholds a good taste and decency complaint it is denying that particular audience their right to receive the type of information and opinions contained in the programme.⁹⁶ Thus, the BSA must be discerning when determining good taste and decency complaints and can uphold complaints only when, essentially, there is a really good reason. Thus, the BSA tends to uphold complaints only where the conduct complained of falls below the bottom line limits.

The concern, however, is not that few good taste and decency complaints are upheld. The concern is with the practical difficulties in applying the standard. The BSA recognises that in most circumstances it can only draw the line at the outer limits of society's acceptance.⁹⁷ The BSA concedes that there are no commonly accepted norms of taste and decency in language and behaviour,⁹⁸ though that might be an overstatement as the statistics do show, to some extent, uniformity in opinions in respect of certain issues and there are also the bottom line limits.⁹⁹ Nevertheless, if there generally is no uniformity in opinions on taste and decency, it raises the question of whether a standard based on upholding community morals can still be effective.

V *INHERENTLY FLAWED?*

The discussion in the previous section looked at the practical difficulties in applying the standard of good taste and decency in today's diverse society. From a different perspective there exists another flaw in the standard. This flaw stems from the dynamic nature of the standard and the medium that it operates in, namely, television.

in respect of radio programmes, especially the use of language, are upheld more often than complaints in respect of television.

⁹⁵ See *Philip v TVNZ*, above n 88, para 24; *CanWest TVWorks v 35 Complainants* (2006-022) para 107 (BSA) (the *South Park* decision).

⁹⁶ See New Zealand Bill of Rights Act 1990, s 14.

⁹⁷ *Freedoms and Fetters: Broadcasting Standards in New Zealand*, above n 6, 86.

⁹⁸ *Ibid*, 85.

⁹⁹ See *ibid*, ch 5 & 6.

The following analysis looks beyond the practical operation of the good taste and decency standard to consider how it is affected by the interaction between viewers, broadcasters, and the BSA.

A The Reverse Chilling Effect

Restricting or punishing freedom of expression can have a “chilling effect”. That is, punishing or threatening to punish speech can cause future speech to be suppressed for fear of punishment, even though that speech might be perfectly legitimate. In the context of the First Amendment it has been said that:¹⁰⁰

A chilling effect occurs when individuals seeking to engage in activity protected by the first amendment are deterred from so doing by governmental regulation not specifically directed at that protected activity.

In other words, people who are entitled to exercise their freedom of expression, or entitled to expression in a particular way, do not. In respect of broadcasting, the chilling effect could cause broadcasters to not screen certain programmes, change screening times, or edit out certain scenes, even though they are not required to modify their actions in that manner.¹⁰¹

Logically, the reverse chilling effect is also possible. That is, if certain speech is not suppressed or not punished then it does not lead to the suppression of future speech, but instead can promote future speech. Essentially, the reverse chilling effect would be the promotion of freedom of expression. The suggestion that the reverse chilling effect has the effect of promoting freedom of expression might seem obvious – if the chilling effect suppresses future speech then the reverse chilling effect should promote future speech. However, though this statement is not necessarily incorrect, the causative link

¹⁰⁰ Shauer, Frederick “Fear, Risk and the First Amendment: Unraveling the ‘Chilling Effect’” (1978) 58 Boston University Law Review 686, 693.

¹⁰¹ For example, see Hilden, Julie “Jackson ‘Nipplegate’ Illustrates the Danger of Chilling Free Speech” (20 February 2004) www.cnn.com (accessed 15 September 2008).

between the reverse chilling effect and speech is not necessarily as direct as the link between the chilling effect and speech.

If certain speech is not punished then people would not necessarily be encouraged to exercise their right to freedom of expression. People fear the possibility of erroneous judicial decision-making resulting in their speech being punished.¹⁰² The fear of erroneous judicial decision-making remains whether decisions punish or uphold freedom of expression – the fear relates to future speech and the possibility of future erroneous decision-making in respect of that speech. So, despite a decision upholding freedom of expression, people are not necessarily more likely to exercise their freedom of expression. People might remain unaffected by a decision that upholds freedom of expression; that is, they are neither more nor less likely to exercise their freedom of expression. However, the cumulative impact of decisions upholding freedom of expression could create a reverse chilling effect.

As discussed, good taste and decency complaints in respect of television programmes are rarely upheld.¹⁰³ The decisions declining to uphold complaints do not place a chill on broadcasters' freedom of expression. Could these decisions, however, have a reverse chilling effect on broadcasters? TV3 monitors all of the BSA's decisions and internally references them in their own programmes.¹⁰⁴ It makes "calculated judgement[s]" about which programmes to broadcast based on previous BSA decisions and their own past experience.¹⁰⁵ Similarly, Television New Zealand ("TVNZ") also monitors all BSA decisions; the decisions "add to an ever-growing body of knowledge and help to further define the boundaries of the different classifications and timeslots".¹⁰⁶ In other words, the BSA's decisions influence broadcasters' programming decisions.

The BSA's decisions declining to uphold complaints could influence programming decisions by providing the broadcaster with reassurance that its current

¹⁰² Shauer, Frederick, above n 100, 694-701.

¹⁰³ See Part IV C Changes in Community Norms of Taste and Decency.

¹⁰⁴ TV3 Standards Committee (9 July 2008) e-mail.

¹⁰⁵ *Ibid.*

programming schedule observes standards of good taste and decency. Alternatively, the decisions could provide the broadcaster with the confidence to exercise its freedom of expression by broadcasting programmes that it might not have, such as programmes with more challenging material. Television broadcasters operate in a commercially competitive market. Television must compete with other media such as the cinema, videos, the internet, as well as print media, such as books, newspapers, and magazines. The need to stand out drives programming; broadcasters push the envelope because it gets higher ratings.¹⁰⁷ Even viewers recognise that broadcasters use sexual imagery because "sex sells".¹⁰⁸ Thus, broadcasters have an incentive to broadcast more challenging material to push moral boundaries in order to stand out. The cumulative impact of the BSA's decisions not upholding good taste and decency complaints arguably provides broadcasters with the confidence to push those boundaries.

B Feedback Loop

The standard of good taste and decency differs from the other standards because its boundaries are determined by society's changing norms of taste and decency.¹⁰⁹ However, what influences those norms of taste and decency, and in particular, does television have a role? If social influence is "any process whereby a person's attitudes, opinions, beliefs, or behaviour are altered or controlled by some form of social communication"¹¹⁰ then it is reasonable to conclude that television has a social influence.

Television is a possible teacher of behaviour; attitudes and values can be learned from television.¹¹¹ Violence is commonly put forward as a concern of the effects of television. Viewing violence on television is claimed to encourage violent behaviour and foster moral and social values about violence in daily life that is unacceptable in a

¹⁰⁶ Dianne P Martin, TVNZ Programme Standards Manager (28 August 2008) e-mail.

¹⁰⁷ See Hillard, Robert and Michael Keith, above n 3, 8.

¹⁰⁸ "Language and Sexual Imagery in Broadcasting: A Contextual Investigation", above n 60, 4.

¹⁰⁹ Contrast with the standard of maintaining law and order and the balance standard: "Free-to-air Television Code of Broadcasting Practice", above n 2, standards 2 and 4 respectively.

¹¹⁰ Hargrave, Andrea and Sonia Livingstone, above n 50, 33.

¹¹¹ "The Social Effects of Television, above n 11, 30-33.

civilised society.¹¹² While television is not a principal cause of violence in society, it is nevertheless a factor that makes a considerable contribution to violent behaviour.¹¹³ On a similar basis, there are often concerns over the portrayal of sex on television because it can lead to the premature sexualisation of children.¹¹⁴ Essentially, television normalises certain behaviour that might not be reflective of reality, which can be harmful. As viewers become accustomed to seeing such behaviour on television, the more acceptable that behaviour becomes.

The causal connection between television and the attitudes of its viewers, however, has been debated.¹¹⁵ There could be merit in the argument that television does not have as strong an influence on viewers as some research claims, but this argument of course depends upon what strength the influence is claimed to be. However, the fact that television exerts an influence over its audience cannot be denied. At the very least, the fact that societies, including New Zealand, administer a broadcasting standards regime, especially in respect of good taste and decency, suggests that the legislature believes there to be such a link.¹¹⁶

On the basis that television influences viewers' attitudes towards issues of taste and decency, a 'feedback loop' emerges. The good taste and decency standard was enacted to provide a limitation or check on broadcasters' freedom of expression. It is meant to ensure that programme content does not fall below the prevailing moral standards in society. These boundaries are ascertained by the BSA and are reinforced by its decisions. However, society's attitudes towards issues of taste and decency are influenced by what people see on television. What viewers see on television is in turn determined by the broadcasters. The circularity in this process is evident: television influences society in its attitudes towards issues of taste and decency, society determines the limits of television programmes in respect of taste and decency, the BSA takes these

¹¹² *Ibid*, 55.

¹¹³ *Ibid*.

¹¹⁴ "Language and Sexual Imagery in Broadcasting: A Contextual Investigation", above n 60, 4.

¹¹⁵ See Hargrave, Andrea and Sonia Livingstone, above n 50, 33.

¹¹⁶ Dickinson, Garry, Michael Hill & Wiebe Zwaga, above n 45, 19.

limits into account in its decision-making, the decisions influence broadcasters' programming decisions.

The reverse chilling effect adds another dimension to the feedback loop. If broadcasters feel confident in screening more challenging material, viewers will respond to the material by either watching or not watching the programme. For those who choose to watch, over time they engage with and become accustomed to the material, thereby normalising that behaviour. Thus, if programmes frequently portray sex scenes, viewers might become more comfortable with viewing such scenes.¹¹⁷ When the BSA conducts its next round of research, it will likely reveal the softening of attitudes towards sex scenes. The BSA then cements the softer attitudes by not upholding complaints about certain sex scenes.

The feedback loop and reverse chilling effect suggest that broadcasters can influence the threshold of the good taste and decency standard. The ability of broadcasters to influence what falls within the realm of good taste and decency, when the standard's purpose is to provide a check on the broadcasters' freedom of expression, undermines the standard. Further, the additional impact of the reverse chilling effect means that broadcasters could potentially lower the threshold required by the good taste and decency standard. In effect, as broadcasters persist in a trend towards more explicit programme content in an attempt to maximise viewer ratings, viewers become accustomed to more explicit content and cease to complain.

C Validity of the Reverse Chilling Effect and Feedback Loop

Tracking good taste and decency decisions, in terms of comparing the subject matter of the complaints and how the complaints were decided, is not a straightforward task. In the area of television and creative freedom, it will be rare to come across identical scenes in a programme with the same contextual surroundings. The use of language is

¹¹⁷ Others have previously averred to this consequence. For example, see Broadcasting Bill (13 December 1988) 495 NZPD 8826, 8831; *Davies v TVNZ* (1999-026) BSA.

probably the best category of conduct to track over time since words can more readily be isolated and compared or ranked than the depiction of violence or the portrayal of sex.

A review of the BSA's decisions from 1993 to 2007 reveals that only one out of the 119 language complaints brought to the BSA in respect of free-to-air television programmes had been upheld.¹¹⁸ The successful complaint was in *Blackburn v TV3*.¹¹⁹ The complainant claimed that the repeated use of the words "fuck" and "motherfucker" in the movie *Albino Alligator* was unnecessary. The contextual factors included a warning before the programme, the broadcast time of 9:30pm, and the programme classification of AO. Despite the contextual factors, the BSA held that the repeated use of the words was gratuitous and contravened standards of good taste and decency.

The language complaints, however, do not necessarily provide an indication of whether the use of bad language in television programmes has increased and whether the kind of language has deteriorated. However, while there are no specific studies detailing the occurrence of bad language on New Zealand screens, the general increase in the use of bad language in television has been noted by various authors and studies.¹²⁰ Generally, the subject matter of language complaints brought before the BSA fall into one of three categories: the use of the word "fuck" (the most common category),¹²¹ the use of blasphemy, including "Christ" or "Jesus Christ",¹²² and the use of "softer" bad language, such as "bugger", "shit", or "bastard".¹²³

The fact that only one complaint had been upheld in those 15 years suggests that broadcasters have been ensuring that their programmes observe standards of good taste and decency in respect of language use. Indeed, TVNZ interprets that few complaints are

¹¹⁸ Broadcasting Standards Authority *Annual Reports* (Wellington, 1993 to 2007).

¹¹⁹ *Blackburn v TV 3* (2001-211) (BSA).

¹²⁰ See generally, "Language and Sexual Imagery in Broadcasting: A Contextual Investigation", above n 60; Hillard, Robert and Michael Keith, above n 3; Shaw, Colin, above n 49, ch 6.

¹²¹ For example, *Kempson v TNNZ* (1994-020); *Soeteman v TVNZ* (1994-026); *Troop v TVNZ* (1995-139); *Werder v TV3* (1997-067); *Schwabe v TVNZ* (2001-019); *Smits v TVNZ* (2002-003); *Crouch v TVNZ* (2005-043).

¹²² *McGuckian v TVNZ* (2005-032); *Gautier v TVNZ* (2006-093).

¹²³ *Duffy v TVNZ* (1997-040); *Schwabe v TVNZ* (2000-080).

upheld reflect that its Appraisals Team is doing a good job in presenting programmes in compliance with the standard.¹²⁴ The use of bad language in television, however, has increased in frequency. These trends are arguably evidence of the feedback loop. Under the feedback loop, broadcasters have the ability to influence the boundaries of good taste and decency. Provided they introduce more challenging material incrementally, thus giving viewers time to become accustomed to the material, then over time broadcasters are able to broadcast material that previously would have fallen foul of good taste and decency. As community attitudes toward bad language gradually soften, the BSA is likely to find that the subject matter of complaints do not breach the current norms of taste and decency. Further, as viewers become accustomed to certain content, they cease to complain, which is evidenced by the trend of falling good taste and decency complaints.¹²⁵

The BSA's surveys provide evidence that New Zealanders' attitudes towards bad language are continuing to soften.¹²⁶ From 2000 to 2005, 19 out of a list of 23 words surveyed had become more acceptable, with eight of those 19 becoming significantly more acceptable.¹²⁷ Specifically, the word "fuck" has always been one of the most unacceptable words, but its level of unacceptability is falling. In 1993 the word was considered by 75 per cent of the respondents to be offensive.¹²⁸ That figure fell to 70 per cent in 2000 and then to 58 per cent in 2005.¹²⁹ As the BSA continues to not uphold complaints concerning the use of the word "fuck",¹³⁰ broadcasters gain the confidence to continue broadcasting programmes with that word (the reverse chilling effect). As the word continues to appear on television, it normalises the word to a certain extent,¹³¹ thereby reducing its level of unacceptability (the feedback loop). Moreover, a greater acceptability of the word "fuck" arguably increases the acceptability of other bad

¹²⁴ Dianne P Martin, above n 106.

¹²⁵ *Freedoms and Fetters: Broadcasting Standards in New Zealand*, above n 6, 70.

¹²⁶ *Ibid.*, 88; Dickinson, Garry, Michael Hill and Wiebe Zwaga, above n 45, 71-74.

¹²⁷ *Freedoms and Fetters: Broadcasting Standards in New Zealand*, above n 6, 100.

¹²⁸ Dickinson, Garry, Michael Hill and Wiebe Zwaga, above n 45, 72.

¹²⁹ *Freedoms and Fetters: Broadcasting Standards in New Zealand*, above n 6, 100.

¹³⁰ See for example, *Kempson v TVNZ*, above n 121, *Soeteman v TVNZ*, above n 121, *Troop v TVNZ*, above n 121, *Werder v TV3*, above n 121; *Schwabe v TVNZ*, above n 121; *Smits v TVNZ*, above n 121; *Crouch v TVNZ*, above n 121.

¹³¹ See "Public Perceptions of Highly Offensive Language", above n 60, 11.

language by comparison, which provides an explanation for the trends in the statistics. In respect of bad language it has been said that “once a first breach has been justified, proposals for subsequent breaches become matters for negotiation.”¹³² In other words, once certain bad language becomes acceptable, it opens the door for the acceptability of the use of other bad language.

There is, however, an intermediary step in the complaints process that must be considered. With the exception of privacy complaints all complaints must first be made to the broadcaster concerned.¹³³ In 2007 the BSA received 131 complaints in total, of which 23 were in respect of good taste and decency.¹³⁴ TVNZ, however, received 346 complaints in 2007, of which 35 were upheld.¹³⁵ The number of complaints rose to 491 for the year ended 30 June 2008.¹³⁶ The subject matter of these complaints is unknown. It would be reasonable to assume that the good taste and decency complaints upheld by TVNZ would also have been upheld by the BSA, had they reached that stage. The existence of this intermediate step means that an analysis of the complaints brought to the BSA does not provide a complete picture of the interaction between television and its audience.

The intermediate step does not necessarily negate the feedback loop or the reverse chilling effect, though it might dilute their impact. Broadcasters reference the BSA’s decisions in their programming decisions, but they also reference their own decisions.¹³⁷ The cumulative effect of the BSA’s decisions upholding freedom of expression might be somewhat countered by internal decisions of the broadcaster to uphold viewer complaints. The decisions of the broadcaster might act as a kind of self-imposed chill on programming decisions. As a result, the reverse chilling effect presumed to arise from the cumulative impact of the BSA decisions might not be as strong as suggested.

¹³² Shaw, Colin, above n 49, 113.

¹³³ Broadcasting Act 1989, ss 5-8.

¹³⁴ Broadcasting Standards Authority *Annual Report 2007* (Wellington, 2007) appendix 1. Note: this figure includes both television and radio complaints.

¹³⁵ Television New Zealand *Annual Report 2007* (2007) 25.

¹³⁶ Television New Zealand *Annual Report 2008* (2008) (to be released): Dianne P Martin, above n 106.

Overall, there is evidence, though admittedly not always unequivocal, to suggest that the reverse chilling effect and feedback loop exist in New Zealand's broadcasting environment. Thus, broadcasters have the ability to influence the boundaries of the good taste and decency standard, making the standard inherently flawed: the fact that broadcasters can influence the boundaries of the standard undermines its purpose of acting as a check on their freedom of expression.

D *Disguised Moral Panic?*

The reverse chilling effect and the feedback loop could be viewed as being the underpinnings of what is described as a 'moral panic'. The term 'moral panic' is used to describe and analyse particular events in society where seemingly deviant behaviour emerges and, subsequently, causes are attributed to the origins of that behaviour.¹³⁸ Historically, broadcasting has been the subject of moral panics. For example, there were concerns that juvenile delinquency was related to the amount of violence on television and that sexual promiscuity was influenced by the sexually permissive attitudes being aired.¹³⁹ In other words, television is often blamed for causing problematic behaviour. However, the purpose of presenting the reverse chilling effect and the feedback loop is not to fuel a moral panic. The purpose is to illustrate that the good taste and decency standard is inherently flawed and therefore should be replaced.

However, the limitations of a moral panic argument also represent the limitations of the theories. In the context of a moral panic, the decline in broadcasting standards could be reflective of a decline in community standards generally.¹⁴⁰ Similarly, the direction of causation could also be questionable in the feedback loop. In the circular process it was presumed that television influences viewers' attitudes, but it could also be the other way around. Ultimately, television operates in complex social settings and it is

¹³⁷ See TV3 Standards Committee, above n 104.

¹³⁸ Dickinson, Garry, Michael Hill & Wiebe Zwaga, above n 45, 18. For example, see *Davies v TVNZ* (1999-026) (BSA), "Language and Sexual Imagery in Broadcasting: A Contextual Investigation", above n 60, sections 3 and 6.

¹³⁹ Dickinson, Garry, Michael Hill & Wiebe Zwaga, above n 45, 18.

¹⁴⁰ *Ibid*, 19.

conceivable that there is a mutual influence between broadcasters' programming decisions and viewers. However, it does not mean that the reverse chilling effect and feedback loop do not exist.

VI REFORM

Reform is necessary. Not only is the standard of good taste and decency difficult to apply in practice, it is inherently flawed. The standard is inefficacious: it has become an artificial limitation on broadcasters' freedom of expression. The good taste and decency standard has become a largely self-serving standard for broadcasters since they are able to influence the boundaries of good taste and decency, at least to a certain extent, to meet their own broadcasting agenda. However, if the good taste and decency standard were removed from broadcasting regulation it would leave a large gap. The type of conduct that the standard governs – sex, nudity, language, violence, and other offensive behaviour – ranks among the top concerns of New Zealanders.¹⁴¹ Thus, these issues of taste and decency cannot be left unregulated. The next part of the paper explores the suitability of replacing the good taste and decency standard with a standard based on preventing harm to regulate issues of taste and decency in television.

VII A STANDARD BASED ON HARM

Harm is widely conceived in objective terms.¹⁴² It is a threshold that is taken to be observable by others as it is measured by reference to an independent threshold, which is in contrast to a threshold based on the subjective views of individuals. There can be harmful effects of the media under certain circumstances. "Harm" in this context refers to more than merely harm to public morality; some kind of demonstrable harm is needed. The types of harm include cognitive (for example, stereotypes), emotional (for example, fear), and behavioural (for example, aggressive behaviour).¹⁴³

¹⁴¹ *Freedoms and Fetters: Broadcasting Standards in New Zealand*, above n 6, ch 6.

¹⁴² For example, see *Films, Videos, and Publications Classification Act 1993*, s 3(1). See generally, Hargrave, Andrea and Sonia Livingstone, above n 50.

¹⁴³ *Ibid*, 35.

The distinction between merely offensive content and harmful content is not always easy to discern, but the context plays a big role in how audiences are affected by and react to certain content. For example, the use of certain words might be merely offensive in some contexts, but in others they are harmful. The use of the word "fuck" as a general expression of frustration might be offensive but it is probably not harmful. However, if the word were used in the phrase "fuck you" in a confrontational situation it could be considered to be harmful because its specific direction towards another person could be demeaning or degrading of that person.¹⁴⁴ Language use includes the use of racist terms, derogatory comments, and stereotyping.¹⁴⁵

The advantage of having a harm-based standard is its objectivity, as it would overcome the practical problems with the good taste and decency standard. The good taste and decency standard is difficult to apply because often there is no obvious perspective to consider the standard from. A standard based on harm, however, can be measured by reference to an independently assessed threshold, making it easier to apply.¹⁴⁶ Moreover, the use of an independently assessed threshold would overcome the issues concerning the reverse chilling effect and the feedback loop as an objective standard limits the ability of broadcasters to influence its boundaries. Broadcasting in New Zealand would not be the first area to move from restricting freedom of expression on the basis of morality to restricting it on the basis of avoiding harm. Broadcasting legislation in the United Kingdom and the censorship regime in New Zealand have both made the change.

A The United Kingdom Experience

From the advent of commercial television in 1954 until 2003 the United Kingdom legislated to prohibit the broadcasting of programmes containing content that offends

¹⁴⁴ "Language and Sexual Imagery in Broadcasting: A Contextual Investigation", above n 60, 15-18.

¹⁴⁵ See *ibid.*, 13.

¹⁴⁶ See generally, Hargrave, Andrea and Sonia Livingstone, above n 50.

against good taste and decency.¹⁴⁷ The vigorous enforcement of the standard by the Broadcasting Standards Council was criticised for having resulted in “cowardly” television and news, compared with honest coverage in a newspaper not “shackled” by the same rules relating to television.¹⁴⁸ In other words, freedom of expression in television suffocated because of the imperative of avoiding offence. The operation of the good taste and decency standard in the United Kingdom was a good illustration of the chilling effect.

Reform came in the Communications Act 2003. While the Act largely replicated the standards objectives under its predecessor,¹⁴⁹ a key change in the Act came in section 319(2)(f). This provision replaced the good taste and decency standard with an objective to avoid offensive and harmful material.¹⁵⁰ In addition, the Office of Communications (“Ofcom”) replaced the Broadcasting Standards Council.¹⁵¹ Ofcom introduced the Ofcom Broadcasting Code in 2005,¹⁵² which contains principles regulating broadcasters’ freedom of expression, similar to New Zealand’s Free-to-air Television Code. Section two of the Ofcom Broadcasting Code sets out the principle of avoiding harm and offence and guidelines for its application.¹⁵³ For example, section 2.3 sets out the contextual considerations that Ofcom must consider in its decisions and there are also guidelines dealing with specific content, such depictions of suicide and self-harm or exorcisms.¹⁵⁴

¹⁴⁷ For example see, Broadcasting Act 1990 (UK), s 6(1)(a). For further information about the history of broadcasting in the United Kingdom see Feintuck, Mike and Mike Varney, above n 31; Fenwick, Helen and Gavin Phillipson, above n 14, ch 11; Robertson, Geoffrey and Andrew Nicol *Robertson and Nicol on Media Law* (5 ed, Sweet & Maxwell, London, 2007) ch 16.

¹⁴⁸ *Ibid*, 871. See also Feintuck, Mike and Mike Varney, above n 31, 184-186.

¹⁴⁹ Broadcasting Act 1990 (UK), s 6.

¹⁵⁰ Communications Act 2003 (UK), s 319(2)(f). See also section 3(2)(e).

¹⁵¹ For further information about the Office of Communications visit www.ofcom.org.uk (accessed 30 July 2008).

¹⁵² A copy of the Code can be obtained from www.ofcom.org.uk. See Appendix 2 for a list of the standards.

¹⁵³ See also Office of Communications *Guidance Notes: Section 2 Harm and Offence* (2008) available at www.ofcom.org.uk (accessed 19 September 2008).

¹⁵⁴ Office of Communications “Ofcom Broadcasting Code” (2005) ss 2.5-2.8 www.ofcom.org.uk (accessed 19 September 2008).

The Communications Act 2003 was influenced by the Television Without Frontiers Directive of the European Union.¹⁵⁵ In particular, the change in content regulation from 'good taste and decency' to avoiding 'offensive and harmful' material was influenced by the European Union's formulation of harm and offence.¹⁵⁶ Article 22 of the directive requires Member States to take appropriate measures to ensure that television broadcasts "do not include programmes which might seriously impair the physical, mental or moral development of minors, in particular those that involve pornography or gratuitous violence." The harm and offence objective in the Communications Act 2003 does not specifically relate to minors, but the Code introduced a standard focused on protecting 'Under-Eighteens'.¹⁵⁷

Ofcom welcomed the change to a notion of harm and offence in the Communications Act 2003. The outgoing Chairman of the Content Board of Ofcom, Richard Hopper, said:¹⁵⁸

In content regulation, the Act also supports a move away from the more subjective approach of the past, based on an assessment of taste and decency in television and radio programmes, to a more objective analysis of the extent of harm and offence to audiences. The result is a Code that is much shorter and is, more importantly, focused on providing protection to those who need it most, particularly children and young people.

The performance of Ofcom has also received praise, with Robertson and Nicol commenting that Ofcom has shown "good sense and some street wisdom."¹⁵⁹ The duty to avoid harm and offence gives Ofcom some leeway in whether it decides to adopt a strict

¹⁵⁵ Council Directive 89/552/EEC, as amended by Directive 97/36/EC of the European Parliament and of the Council, adopted in 1989. For further information visit the European Council website: <http://ec.europa.eu> (accessed 17 September 2008). See generally Hargrave, Andrea and Sonia Livingstone, above n 50, 24-25; Fenwick, Helen and Gavin Phillipson, above n 14, 566-569.

¹⁵⁶ Hargrave, Andrea and Sonia Livingstone, above n 50, 24.

¹⁵⁷ "Ofcom Broadcasting Code", above n 154, standard 1.

¹⁵⁸ Office of Communications *Annual Report 2004-2005* (2005) Report from the Chairman of the Content Board.

¹⁵⁹ Robertson and Nicol on *Media Law* (2007), above n 147, 896.

or liberal stance; it appears to have taken the latter route by taking a robust stance in respect of creative freedom.¹⁶⁰

Ofcom's liberal stance was illustrated in its 2005 decision in respect of *Jerry Springer – the Opera*.¹⁶¹ The programme was a televised performance of the West End stage production based on Jerry Springer's television show. It was highly charged emotionally, satirised the Christian faith, regularly featured strong language and violent confrontations, and contained extreme and shocking revelations. Ofcom received 16,801 complaints about the broadcast.¹⁶² Ofcom had to apply standards regarding harm and offence in a manner that "best guarantees an appropriate level of freedom of expression"¹⁶³

Ofcom appreciated that the representation of religious figures and shocking content would have been offensive to some people. However, the show addressed moral issues in the context of a contemporary setting and contained a strong message; the show's effect was to satirise modern fame and the culture of celebrity.¹⁶⁴ The programme as broadcast was clearly labelled and signposted and while the show had the potential to offend, and indeed the intention was to shock, it was set in a "very clear context as a comment on modern television."¹⁶⁵ In addition, the most offensive language occurred after 10:30pm and the most challenging material occurred after 11:00pm. Ofcom concluded that the broadcast was not harmful and therefore did not contravene the harm and offence standard.

The *Jerry Springer* decision was praised as being "a remarkably intelligent and liberal decision".¹⁶⁶ In terms of being liberal, Ofcom faced a difficult decision given the number of complaints and the shocking and offensive content but it nevertheless upheld

¹⁶⁰ Fenwick, Helen and Gavin Phillipson, above n 14, 606.

¹⁶¹ Summary of the decision obtained from Office of Communications "Ofcom Broadcast Bulletin 34" (9 May 2005) 12-17.

¹⁶² Ibid, 13.

¹⁶³ Ibid, 14.

¹⁶⁴ Ibid, 12.

¹⁶⁵ Ibid.

¹⁶⁶ Robertson and Nicol on Media Law (2007), above n 147, 898.

freedom of expression. Ofcom's decision could be seen as being intelligent in that it not only considered the context of the broadcast but also the value of the underlying message of the programme. In effect, it decided that the benefit to the public in receiving the programme's message outweighed any offence caused by its method of communication. The decision indicates that the threshold for upholding harm and offence complaints is higher than under the good taste and decency standard since the offence caused was not enough to satisfy the harm and offence standard.

The United Kingdom experience appears to have been that freedom of expression has been able to flourish more under a harm and offence standard than it did under the good taste and decency regime. The standard is not as strict as good taste and decency and Ofcom's liberal stance towards protecting creative freedom has also contributed towards greater freedom of expression in television.¹⁶⁷ Moreover, Ofcom recognised that the harm and offence standard is easier to apply because of its objective nature. Though the standard retains an "offence" element, Ofcom's *Jerry Springer* decision suggests that the level of offence would have to be harmful, or at least border on being harmful, to come within the standard. Overall, the shift away from a good taste and decency standard towards monitoring harm and offence has been a welcome change in the United Kingdom.¹⁶⁸

B Censorship in New Zealand

New Zealand's censorship regime is another example of where the regulation of freedom of expression changed from being based on a subjective to an objective standard. The censorship laws were initially based on concepts of obscenity and indecency,¹⁶⁹ which are subjective concepts underpinned by notions of morality. In 1993, however, the Films, Videos, and Publications Classification Act introduced the concept of

¹⁶⁷ See Fenwick, Helen and Gavin Phillipson, above n 14, 596-607.

¹⁶⁸ See Office of Communications *Annual Report 2004-2005*, above n 158; Fenwick, Helen and Gavin Phillipson, above n 14, ch 11; *Robertson and Nicol on Media Law* (2007), above n 147, ch 16.

¹⁶⁹ For example see, Indecent Publications Act 1963; Films Act 1976. See also *Robertson and Nicol on Media Law* (2007), above n 147, ch 4.

“objectionable publications”.¹⁷⁰ Whether a publication is objectionable depends on whether its availability is likely to be “injurious to the public good”.¹⁷¹ In other words, the censorship system is designed to protect the New Zealand public from harmful material. The censorship regime has thus moved away from a morality-based standard to a harm-based standard.¹⁷²

The broadcasting standard of good taste and decency is the closest counterpart to the censorship regime’s “harm” standard. Replacing good taste and decency with a standard based on harm would bring New Zealand’s broadcasting laws closer aligned to the censorship legislation. However, although films, videos, and television are all audio-visual forms of media, broadcasting historically has been regulated more strictly than other communication media, especially in respect of offence-avoidance.¹⁷³ Robertson and Nicol argued that tabloid newspapers, which most people in the United Kingdom read, require no statutory controls, yet their impact on moral standards must be much greater than late night television programmes that play to self-selecting audiences.¹⁷⁴ At the beginning of this paper the rationale of regulating broadcasting to ensure pluralism and diversity was discussed.¹⁷⁵ This rationale, however, does not explain regulation based on offence-avoidance since it is designed to curb certain forms of expression rather than to encourage diversity. There are, however, a number of other arguments that have been put forward to justify the special regulation of television.¹⁷⁶

C Impact of the Medium

Historically, spectrum scarcity was used to justify broadcast regulation.¹⁷⁷ The scarcity of frequencies prevented allowing everyone who wanted to broadcast an

¹⁷⁰ Films, Videos, and Publications Classification Act 1993, s 3(1).

¹⁷¹ *Ibid.*

¹⁷² For a history of New Zealand’s censorship regime, see Office of Film & Literature Classification “History of Censorship” www.censorship.govt.nz (accessed 15 July 2008).

¹⁷³ *Broadcasting Law: A Comparative Study*, above n 16, ch 1.

¹⁷⁴ *Robertson and Nicol on Media Law* (2007), above n 147, 869.

¹⁷⁵ Part III A Justifications of Freedom of Expression.

¹⁷⁶ See generally Hitchens, Lesley, above n 15, ch 2; *Freedom of Speech*, above n 13, 445-449.

¹⁷⁷ Fenwick, Helen and Gavin Phillipson, above n 14, 563; *Robertson and Nicol on Media Law* (2007), above n 147, 869; *Freedom of Speech*, above n 13, 445.

opportunity to do so. It was therefore reasonable to impose conditions on those who were given a licence to broadcast,¹⁷⁸ such as the duty to demonstrate standards of good taste and decency. However, the growth of digital television and the growth of actual and potential television channels have made it difficult to sustain the spectrum scarcity argument.¹⁷⁹

An often-cited rationale for broadcasting regulation is related to the perceived power and persuasion of broadcasting. Television, because of its audio-visual impact and reach into the family home, has been seen as likely to exert more influence on its viewers compared with other media.¹⁸⁰ This rationale helps to explain regulations over certain types of content such as sexually explicit programming or what can be broadcast during hours when children might be watching.¹⁸¹ It can also be relevant to rules requiring programmes such as the news or other current affairs items to provide a balanced range of views.¹⁸² The influence of television, however, does not explain the need for regulation based on offence-avoidance.

Linked with the pervasive and powerful nature of television is the intrusive nature of television. Television is easily accessible. There is a concern that people could be unexpectedly confronted with, and therefore inadvertently offended, by offensive broadcast material.¹⁸³ The unwilling confrontation with offensive material is usually the main reason advanced for providing a stricter regime for television compared with films and videos.¹⁸⁴ Essentially, the argument is that cinemas must be visited and videos have to be borrowed and so people in those situations voluntarily submit themselves to being confronted with offensive content. With television, however, viewers supposedly do not have the same element of control or knowledge in respect of the content.¹⁸⁵

¹⁷⁸ *Freedom of Speech*, above n 13, 445, citing *Red Lion Broadcasting v FCC* 395 US 367 (1969).

¹⁷⁹ Feintuck, Mike and Mike Varney, above n 31, ch 1.

¹⁸⁰ Hitchens, Lesley, above n 15, 46-47.

¹⁸¹ *Ibid.*, 47.

¹⁸² *Ibid.*

¹⁸³ Fenwick, Helen and Gavin Phillipson, above n 14, 563; See also Shaw, Colin, above n 49, 36; Barwise, Patrick & Andrew Ehrenberg, above n 10, 150.

¹⁸⁴ Fenwick, Helen and Gavin Phillipson, above n 14, 562.

¹⁸⁵ See Shaw, Colin, above n 49, 36.

D Personal Responsibility

The problem with justifying the stricter regulation of television based on its influence and reach into the family home is that it appears to ignore the role of personal responsibility. It is argued that television comes into the family home uninvited, but it is difficult to see what the difference is between a person's ability to decide to buy a magazine, to buy a ticket for a film, or to switch on the television.¹⁸⁶ Moreover, as Barendt points out, it seems inconsistent with general free speech principles to impose greater restrictions on a mode of speech merely because it is thought to be more effective than other media or means of communication.¹⁸⁷

Viewers have a personal responsibility to protect themselves from viewing material that they consider offensive.¹⁸⁸ The Free-to-air Television Code imposes obligations on broadcasters to ensure that adequate signposts are provided to warn viewers of any potentially offensive material that a programme might contain. Signposts include pre-broadcast warnings, programme classifications, and the time of broadcast.¹⁸⁹ Viewers have a responsibility to use these contextual factors to ascertain whether they wish to watch a programme. Furthermore, if viewers are inadvertently confronted with offensive material they can switch channels or turn off the television; they are not powerless against television.

In a pluralistic society where, apart from the bottom lines, there is generally no consensus on what is offensive, the role of personal responsibility plays an important role in enabling a diverse range of programmes to be broadcast to cater for specific groups within the diverse audience. Personal responsibility, however, cannot be taken too far. The legislature cannot rely on personal responsibility to give a free pass to broadcasters, especially in respect of content that may be harmful. Viewers might not know that certain content is harmful. Offence is something that is experienced by the individual whereas

¹⁸⁶ *Ibid.*, 46.

¹⁸⁷ *Freedom of Speech*, above n 13, 446.

¹⁸⁸ Fenwick, Helen and Gavin Phillipson, above n 14, 571.

¹⁸⁹ *Freedoms and Fetters: Broadcasting Standards in New Zealand*, above n 6, 73.

because harm is measured by reference to an independent threshold it is not necessarily experienced and identified by the individual viewer. The bottom line is harmful content, which is represented by the New Zealand censorship and the United Kingdom broadcasting regimes.

E Adopting a Harm-Based Standard in New Zealand

New Zealand broadcasting would benefit from adopting a standard based on preventing harm. As a harm-based standard imposes an objective threshold it would be easier to apply than the subjective threshold of the current good taste and decency standard. Also, a harm-based standard provides greater scope for freedom expression by increasing the threshold for a breach to arise. In addition, having an independent threshold could help viewers to understand or accept the BSA's decisions and reasoning. Some viewers express concern that provided viewers are warned broadcasters can get away with anything.¹⁹⁰ However, the BSA must adopt a high threshold to protect broadcasters' and other viewers' rights under section 14 of the New Zealand Bill of Rights Act 1990. Having an objective standard would facilitate a detached view of certain content rather than viewers applying their own moral standards to the situation.

A standard based on preventing harm would bring New Zealand's broadcasting regime in line with the censorship regime but it does not follow that both regimes would impose the same harm threshold. In terms of the practical application of a harm-based standard, the impact of the medium and the difference in accessibility is relevant.¹⁹¹ Films can carry, for example, age restrictions,¹⁹² whereas there are no legal restrictions to watching television. Thus, television is able to attract a larger and more diverse audience than films.

The accessibility of television makes it difficult to ensure that potentially harmful material is restricted to a particular audience, namely, one to whom the content would not

¹⁹⁰ Ibid.

¹⁹¹ Compare Films, Videos, and Publications Classification Act 1993, s 3(4)(b).

be harmful. As a result, there is greater potential for television programmes to be harmful because of the greater audience. Not only must the probable size and composition of the potential audience be considered, so too must the nature of the audience for television in general.¹⁹³ Because of the accessibility issues, a harm threshold under the broadcasting regime must be lower than the censorship regime and therefore broadcasters would ultimately still face stricter regulation. At least in this situation the stricter standard would be justified. The harm and offence standard in the United Kingdom recognises the impact of the medium and that harm in television requires a lower threshold than under other area of the law.¹⁹⁴

VIII IMPACT OF A HARM STANDARD ON BROADCASTING IN NEW ZEALAND

The function of regulation intended to curb broadcasting on the basis of avoiding offence is, it is argued, founded solely on a societal concern to protect viewers from inadvertent confrontations with offensive images.¹⁹⁵ In other words, the core of the good taste and decency standard is not concerned with preventing harm. Nevertheless, the BSA has imposed a threshold that in essence makes the good taste and decency standard a de facto harm-based standard. Thus, changing the standard of good taste and decency to one based on preventing harm might not actually be that great a change for broadcasting in New Zealand.

A Blurring the Line between Offence and Harm

A complaint under the good taste and decency standard will not be upheld merely because it causes offence to some people.¹⁹⁶ To justify upholding a complaint the content would have to offend a significant portion of society, in other words, it would have to satisfy a community standard of offence. The strongest community standard in today's

¹⁹² Ibid, ss 3A, 3B, 23(2).

¹⁹³ See Fenwick, Helen and Gavin Phillipson, above n 14, 598.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

society would be the threshold pertaining to the bottom line limits. This observation is evidenced by the fact that the BSA tends to uphold complaints only where these bottom lines have been breached. The examples discussed earlier in the paper concerned scenes involving the repeated and gratuitous use of highly offensive language and gratuitous depictions of sexual activity.¹⁹⁷ The kind of content that falls below the bottom lines, though treated as a contravention of good taste and decency, arguably goes beyond being merely offensive and should properly be categorised as harmful content.¹⁹⁸

If the New Zealand broadcasting legislation already, in effect, imposes a de facto harm and offence standard on broadcasters, one might ask whether the reform proposed by this paper is necessary. In addition, the BSA already imposes an element of personal responsibility on adult viewers, especially in respect of content broadcast after the 8:30pm watershed. The BSA assumes that adult viewers will take reasonable measures to inform themselves about what they are watching and accept responsibility for protecting their own sensibilities.¹⁹⁹ Thus, would enacting a standard of avoiding offensive and harmful material have any significant impact on the regulation of freedom of expression in television in New Zealand? In terms of the practical or visible impact, the change is unlikely to be significant. However, reform would enable a more principled application of broadcasting regulation in respect of issues of taste and decency.

The high threshold imposed by the good taste and decency standard is imposed partly by default. The actual threshold of good taste and decency in a particular context can be very difficult to ascertain, which makes it safer to fall on the side of upholding freedom of expression. Under a harm and offence standard the threshold is deliberately set high because that is where the standard, objectively measured, lies. A firm and ascertainable threshold assists broadcasters in making their programming decisions by making it easier to determine whether they comply with the legislative standard. In

¹⁹⁶ *Freedoms and Fetters: Broadcasting Standards in New Zealand*, above n 6, 73.

¹⁹⁷ *TVNZ v Morrish and Valenta*, above n 72; *TVWorks Ltd v Miller*, above n 77; *Blackburn v TV3*, above n 119.

¹⁹⁸ See Hargrave, Andrea and Sonia Livingstone, above n 50, ch 1. "Language and Sexual Imagery in Broadcasting: A Contextual Investigation", above n 60, 11; "Public Perceptions of Highly Offensive Language", above n 60, 10.

contrast, under an elusive good taste and decency standard, broadcasters, generally, would rely on the fact that the BSA would apply the high threshold of the bottom line limits because of the difficulty in identifying the correct threshold in a particular situation.²⁰⁰

The BSA recognises that there are no commonly accepted norms of taste and decency (presumably aside from the bottom line limits) and that it cannot hope to cater to the range of personal tastes that exist in society.²⁰¹ So, the question is, if there are no commonly accepted norms of taste and decency, why does the Broadcasting Act 1989 still impose such a standard? In effect, the good taste and decency standard, as it is applied, is no longer a standard of good taste and decency. Rather, the standard is masquerading as a harm and offence standard. Contributing to the problem is the feedback loop – the diverse range in programming by broadcasters is likely to be causing individuals' norms in taste and decency to diversify further. Essentially, regulating freedom of expression on the basis of a standard that even the BSA acknowledges that no such threshold exists is unprincipled and should be remedied.

B Potential Disadvantage of a Harm and Offence Standard

There is potentially a disadvantage to having a harm and offence standard under New Zealand's post-release broadcasting complaints system. If a harm and offence standard were introduced, broadcasters could be held to have breached it if it broadcasts harmful material. Upholding a complaint could discourage broadcasters from broadcasting similar harmful content in the future, but harm would nevertheless have already occurred in respect of that particular programme. On this basis, retaining the good taste and decency standard would arguably be better because being exposed to merely offensive content is the lesser evil compared with being exposed to harmful material.

¹⁹⁹ *Freedoms and Fetters: Broadcasting Standards in New Zealand*, above n 6, 73.

²⁰⁰ See *ibid*, 85.

The problem with this argument is that the good taste and decency standard does not necessarily protect viewers from harmful content. Despite the aim of the good taste and decency standard to prevent the broadcast of offensive material, some offensive material nevertheless slips through the net. That material could be merely offensive (that is, offensive but not harmful) or it could be offensive material that is also harmful. The good taste and decency standard merely imposes a lower threshold (at least in theory) to justify upholding complaints. Put another way, the good taste and decency standard enables viewers to make complaints about a wider range of content and imposes a greater restriction on broadcasters' freedom of expression than under a harm and offence standard, but it does not necessarily protect viewers from harmful content. Both standards would arguably operate better under a pre-release censorship system. Thus, while a harm-based standard would operate better under a pre-release censorship system, it does not follow that a harm-based standard is more disadvantageous than a good taste and decency standard under a post-release complaints systems.

C Safety Net

In the area of good taste and decency the BSA acknowledges that it can act only as a safety net, that is, the BSA's role is to establish the outer limits of society's acceptance and, after considering contextual factors, to draw the line.²⁰² Under a harm and offence standard the BSA's role in respect of issues of taste and decency would remain as a safety net. Thus, the success rate of complaints under the new standard is unlikely to dramatically change. Some members of the public might be disappointed in reform that allows more sex, violence, and bad language on television as well as making it harder to successfully complain about such content. However, the reform proposal was never driven by the fact that few complaints were upheld or by the kind of content that is broadcast. Rather, the concern was in respect of the efficacy of the good taste and decency standard – its practical and inherent flaws created the impetus for change.

²⁰¹ Ibid.

²⁰² Ibid, 86.

Some people might nevertheless feel that because the standard deals with sex, violence, and bad language it should impose a lower threshold for complaints because of the need to protect children. Some programmes are capable of harming children by relaying the wrong values. For example, if not inciting children to violence, they may suggest to children that violence is an acceptable way of resolving conflicts.²⁰³ The special interests of children, however, are already recognised by the "Children's Interests" standard under the Free-to-air Television Code.²⁰⁴ This standard requires broadcasters to consider the interests of child viewers when broadcasting programmes in normally accepted children's viewing times.²⁰⁵ For example, scenes and themes dealing with disturbing social and domestic friction or sequences in which people, especially children, may be humiliated or badly treated should be handled with care and sensitivity.²⁰⁶ Having a standard specifically focused on children's interests should allay concerns that the harm and offence standard, in acting as a safety net, would somehow disadvantage children.

The harm and offence standard, though it was proposed as a replacement for the good taste and decency standard to deal with issues of taste and decency, would not necessarily be confined to such issues. It is possible, for example, that harm is caused when viewers are misled by reason of omission of a material factor in the presentation of research of public importance. This situation would likely be caught under the balance standard,²⁰⁷ but if for some reason it did not then the harm and offence standard could potentially also act as a safety net if appropriate. 'Harm and offence' is definitely open to an interpretation that encapsulates more than just the harm that arises from viewing programmes containing content such as sex, violence, and bad language. If this liberal interpretation is adopted then a harm and offence standard could act as a general safety net in broadcasting regulation to protect viewers from harm. This approach could be desirable and, provided that an appropriate harm threshold could be ascertained in respect

²⁰³ Shaw, Colin, above n 49, 66. See generally, *ibid*, ch 4.

²⁰⁴ "Free-to-air Television Code of Broadcasting Practice", above n 2, standard 9. The Code also acknowledges that New Zealand is a party to the United Nations Convention of the Rights of the Child.

²⁰⁵ "Free-to-air Television Code of Broadcasting Practice", above n 2, standard 9.

²⁰⁶ *Ibid*, guideline 9e.

of breaches of the other broadcasting standards, freedom of expression could justifiably be restricted by the operation of this general safety net.

IX MORALITY VS HARM

The analysis thus far has focused on the practical arguments surrounding the good taste and decency and the harm and offence standards. This part of the paper looks at the two standards from a theoretical perspective, which supplements the arguments made up to this point. As discussed, the good taste and decency standard is underpinned by morality, whereas a standard of harm and offence is underpinned by the need to prevent harm. Viewed in this light, the two standards can be compared in the context of the debate between whether the law should intervene to protect morality and whether it should be used only to prevent harm to others. The following analysis considers the debate by looking at how each standard fulfils the theoretical justifications of free speech and finds that preventing harm is a justifiable limitation on freedom of expression in television. The analysis supports the conclusion that the good taste and decency standard should be replaced with a harm and offence standard.

A The Debate

According to liberal theorists the law should not seek to impose moral restraints on people unless the conduct would harm another person.²⁰⁸ The idea of making laws on matters of morals just because the majority of people think such conduct immoral is undesirable.²⁰⁹ The law, according to this theory, should seek to place restrictions on individual liberty only where the exercise of that liberty could result in causing harm to other people. However, those who object to the liberal theory view the law as an

²⁰⁷ Broadcasting Act 1989, s 4(1)(d), "Free-to-air Television Code of Broadcasting Practice", above n 2, standard 4.

²⁰⁸ See generally, Mill, J. S. *On Liberty* (Longman, Green, London, 1884); Hart, H. L. A. *Law, Liberty and Morality* (Oxford University Press, Oxford, 1968). Narveson, Jan "Freedom of Speech and Expression: A Libertarian View" in Waluchow, W J (ed) *Free Expression: Essays in Law and Philosophy* (Oxford University Press, New York, 1994) 59-90.

²⁰⁹ McDowell, Morag and Duncan Webb *The New Zealand Legal System* (4 ed, LexisNexis, Wellington, 2006) 7.

appropriate vehicle for purposes of maintaining moral standards and moral homogeneity in the community.²¹⁰

In practice, the distinction between the two sides of the debate is not always clear cut. Some conduct might be considered by some to be immoral, and even though it causes no demonstrable harm, the harm to public morality might nevertheless be viewed as harmful conduct. However, the harm and offence standard proposed in this paper is assumed to require more than harm to public morality to constitute harm under the standard. In other words, mere offence is not harmful, though in some circumstances offensive content can also constitute harmful content. There is no correct answer as to which theory is correct or better. The appropriateness of each theory in justifying a particular law depends on the conduct or liberty sought to be restricted and the surrounding context. In this paper the relevant liberty sought to be restricted is freedom of expression in the context of television.

One of the benefits identified of a harm and offence standard is that it imposes a higher threshold for successful complaints than the good taste and decency standard; it is easier for a viewer to be offended than harmed from watching a television programme.²¹¹ It follows that a harm and offence standard provides greater scope for freedom of expression than the good taste and decency standard. The following discussion looks at the benefits derived from this additional scope for freedom of expression, and in particular, the costs of regulating speech by a morality-based good taste and decency standard.

B *Morality vs. Harm: Free Speech Theories*

The restriction on freedom of expression imposed by the good taste and decency standard places limitations on the extent to which individuals can act as autonomous

²¹⁰ Ibid, 6.

²¹¹ See the discussion in respect of Ofcom's *Jerry Springer* decision under Part VII A The United Kingdom Experience.

decision-makers in pursuit of self-fulfilment, the contribution to the marketplace of ideas, and the contribution to democracy.²¹²

The good taste and decency standard, in prohibiting the broadcast of content that falls below the prevailing level of morality is, in effect, making moral decisions on behalf of viewers. That is, the good taste and decency standard decides on behalf of viewers what content is immoral or offensive and therefore should not be viewed. Restrictions on what individuals are allowed to say and write or to read and hear inhibit the development and growth of individual personalities.²¹³

It could be argued that the legislature's decision to include the good taste and decency standard was the result of individuals' autonomous decision making in the first place, as they chose that particular government to represent their views. However, even if this argument were accepted, the inability to continue to exercise their autonomy would nevertheless inhibit the development of individual personalities. Thus, the inability of viewers to make their own decisions in respect of programme content runs counter to the autonomy and self-fulfilment theories. In contrast, a harm and offence standard imposes greater personal responsibility on viewers to protect themselves from offensive material. Greater personal responsibility requires individuals to exercise their autonomy to make decisions as to what they wish to watch.

The greater scope for freedom of expression under a harm and offence standard also enables a greater variety of voices and views to be broadcast in the contribution towards the marketplace of ideas and towards democracy. The English case of *R (On the Application of ProLife Alliance) v BBC*²¹⁴ illustrates the potential limitations of a good taste and decency standard in respect of the contribution to democracy. The ProLife Alliance is a political party that opposes abortion and in its allocated party election broadcast in 2001 it wished to broadcast a video that contained prolonged and graphic images of aborted fetuses. Broadcasters refused to broadcast the video on the grounds

²¹² See Part III A Justifications of Free Speech.

²¹³ *Freedom of Speech*, above n 13, 13.

that the images were offensive and breached good taste and decency. They accepted the video only after the most graphic images were removed. The ProLife Alliance sought judicial review of the broadcasters' refusal to broadcast the original version of the video, arguing that the broadcasters failed to attach sufficient significance to the electoral context. Their Lordships gave deference to the broadcasters and accepted that they had applied the standard of good taste and decency correctly.²¹⁵

While the footage was offensive, it might not have necessarily been harmful under the harm and offence standard in the Communications Act 2003.²¹⁶ Lord Nicholls said that many people would have found the images "distressing, even harrowing",²¹⁷ but it would have been a one-off broadcast lasting fewer than five minutes. Further, it would have been shown after 9pm and preceded with a warning about the distressing nature of its contents. Following the liberal stance taken in the *Jerry Springer* decision,²¹⁸ Ofcom may have given greater weight to the political message of the ProLife Alliance's video to decide in favour of freedom of expression. The *ProLife Alliance* decision illustrates the potentially greater limitations that a good taste and decency standard imposes on the contribution to democracy than would be the case under a harm and offence standard.

C Benefits of Pluralism

The value in pluralism is illustrated by its contribution to the benefits of free speech pursuant to the free speech theories. For example, a diverse society enables a diverse range of opinions and views to be expressed, thereby contributing towards the self-fulfilment of its members. In turn, the development of more reflective and mature

²¹⁴ [2003] 2 WLR 1403; [2003] 2 All ER 977; [2003] UKHL 23.

²¹⁵ This summary greatly simplified the decision for the purposes of this paper. For further discussion about the case see Barber, N W "A Question of Taste" (2002) 118 LQR 530-534; Barendt, Eric "Free Speech and Abortion" (2003) Public Law 580-591; Fenwick, Helen and Gavin Phillipson, above n 14, 577-592 and 607-617; Hare, Ivan, above n 29, 525-528; Macdonald, Alison "R. (On the Application of ProLife Alliance) v British Broadcasting Corporation: Political Speech and the Standard of Review" (2003) 6 European Human Rights Law Review 651-657.

²¹⁶ Section 319(2)(f).

²¹⁷ *R (On the Application of the ProLife Alliance) v BBC* [2003] UKHL 23, para 3.

²¹⁸ See part VII A The United Kingdom Experience.

individuals benefits society as a whole.²¹⁹ On another view, having pluralism and diversity in society and on television is surely better than homogenised, bland, mainstream speech and images reflecting uncontroversial, majoritarian viewpoints.²²⁰ A diversity of attitudes, moral beliefs, and ways of life exists in any developed or liberal society and freedom of expression validates that diversity. The ways of life that are portrayed and expressed are validated through their portrayal and expression.²²¹ In contrast, censorship or other restrictions of certain expression acquire a negative significance. In other words, public portrayal validates ways of life whereas censorship and restrictions on expression represent public condemnation of ways of life.²²²

The ability of freedom of expression to validate certain ways of life was reflected in the analysis of the feedback loop, discussed above.²²³ That is, as viewers engage with the content they see on television they become accustomed to it, which to some extent normalises that kind of behaviour or way of life. In addition to validating different ways of life, moral beliefs, and attitudes, exposing society to this kind of pluralism through freedom of expression in television could lead to development of tolerant attitudes towards others' beliefs. It could also lead to individuals becoming thick skinned about behaviour that they might consider to be offensive. Tolerance and a thick skin are in turn vital in a modern pluralist democracy.²²⁴

Restraints imposed on the basis of avoiding offence run counter to the enhancement of plurality and diversity since they curb the more controversial broadcasts of expression, including that reflective of the practice of sexual minorities.²²⁵ The standard of good taste and decency is meant to reflect the current moral attitudes in society, but what if the prevailing moral attitudes are discriminatory or otherwise

²¹⁹ *Freedom of Speech*, above n 13, 13.

²²⁰ See Fenwick, Helen and Gavin Phillipson, above n 14, 560.

²²¹ Raz, Joseph, above n 14, 312.

²²² *Ibid.*

²²³ Part V B Feedback Loop.

²²⁴ *Freedom of Speech*, above n 13, 34. Alexander, Larry, above n 13, 132. However, Alexander questions whether freedom of expression is the cause rather than the effect of tolerance: *ibid.* See generally Bollinger, Lee *The Tolerant Society* (Oxford University Press, New York, 1986).

²²⁵ Fenwick, Helen and Gavin Phillipson, above n 14, 565.

negative diversity? There will be times when it is in the interests of a community for moral attitudes to change.

D Case Study: Discriminatory Attitudes towards Homosexuality on Television

Depictions of homosexual sexual activity gain a much higher level of disapproval than depictions of heterosexual sexual activity.²²⁶ In the BSA's 2005 national survey 53 per cent of respondents thought that a scene important to the storyline depicting two men in bed having sex with their top halves showing screened after 8:30pm was unacceptable.²²⁷ In contrast, a man and a woman having sex with their top halves showing in the same context was thought to be unacceptable by only 26 per cent of respondents.²²⁸ Further, the same scene with a man and a woman having sex but not important to the storyline was regarded inappropriate by only 38 per cent of the respondents.²²⁹ Because the BSA is required to reflect these community standards, its decisions may in fact sometimes enforce attitudes that can be seen as discriminatory.²³⁰ Removing the concern with enforcing standards of good taste and decency could help to counter these discriminatory attitudes.

If homosexual sex scenes on television were to receive the same level of approval as heterosexual sex scenes, it could potentially reduce that kind of discrimination in society. For example, in conservative southern Florida, a programme was broadcast that contained a scene involving a lesbian kiss with a clear implication of a budding lesbian relationship. In response to being asked their views on the scene, some interviewees said "they've now seen gay relationships so many times in the media that they don't think of them as out of the ordinary and certainly not indecent."²³¹

²²⁶ *Freedoms and Fetters: Broadcasting Standards in New Zealand*, above n 6, 100. See also Dickinson, Garry, Michael Hill and Wiebe Zwaga, above n 45; Broadcasting Standards Commission "Sex and Sensibility" (1999) www.ofcom.org.uk (accessed 19 September 2008); Shaw, Colin, above n 49, 94-96.

²²⁷ *Freedoms and Fetters: Broadcasting Standards in New Zealand*, above n 6, 100.

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ John Burrows and Ursula Cheer *Media Law in New Zealand* (5 ed, Oxford University Press, Melbourne, 2005) 598.

²³¹ Hillard, Robert and Michael Keith, above n 3, 156.

The example of discriminatory attitudes towards homosexuality in television illustrates that restricting freedom of expression based on prevailing moral standards and attitudes is not always desirable. The restrictions imposed by the good taste and decency standard do not always encourage tolerance or validation of certain ways of life. Having an objective standard to regulate content such as sex and violence promotes a detached view of the content and requires viewers to look at the content beyond their own moral standards to see that the content is not causing anyone harm. From this perspective, viewers might become more accepting or tolerant of certain behaviour. The feedback loop in television could help combat discrimination by helping to normalise the fact that sexual minorities are an important part of our society.

If viewers were confronted with a homosexual sex scene on television, they could exercise their autonomy to decide that they are not offended by such behaviour. However, if good taste and decency prevents the broadcast of that material then viewers cannot make such a decision. Some viewers might nevertheless continue to find heterosexual sex scenes more acceptable than homosexual sex scenes, but it is possible that some viewers, having watched a particular scene, to decide that they can accept both ways of life. Viewers might feel better fulfilled for being able to have an open mind in respect of the issue. Ultimately, television is probably not the ideal or primary mechanism to combat issues such as discrimination, but it should nevertheless be utilised if it could contribute positively to the situation. If broadcasters' wish to push moral boundaries can result in a reduction in discriminatory attitudes then they should be not prevented from doing so. In other words, a good taste and decency standard can hinder the operation of a diverse and liberal democracy.

E Moral Decline or Moral Change?

Having a good taste and decency standard in television can perpetuate the status quo in respect of the prevailing level of morality. As people accept certain behaviour as the norm it can be quite difficult to change that norm. However, as a harm and offence standard does not restrict freedom of expression on the basis of morality, it would

arguably be easier for moral attitudes to change under that standard. However, if attitudes towards certain issues become more liberal or, on another view, more tolerant, some people might interpret that change as being a fall in society's moral standards. For example, some people feel that an increase in the use of bad language is a sign of moral decline and a decline in respect for authority.²³²

However, a distinction needs to be drawn between a decline in broadcasting standards and a decline in moral standards. In today's diverse society, liberal changes in attitudes can lead to a decline in broadcasting standards because society is more accepting of certain content and therefore permits that kind of content to be reflected in television programmes. A decline in broadcasting standards loosens the restrictions placed on freedom of expression. However, a fall in broadcasting standards does not necessarily represent moral decline. The change in attitudes may be, as the description implies, simply a change, without necessarily being positive or negative. Sometimes the moral change can be positive, as discussed in respect of changing the discriminatory attitudes towards homosexuality on television. Alternatively, while a moral change might not be positive or negative, the process in allowing the change to occur can be beneficial to society. For example, the change could have occurred as the result of individuals exercising their autonomy to change their moral attitudes.

Some members of the public might nevertheless find that allowing more sex, bad language, and violence on television detracts from the value of the programmes and is therefore unnecessary and undesirable television content.²³³ On one view, this argument merely brings the discussion back to what was said at the beginning of this paper that what may appear to be "dirty discourse" to some may be considered to be laudable satire to others.²³⁴ Another way to view this argument is in the context of the free speech theory of the distrust of government.²³⁵ Let's assume that in respect of sex scenes there are some

²³² Hargrave, Andrea and Sonia Livingstone, above n 50, 78.

²³³ See Raz, Joseph, above n 14, 317-318.

²³⁴ Hillard, Robert and Michael Keith, above n 3, XI. See part IV C Changes in Community Norms of Taste and Decency.

²³⁵ See Fenwick, Helen and Gavin Phillipson, above n 14, 16; Alexander, Larry, above n 13, 145; *Freedom of Speech*, above n 13, 21-23.

that have value in their presentation and others that have no value (perhaps they are entirely gratuitous) and are offensive but not harmful. Can the legislature be trusted to always correctly regulate such expression or, specifically, can the good taste and decency standard legitimately distinguish the two? While the BSA might make a correct distinction on most occasions, it is not immune to errors. Thus, on the basis of the distrust of government, television content should not be regulated in terms of good taste and decency because of the possibility that valuable speech would erroneously be suppressed.

F Harm as the Bottom Line

While the good taste and decency standard imposes a greater restriction on freedom of expression than a harm and offence standard, the latter still represents a restriction on expression. As a restriction on freedom of expression, a harm and offence standard also carries the disadvantages of a good taste and decency standard in a diverse and liberal democracy, though to a lesser extent. However, restricting freedom of expression to avoid causing harm to others is often a legitimate restriction on freedom of expression.²³⁶ Laws that prevent messages that cause harm implicate freedom of expression but they do not necessarily violate it.²³⁷ Whether content regulation violates freedom of expression depends upon the result of weighing the interest in freedom of expression against the government's interest in preventing causing harm to, for example, confidentiality, privacy, or emotional peace.²³⁸ However, the only way to weigh the interest in receiving certain messages against harms those messages cause is to assign a value to the ideas or information that those messages contain.²³⁹

The value of freedom of expression in respect of moral issues arises from its contribution to autonomy, self-fulfilment, the marketplace of ideas, and democracy and also the value it brings to a diverse society. The harm caused from freedom of expression that falls below the prevailing level of morality is an affront to viewers' sensibilities.

²³⁶ See Alexander, Larry, above 13, 56.

²³⁷ *Ibid.*, 57.

²³⁸ *Ibid.*

²³⁹ *Ibid.*

Weighing up these competing values, the outcome must fall in favour of freedom of expression. However, the value of freedom of expression in broadcasting issues of taste and decency is not great enough to outweigh the harm in the emotional trauma or distress that certain television content can cause.

Ultimately, a line must be drawn and that line is where freedom of expression in television content can cause harm. The marginal value in allowing freedom of expression to be harmful in addition to being offensive is not enough to justify the harm caused. The distrust of government might oppose regulating freedom of expression in television, but the possibility of valuable speech being erroneously suppressed on the basis of being harmful is a justifiable sacrifice to protect viewers from content that actually is harmful. Again, this argument for a harm standard is not as strong in the context of a post-release complaints system, but for the reasons discussed earlier,²⁴⁰ it does not necessarily make a good taste and decency standard any better by comparison.

This weighing exercise is reflected in the United Kingdom broadcasting legislation and New Zealand's censorship system, which both regulate freedom of expression on the basis of preventing harm rather than on the basis of preventing offence. Overall, in the context of freedom of expression in television, the prevailing level of morality in society should not confine freedom of expression. Instead, a liberal approach should be taken and thus, freedom of expression should be restricted only to prevent causing harm to others.

X CONCLUSION

A standard of good taste and decency, at its core, is not concerned with harm – it is concerned with avoiding offence and affronting viewers' sensibilities. However, the standard fails to recognise the diversity in attitudes and opinions that exist in today's pluralistic society and the need to protect and reflect that diversity. The standard is inherently flawed in that its purpose of acting as a check on broadcasters' freedom of

²⁴⁰ Part VIII B Potential Disadvantage of a Harm and Offence Standard.

expression is undermined by the broadcasters' ability to influence the boundaries of the standard. The subjectivity of the standard makes it difficult to apply and as a result the BSA, in effect, treats the standard as one of preventing harm.

This paper proposed that New Zealand should replace the good taste and decency standard with a harm and offence standard. A harm and offence standard enables viewers to exercise their personal responsibility by taking steps to protect themselves from what they perceive to be offensive content. A harm and offence standard imposes a higher threshold for complaints to succeed, which softens the restriction on freedom of expression, giving it greater scope to flourish. While in practical terms the change is unlikely to have a dramatic impact, it will nevertheless enable a more principled approach dealing with complaints concerning issues of taste and decency. A harm and offence standard reflects and reinforces the diversity in today's society and can assist in developing a tolerant society by imposing the smallest restriction possible on freedom of expression that is necessary to protect viewers. In other words, a liberal approach to issues of taste and decency should be taken when seeking to restrain freedom of expression.

APPENDIX 1: FREE-TO-AIR TELEVISION CODE OF BROADCASTING PRACTICE

There are 11 standards in Free-to-air Television Code²⁴¹ under which viewers can raise a complaint:

Standard 1: Good Taste and Decency

Standard 2: Law and Order

Standard 3: Privacy

Standard 4: Balance

Standard 5: Accuracy

Standard 6: Fairness

Standard 7: Programme Classification

Standard 8: Programme Information

Standard 9: Children's Interests

Standard 10: Violence

Standard 11: Liquor

X CONCLUSION

A standard of good taste and decency, at its core, is not concerned with harm – it is concerned with avoiding offence and affronting viewers' sensibilities. However, the standard fails to recognise the diversity in attitudes and opinions that exist in today's pluralistic society and the need to protect and reflect that diversity. The standard is

²⁴¹ Visit Broadcasting Standards Authority www.bsa.govt.nz for more information.

APPENDIX 2: OFCOM BROADCASTING CODE

The Ofcom Broadcasting Code²⁴² contains the following standards:

Section 1: Protecting the Under-Eighteens

Section 2: Harm and Offence

Section 3: Crime

Section 4: Religion

Section 5: Due Impartiality and Due Accuracy and Undue Prominence of Views and Opinions

Section 6: Elections and Referendums

Section 7: Fairness

Section 8: Privacy

Section 9: Sponsorship

Section 10: Commercial References and Other Matters

²⁴² Visit Office of Communications www.ofcom.org.uk for more information.

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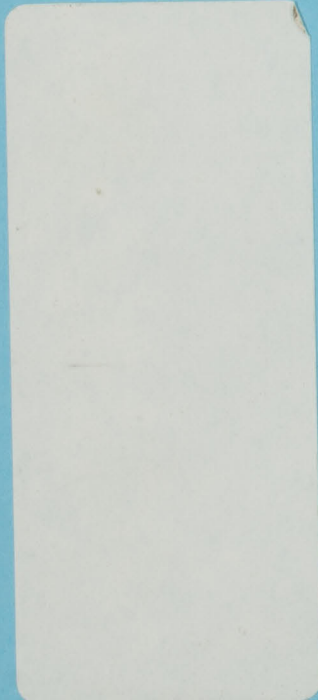
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