

Supplementary Analysis Report: Update to the standardising classification for Commercial Video on-Demand content Regulatory Impact Assessment

On 2 September 2019, Cabinet approved key policy proposals to amend the Films, Videos, and Publications Classification Act 1993 (the Classification Act) to require the classification of CVoD content prior to its availability in New Zealand [CAB-19-MIN-0445 refers]. This included allowing providers to self-classify content using their own systems approved by OFLC or online tools and resources provided by OFLC. Instructions were issued to the Parliamentary Counsel Office (PCO) to draft an amendment Bill with the aim of introduction in November 2019.

The Quality Assurance panel considered that the Regulatory Impact Assessment (RIA), which accompanied the policy proposals at the Cabinet Social Wellbeing Committee (SWC), did not meet the Quality Assurance criteria. This Supplementary Analysis Report (SAR) has been undertaken to address the panel's assessment that the RIA did not 'establish the criteria which will be used to determine which providers will be regulated, and whether consideration will be given to exempting small or niche providers'. This was, effectively, uncertainty about the definition of CVoD.

Following consideration of policy proposals by SWC, Cabinet authorised the Minister of Internal Affairs to undertake targeted consultation on the CVoD definition, and the Minister of Finance and the Minister of Internal Affairs agreed that a SAR addressing the CVoD definition would be provided to Cabinet prior to Cabinet considering the Bill in November 2019.

Because the supplementary analysis work on the CVoD definition does not present major changes to the original policy objectives or their expected regulatory impact, DIA has proceeded by updating the existing RIS rather than undertaking a new one. New material is incorporated in italics.

The additional analysis included in this RIA covers:

- *Background information (page 41)*
- *Three objectives identified to assess the proposed recommended approach on the CVoD definition criteria (page 41)*
- *Two options that were considered for clarifying the CVoD definition, and assessment against the three objectives (pages 41-45)*
- *Information about the targeted consultation that was conducted, and the four key themes that emerged from submissions (pages 45-46)*
- *Information about market research that was considered as part of our analysis (page 46-47)*
- *Analysis of submissions received (pages 47-48)*
- *Refined objectives for assessing our recommended approach (page 48)*
- *Our recommended approach to clarify the CVoD definition and providers (pages 49-51)*
- *Assessment of our recommended approach against the Option 1 proposal that we consulted on (page 51)*
- *Assessment of recommended approach against the three refined objectives (pages 52-53)*

Updated RIA: CVoD definition analysis

- *Analysis of how the recommended approach affects different types of providers (pages 53-54)*
- *An explanation on further analysis to be undertaken as part of a separate DIA workstream (page 54)*

Limitations to supplementary analysis: Time constraints due to Ministerial direction, and targeted consultation undertaken on only one option.

The Minister of Internal Affairs has required CVoD content to be brought under the Classification Act regime this term. In order to meet this timeframe, we conducted a condensed two-week targeted consultation on the CVoD definition and invited written submissions from specific industry and regulatory stakeholders. The condensed consultation timeframe may have meant that some stakeholders did not have enough time to make a submission, so did not provide feedback. However, three submitters we engaged with were given additional time (of up to 1 week) to provide their feedback. We accommodated these requests where we were able to.

Targeted consultation was also only undertaken on one proposed approach (Option 1). While it would have been preferable to consult on more than one option, we determined that the Option 2 proposal clearly fell short of meeting our objectives when compared to Option 1. As such, we provided this advice to the Minister and received direction from the Minister to undertake targeted consultation on only one option.

We are confident that our recommended approach has been developed and refined in consideration of feedback received from consultation on the proposed CVoD definition.

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Coversheet: The Films, Videos, and Publications Classifications Amendment Bill – standardising classification for Commercial Video on-Demand content

Advising agencies	<i>DIA</i>
Decision sought	<i>Agree to final policy proposals to standardise classification for commercial video on-demand content</i>
Proposing Ministers	<i>Hon Tracey Martin, Minister of Internal Affairs</i>

Summary: Problem and Proposed Approach

<p>Problem Definition</p> <p>What problem or opportunity does this proposal seek to address? Why is Government intervention required?</p>
<p>The specific issue that this proposal is attempting to address is inadequate and inconsistent information being provided to consumers of Commercial Video on-Demand (CVoD) content, which is accessed online on-demand after payment of a fee. This problem presents a risk of psychological and physical harm to vulnerable New Zealanders, particularly children and young people, from viewing inappropriate content. The risk of harm may be minimised if consumers are presented with enough information via content labels to make informed viewing decisions.</p> <p>CVoD providers currently classify their content in two ways: by using the New Zealand Media Council (the Media Council) Video on-Demand Classifications Code (VoD Code), which uses the Pay Television Code’s classifications, or by using their own classifications.</p> <p>Providers using the Media Council’s code are also authorised by the Media Council to use their own ratings if they choose. For example, Netflix is a member of the VoD Code but uses its own ratings on its platform. This currently means there are inconsistent classifications across CVoD content New Zealanders are viewing. It has also resulted in the Chief Censor’s reactive “call in” power being used when these classifications result in complaints to the Office of Film and Literature Classification (OFLC). This power tends to only be used once harm has been caused, which leaves children and young people vulnerable to the risk of harm.</p>

The objective of this work is to ensure that New Zealanders, particularly young people, children and their parents, are provided with consistent and trusted information to make informed viewing decisions. Government intervention is necessary to provide clear requirements for providers and industry to consistently adhere to, within an established classification regime that New Zealanders are familiar with.

Proposed Approach

How will Government intervention work to bring about the desired change? How is this the best option?

The proposed amendment to the Films, Videos, and Publications Classification Act 1993 (the Classification Act) will ensure CVoD content is subject to a mandatory classification scheme, with the ability for providers to self-classify their content under a method prescribed by the OFLC.

This approach closely met the assessment criteria for this work which focussed on providing succinct and specific information that would minimise the risk of harm to children and young people, how quickly that information could be provided, and how it impacts CVoD providers and regulators financially and operationally.

It will provide for consistent information to be displayed on CVoD content, so consumers can make informed viewing decisions. It will also provide clarity for providers regarding Government expectations on how they should operate responsibly within the New Zealand market.

This approach ultimately helps to manage the risk of harm to children and young people from viewing inappropriate content while making compliance convenient and efficient for providers. CVoD providers that do not wish to self-classify will need to comply using the current process. This means submitting content to the Film and Video Labelling Body (the Labelling Body), which may then refer restricted content to OFLC for classification.

Section B: Summary Impacts: Benefits and costs

Who are the main expected beneficiaries and what is the nature of the expected benefit?

We expect all New Zealand consumers using CVoD services to benefit from this change. Recent research has shown that Netflix alone has almost two million subscribers in New Zealand. New Zealanders, especially young people, children and their parents, will be better informed about the content they wish to view. Having trusted information in a familiar format will help New Zealand consumers make informed decisions and potentially help prevent long term psychological, physical and emotional harm from occurring.

This approach is consistent with Government priorities regarding the welfare of children and young people and supports Government's obligations outlined in the United Nations Convention of the Rights of the Child (the Convention). In particular, Article 17(e) of the Convention requires that state parties "encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her wellbeing".

Where do the costs fall?

This proposal will require CVoD providers to pay a classification fee once it is established. Fees payable under the Classification Act are set on a cost-recovery basis (e.g. films submitted for classification currently incur a fee of \$1,124.40 per film).

The Department of Internal Affairs (DIA) is undertaking a review of OFLC's fees and funding model which will need to be reported to Cabinet by April 2020. This separate piece of work will consider an appropriate level and method of charging for a CVoD fee. We will not know how much CVoD providers will be charged until this review is complete.

OFLC and the Labelling Body will likely incur additional costs to manage additional workloads as a result of this proposal. However, allowing CVoD providers to self-classify should assist in streamlining the process for both regulators and regulated parties. OFLC is expecting the self-classification tool to cost \$1 million over two years for implementation cost and \$250,000 for ongoing costs. We have little evidence to show what the costs to providers will be. However, one CVoD provider that did provide figures suggested that the cost for them would be substantial. This was based on the self-classification tool in its current development state and assumptions about classifying their entire back catalogue.

What are the likely risks and unintended impacts, how significant are they and how will they be minimised or mitigated?

There is a risk that content providers may withdraw from the New Zealand market due to an increased compliance burden should they be required to classify all content via the current process (e.g. submitting content through the Labelling Body, referring to OFLC where appropriate). The preferred approach mitigates this risk because it allows providers to classify their own content using a method prescribed by OFLC. This should streamline and allow for an efficient classification process. International evidence, especially from Australia and the UK, indicates a move toward self-classification under official regimes.

CVoD providers also made submissions during the public consultation process on these proposals and did not state any intention to leave the New Zealand market due to this proposal. However, they did indicate a preference for self-classification in general, and support for a cost-effective and efficient process.

We have also identified operational risks, including OFLC's self-classification tool not being ready on time for the proposed change to take effect by mid-2020, OFLC not having enough funding for ongoing maintenance costs, and how the new process will be implemented. We will work with OFLC to ensure the tool is ready for implementation and address their funding concerns. We will consult with industry and regulators to ensure a workable process that suits all affected parties is created.

There is a risk that the preferred approach may mean CVoD providers pass on costs to consumers, as cost-recovery for complying under the proposed system. As mentioned above, any fees charged for the classification of CVoD content will be considered as part of a separate piece of work DIA is undertaking.

Other risks identified during the public consultation relating to the preferred approach included implementing a fragmented approach to Video on-Demand content that will only cover CVoD and not Free Video on-Demand or user-generated content, and creating an uneven playing field between CVoD providers and film distributors. We believe these are valid concerns and have determined these to be more appropriately addressed as part of an expected upcoming broader reform of the classification system. This is because these issues are less likely to create harm in the time before reform can be completed.

Identify any significant incompatibility with the Government's 'Expectations for the design of regulatory systems'.

The intervention is designed for a specific subset of the media entertainment industry. The scope for the current regulatory system to evolve in response to changing circumstances is limited. However, this is mitigated by the broader reform of New Zealand's media content regulation regime which is expected to be underway later in 2019. This will be jointly-led by DIA and the Ministry for Culture and Heritage (MCH), with agreement from the Minister of Internal Affairs and the Minister of Broadcasting, Communications and Digital Media.

Section C: Evidence certainty and quality assurance

Agency rating of evidence certainty?

How confident are you of the evidence base?

Our view is informed by research conducted in New Zealand and overseas highlighting the effect CVoD content can have on children and young people, including:

- a United Kingdom report commissioned by the UK regulator Ofcom into what video content children are watching, including their viewing preferences and habits¹;
- OFLC research noting that 76 per cent of New Zealanders are concerned about children and teens' exposure to visual media content, and 59 per cent are worried that the wide range of media platforms makes it easier for children to access harmful media²; and

¹ Life on the small screen: What children are watching and why (2019). Ofcom. Retrieved from: https://www.ofcom.org.uk/data/assets/pdf_file/0021/134832/Ofcom-childrens-content-review-Publish.pdf

² Children and teen exposure to media content, (2016). <https://www.classificationoffice.govt.nz/assets/PDFs/research-UMR-media-content-exposure-2017-2.pdf>

- research looking at the effects of violent media on aggression in children and adults which concluded that viewing such content can cause long term psychological, physical and emotion harm to children and young people³.

We also conducted public consultation with CVoD providers, industry bodies and other organisations, which helped in our analysis of options. We followed this consultation with a workshop involving industry and regulators to further discuss definitions and implementation of self-classification.

We do not have conclusive evidence to prove definitively that classification of media content is an effective way of preventing harm. Due to the time restraints this analysis has relied on the assumption that the policy basis for New Zealand's and other jurisdictions' classification systems is sound. This is something that could be considered as part of the wider reform.

We are confident that this is a workable solution to address the identified informational gap. It will bring CVoD content under the New Zealand classification regime while allowing for ease of implementation and compliance for regulators and regulated parties. It will also support educational efforts to minimising the risk of harm for New Zealand consumers, particularly children and young people, from viewing inappropriate and unclassified content.

To be completed by quality assurers:

Quality Assurance Reviewing Agency:

Joint panel of the Treasury's Regulatory Quality Team and Department of Internal Affairs

Quality Assurance Assessment:

A Quality Assurance Panel with representatives from the Department of Internal Affairs and the Treasury has reviewed the Supplementary Analysis Report for the above legislative/regulatory proposal in accordance with the quality assurance criteria set out in the [CabGuide](#).

The Quality Assurance Panel considers that the Supplementary Analysis Report meets the Quality Assurance Criteria.

The Quality Assurance statement for the original Regulatory Impact Assessment was that it did not meet the Quality Assurance criteria. The full statement read:

The Panel considers that the RIA is clearly written, and is transparent about the constraints on the analysis, and about many of the gaps in the analysis. Overall, the panel considers that there is sufficient analysis for Ministers to make an informed decision not to pursue Option 1 but does not provide sufficient analysis to inform the decision about whether Option 2 (the preferred option) or Option 3 is the best way of achieving the Government's

³ Short-term and long-term effects of violent media on aggression in children and adults (2006).
<https://research.vu.nl/en/publications/short-term-and-long-term-effects-of-violent-media-on-aggression-i>

objectives. Our concerns are summarised under the quality assurance criteria of complete and convincing, and consulted.

Complete and convincing

There is limited analysis of the size of the problem, particularly the magnitude of the risk from misclassifying content and the degree to which other information offered by commercial video on demand providers (e.g. in the synopsis and genre label that a consumer sees before viewing) mitigates the risk. There is also limited evidence that the problem needs addressing now, instead of waiting for the intended wider review.

The RIA does not establish the criteria which will be used to determine which providers will be regulated, and whether consideration will be given to exempting small or niche providers. Other options could have been considered. For example, encouraging providers to join the voluntary system, with the chance that regulation might follow if that was unsuccessful.

Information about impacts of options is light. Two examples are:

- *Little information about the costs to providers, and the extent to which costs will be passed onto consumers – whether through higher prices or reductions in content (lower-profitability minority audience content might be at greater risk).*
- *Whether Option 2 would increase, rather than decrease, inconsistency of classification when considered across all household video content – a point raised in submissions.*

The RIA identifies risks of non-compliance with Option 3 but is not convincing that these risks will not also manifest for Option 2. The RIA could have assessed what factors might lead providers to comply and had an implementation plan for gaining compliance.

Consulted

The RIA generally summarises and responds to the feedback from public consultation well. Consultation elicited many issues, and providers said they required more information before they could estimate the cost of options and the time required to implement them. Further, targeted, consultation would likely help, and ultimately result in sufficient analysis to inform Ministers' decisions.

Supplementary Analysis Report

The Minister of Finance and the Minister of Internal Affairs agreed that the Department of Internal Affairs would do supplementary analysis of the above issues, including the Supplementary Analysis Report attached to this Cabinet paper which addresses the definition of CVoD.

*The Panel considers that the Supplementary Analysis Report **fully** addresses the Panel's concern that the original RIA did not 'establish the criteria which will be used to determine which providers will be regulated, and whether consideration will be given to exempting small or niche providers'. The Panel also considers that the SAR goes some way to addressing the Panel's concern that the regulatory proposals would 'increase, rather than decrease, inconsistency of classification when considered across all household video content'.*

Impact Statement: The Films, Videos, and Publications Classification Amendment Bill – standardising classification for Commercial Video on-Demand content

Section 1: General information

Purpose

1. This Regulatory Impact Statement (RIS) has been prepared by the Department of Internal Affairs (DIA). DIA is solely responsible for the analysis and advice set out in this RIS except as otherwise explicitly indicated. This analysis and advice has been produced for informing policy decisions to be taken by Cabinet.
2. This RIS provides analysis of the proposed amendment to the Films, Videos and Publications Classification Act 1993 (the Classification Act). This amendment requires Commercial Video on-Demand (CVoD) content, which is accessed online on-demand after payment of a fee, to be classified in accordance with the Classification Act. This proposal is being made following public consultation.

Limitations to analysis: Scope, delivery pressures due to Ministerial priority, and lack of financial information to accurately assess financial implications for providers

3. The scope has been narrowed to only include visual media content that is accessed online on-demand by a user who has paid a fee. User-generated content (e.g. YouTube free content) and Free Video on-Demand (FVoD, e.g. TVNZ on-Demand) services are out of scope for this proposal. Including other forms of visual media content within this proposed change, while desirable, is not preferred as doing so could add additional complexity and delays in bringing CVoD content within the classification regime. Out of scope content would also be addressed as part of the upcoming broader reform of New Zealand's media content regulation regime.
4. Addressing a regulatory gap that creates a risk of harm to children and young people, from watching inappropriate CVoD content, is a priority for the Minister of Internal Affairs. The Minister has required proposals to be enacted before the end of this term. DIA and MCH are currently undertaking scoping work on a broader reform which will mitigate any risks arising from this change. An extensive reform of the current regime will take at least 18 to 24 months to complete and is largely dependent on Government priorities.

Updated RIA: CVoD definition analysis

5. Due to time constraints we have been unable to conduct an extensive analysis of the current research regarding content classification and harm reduction. We are confident that the research we have found indicates a real risk of harm to children and young people regarding insufficient information and warnings provided for visual media content. There is a lack of financial information from the industry to accurately gauge financial or cost implications for CVoD providers from the proposed change. We were hoping to receive this information during consultation. However, only one provider supplied estimated costs to help us with our impact analysis for the preferred approach.

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Section 2: Problem definition and objectives

2.1 What is the context within which action is proposed?

6. There is inconsistent and inadequate information being provided to New Zealand consumers of Video on-Demand content. This makes it difficult for parents and caregivers as well as children and young people to make informed decisions about what content is appropriate to view. There is evidence to show that viewing inappropriate content can lead to the risk of harm⁴. This creates a risk of harm to children and young people, as well as other vulnerable groups of society such as people with mental health issues, eating disorders or people still traumatised by suicide.
7. The current system provides this information through classifications and consumer warnings provided by OFLC under the Classification Act. Classifications provided by OFLC have been tailored over the years to provide clear and concise information to New Zealanders which highlights topics that are of concern. OFLC also utilises its Youth Advisory Panel which helps them understand the topics that are of concern for younger viewers. This information can then be used by other organisations to provide advice and support to consumers who find the content distressing.
8. An example of this is the Mental Health Foundation's advice for viewers of *13 Reasons Why*. The show depicted scenes of rape and suicide which had not been made clear by the warning labels provided by Netflix at the time of release. The Foundation now has advice on its website for parents and caregivers to discuss the themes in the show as well as for younger viewers who may wish to watch or have been affected by the show.

There is a risk of harm to children from watching inappropriate content

9. New Zealanders are concerned about what children and teens are watching. An OFLC study showed 76 per cent of New Zealand respondents were moderately to highly concerned about children and teens' exposure to content. Likewise, parents of participants in a UK study by OfCom⁵ were more worried about what their children watched on Netflix on personal devices, than on public broadcast television⁶.
10. Research has found that children viewing violent media content showed long term increase in aggressive thoughts, behaviour and angry feelings⁷. The producers of the Netflix series *13 Reasons Why* were warned against the graphic portrayal of suicide in the show.
11. The study by Ofcom has shown that children are increasingly more interested in content that they can view on their own devices. As this removes a degree of parental discretion it shows the need for up-front classifications that can inform a child or young person's decision making.

⁴ Short-term and long-term effects of violent media on aggression in children and adults (2006). Retrieved from: <https://research.vu.nl/en/publications/short-term-and-long-term-effects-of-violent-media-on-aggression-i>

⁵ OfCom is the UK regulator for communications services including broadband, television, radio and on-demand content.

⁶ Life on the small screen: What children are watching and why (2019). Ofcom. Retrieved from: https://www.ofcom.org.uk/data/assets/pdf_file/0021/134832/Ofcom-childrens-content-review-Publish.pdf

⁷ Short-term and long-term effects of violent media on aggression in children and adults (2006). Retrieved from: <https://research.vu.nl/en/publications/short-term-and-long-term-effects-of-violent-media-on-aggression-i>

12. New Zealand has one of the highest youth suicide rates in the Organisation for Economic Co-operation and Development⁸. Organisations with a focus on the welfare and wellbeing of New Zealand youth release guidance and information about certain content that have strong adult themes like suicide. This is to help young people and parents navigate sensitive issues due to the number of complaints these organisations receive about films and certain CVoD shows (e.g. *13 Reasons Why*).

Commercial video on-demand is an increasing market in New Zealand

13. CVoD services entered the New Zealand market in 2014 and have continued to see increases in the number of providers and viewers due to their popularity. In 2016, nearly two in five New Zealand homes had a subscription to a CVoD service, with an increasing number having more than one CVoD provider⁹. Providers produce and release a lot of original content, with Netflix reportedly forecast to spend \$15 billion on original content in 2019¹⁰.
14. The cost for a monthly subscription or a transactional payment for CVoD content is usually comparable to or less than a cinema ticket¹¹. With a monthly subscription to access CVoD content, consumers can choose from a variety of content to watch whenever and wherever they want.
15. Netflix was the most popular CVoD service by the end of 2018 with nearly two million New Zealanders having a subscription in their household, followed by Spark's Lightbox with 830,000 users¹². Other notable industry names have also announced intentions to enter the global CVoD market like Disney, Apple, Warner Media and NBCUniversal.
16. Children and young people prefer to watch content online on-demand, with providers like Netflix becoming increasingly popular due to the instant availability and vast choice of content. Studies have noted that children and young people are most attracted to interesting content they can view on their own device and at their own choosing¹³. The widespread use of the Internet and smart devices makes it easier for consumers, especially young people and children, to view and interact with content without parental or adult supervision.

⁸ *The Social Report, 2016*. The Ministry of Social Development. Retrieved from: <http://socialreport.msd.govt.nz/health/suicide.html>

⁹ *Nearly 2 in 5 Kiwis now have Subscription Video on Demand in the home (2017)* Roy Morgan. Retrieved from: <http://www.roymorgan.com/findings/7164-netflix-and-lightbox-svod-new-zealand-december-2016-201703011134>

¹⁰ News article (2019): <https://variety.com/2019/digital/news/netflix-content-spending-2019-15-billion-1203112090/>

¹¹ Netflix NZ subscription plans range between \$11.49-\$18.49 per month. Cinema tickets from Event Cinema cost \$13.50 (child), \$17.00 (student) and \$19.00 (adult).

¹² *Netflix on verge of 2 million viewers in New Zealand (2018)* Roy Morgan. Retrieved from: <http://www.roymorgan.com/findings/7701-roy-morgan-pay-tv-subscription-tv-netflix-lightbox-skytv-neon-vodafone-tv-youtube-june-2018-201808100738>

¹³ *Life on the small screen: What children are watching and why (2019)*. Ofcom. Retrieved from: https://www.ofcom.org.uk/data/assets/pdf_file/0021/134832/Ofcom-childrens-content-review-Publish.pdf

On-Demand audio-visual content not required to be ‘classified’ under law

17. It is the view of DIA that CVoD content is not covered under the definition of “film” in the Classification Act. Films are required to be classified prior to being made available to consumers. On-Demand audio visual content fits the definition for “publication” as outlined by the Act. It is therefore regulated under the Classification Act but is not required to be classified prior to availability in New Zealand, unlike films released in cinema, DVDs or Restricted-rated video games.
18. Publications can be subjected to the classification process, usually when they are “called in” by the Chief Censor under Section 13 (3) of the Classification Act or proactively submitted by providers to ensure content is appropriately classified. Prior to 2015, providers like Netflix and Lightbox were submitting content for classification to the Labelling Body, and OFLC when required. After discussions between MCH, DIA and the Ministry of Justice (the administrator for the Classification Act at the time), it was agreed that Video on-Demand services were not covered under the definition of film under the Act and not required to be proactively classified by the Labelling Body and OFLC as a result.
19. As CVoD providers are often using their own rating system (developed overseas) or a combination of the Media Council Video on-Demand Classification Code (which incorporates BSA standards) and their own rating labels, the information available to consumers becomes inconsistent. An example of how this looks in practice can be found by looking at the movie *A Star is Born*. The official OFLC classification for this movie is ‘M’ – unrestricted, suitable for 16 years and over with consumer warnings stating, “suicide, sex scenes, offensive language & drug use”. The movie is found on Lightbox with a rating of M and consumer warnings stating “SLC¹⁴” and on iTunes with a rating of M (16+) and no consumer warnings.
20. The shows *Trinkets* and *The End of the F***ing World* are both targeted at teens and appear on the Netflix platform. *Trinkets* has an age rating of 13+ but does not indicate that it contains potentially harmful material such as sexual coercion. Similarly, *The End of the F***ing World* displays an age rating of 16+ but does not indicate such harmful content as self-harm (a particular concern for the OFLC youth advisory panel) and sexual violence. In the past Netflix has also made the movie *The Human Centipede 2* available on their platform. This movie is classified as objectionable by OFLC and is illegal to supply or view in New Zealand. Further examples of inconsistent or lacking information on content classifications can be found in the table below:

Title	Platform classification and consumer warnings	Official New Zealand classification and consumer warnings
Get Out (2017)	Netflix: 16+, Violence	R16, Violence, offensive language and horror
	Google Play R16	

¹⁴ These are based on the Pay TV classifications which display General, Parental Guidance, Mature and age-related ratings (16 and 18). It also stipulates warning symbols that indicate whether content, language, violence and sexual material may offend (C, L, V, S).

	iTunes 17+ Horror thriller is surprising, shocking, timely, and funny (third party classification)	
TED (2012)	Netflix 16+, Language	R16, Contains offensive language, drug use and sexual content that may offend.
	Google Play R16	
	iTunes 17+ Extremely vulgar comedy also has some genuine sweetness (third party classification)	
Atomic Blonde (2017)	Netflix 18+, Language, violence	R16, Graphic violence, sex scenes, offensive language & nudity
	Google Play R16	
	iTunes 17+ Powerful woman at core of stylish, very violent spy story (third party classification)	
Train to Busan (2016)	Netflix 16+ Language, violence	R16, Graphic violence, sex scenes, offensive language
	Google Play M	
	iTunes (Not rated)	
Breaking Bad (2008-2012)	Lightbox 16CLV, (hover text shows Content, Language, and Violence may disturb)	R16, (4 th season is R18) Drug use, violence, sex scenes, disturbing content.
	iTunes TV-14	
The Spy Who Dumped Me (2018)	Lightbox 16	R16, Strong violence, offensive language and nudity.
	Google Play R16	
	iTunes 16+ Bullets and profanity fly in feminist friendship comedy (third party classification)	
Sweet Country (2018)	Lightbox 16VSLC (hover text shows Sexual Violence)	R16, Violence, sexual violence, offensive language and content that may disturb.
	Google Play R16	
	iTunes MA15+ (Australian classification)	
Red Sparrow (2018)	Neon 16VLSC	

	Google Play R16	R16 Graphic violence, sexual violence, rape, cruelty and offensive language
	iTunes 17+ Graphic violence, sex in dull Jennifer Lawrence thriller (third party classification)	

The Status Quo: Industry self-regulation and reliance on Chief Censor’s “call in” powers to classify commercial video on-demand content

21. The New Zealand Media Council (the Media Council), an industry representative body, established a Video on-Demand Classifications Code (the VoD Code) in 2018 which requires its members to classify programmes in a socially responsible way. It is a voluntary scheme allowing members that provide free and commercial Video on-Demand services to self-classify using the VoD Code¹⁵.
22. This scheme provides classifications that are based on the Pay Television Code, which New Zealanders are familiar with from viewing Sky Television programmes¹⁶. Members of this scheme can also use alternative classifications and warning symbols with approval from the Media Council. Netflix is a member of this scheme but uses its own ratings on its platform. Not all CVoD providers that provide services in the New Zealand market are members of this scheme. Non-members tend to use classifications from other countries like the United States. This creates inconsistencies in CVoD classifications across the different CVoD providers.
23. Under the Classification Act, the Chief Censor can “call in” a publication or film to be classified. The Chief Censor has used these powers to classify certain CVoD content (e.g. *13 Seasons Why*) but has found this process cumbersome. He has more recently engaged with providers to advise of suitable New Zealand classifications where appropriate (e.g. Netflix’s *The Perfection*¹⁷). This is usually after a complaint has been made to OFLC and content has already been made available to consumers.

Counter-factual

24. Under the status quo, consumers are likely to be viewing an increasing amount of CVoD content that is either unclassified or has inconsistent or incomplete ratings and advisory notes when compared to similar content on other platforms. As mentioned above, there is an expectation of further CVoD industry growth as more providers enter the global and New Zealand market. Apple, Disney and Warner Media have announced plans to start CVoD services that will compete with the likes of Netflix, Amazon Prime, Lightbox, Neon and Google Play in an unregulated market in New Zealand.

¹⁵ This includes FVoD providers like TVNZ on-Demand and CVoD providers like Netflix, Lightbox and StuffPix.

¹⁶ Pay TV classifications display General, Parental Guidance, Mature and age-related ratings (16 and 18). It also stipulates warning symbols that indicate whether content, language, violence and sexual material may offend (C, L, V, S).

¹⁷ *The Perfection* is a Netflix original movie that was advised to be classified as R18 compared to the original Australian rating of 16+. Netflix voluntarily added advisory warnings about rape, sexual violence, suicide references and graphic violence, after discussion with OFLC.

25. As the market expands there is a greater risk of fragmentation. With a rise in the number of platforms and increasing amounts of original content provided on these platforms, insufficient or inconsistent consumer warnings and information will increase the risk of harm to vulnerable groups.
26. The Media Council's voluntary scheme will continue to provide some guidance for its members (who can also use their own classifications), while non-members continue to provide their own classifications for content or not at all. The Chief Censor's reactive power to "call in" publications for classification will continue to be relied on as a government backstop. Without reliable and complete information about content that may be viewed, consumers will have difficulty making informed decisions and education programmes will be less effective.
27. There is potential for non-government led regulation as the market continues to increase. However, this would require industry buy-in that could delay making the current environment more consistent.

2.2 What regulatory system, or systems, are already in place?

Key features and objectives of current regulatory system

28. The current media content regulation regime comprises the Classification Act and the Broadcasting Act 1989 (the Broadcasting Act). The Classification Act provides for the classification of films (e.g. cinema and DVD release) and was transferred to DIA in August 2018 from the Ministry of Justice. The Broadcasting Act is administered by MCH and provides for the establishment of the four broadcasting codes: Pay Television, Free to Air Television, Radio and Election Programmes. Each code has its own set of classifications and audience advisories.
29. The objectives of the current regulatory system are to provide accurate and reliable information to New Zealand consumers of media content. This is achieved using standards and classifications with advisory notes for content across platforms with some tools tailored to particular platforms (e.g. the free-to-air television watershed). The intention was for a consistent and well-understood media content regulation regime, which has been developed and enhanced over the last few decades. This system is trusted by New Zealanders as a means of understanding what is present in media content¹⁸ but is now failing to keep up with modern changes in technology because of its age.
30. The two Acts are based on viewing platforms that were available at the time they were designed more than 20 years ago. This has resulted in areas of regulatory uncertainty around media content available on new and emerging platforms (e.g. online and on-demand). The current regime did not anticipate technological change, or the shifting ways New Zealanders now view, consume and interact with media content. This means that content that is broadcasted (Pay Television, Free to Air Television and Radio) is covered by the Broadcasting Act while Cinema and DVDs are covered by the Classification Act.
31. Both regulators under their Acts are required to conduct research into media content and the use of the regulations. OFLC also provide educational material for use in schools to enable better understanding of classifications and media use. This helps support use of the classifications and informs their application by regulators.

¹⁸ *Understanding the classification system: New Zealanders' Views, 2016*. Colmar Brunton. Retrieved from <https://www.classificationoffice.govt.nz/assets/PDFs/research-public-understanding-2016.pdf>

32. The Mental Health Foundation has provided supplementary education material following the release of *13 Reasons Why*. This material is to help caregivers have discussions with children and young people about the material in the show as well as help children and young people when struggling with the content.

The Classification Act regulates films, videos and publications

33. The Classification Act is administered by DIA and establishes the following regulatory and statutory bodies:
- a. OFLC, an independent Crown Entity responsible for classifying films, videos and publications, which is led by the Chief Censor (and Deputy Censor);
 - b. The Labelling Body which rates unrestricted films and issues labels; and
 - c. The Film and Literature Board of Review which can review classification decisions made by OFLC, upon application.
34. DIA has an enforcement role under this Act as the Secretary of Internal Affairs appoints inspectors of publications (with search and seizure powers). DIA's Digital Safety Inspectorate focusses on addressing content that has been classified as objectionable, or content that is clearly objectionable (e.g. child exploitation material).
35. DIA also monitors and supports OFLC in carrying out its statutory functions on behalf of the Minister of Internal Affairs. The Minister appoints the Chief Censor, the Deputy Chief Censor, community representatives for the Labelling Body, and members of the Film and Literature Board of Review¹⁹.
36. The Classification Act allows the Labelling Body and OFLC to proactively classify film content and call in publications that require potential classification due to the nature of their content. The Chief Censor can provide an age restriction with content warnings to inform consumers as to the type of content that a film or publication contains. The Chief Censor can also classify content as objectionable making it illegal to view or distribute in New Zealand.

Classification process for films under the Classification Act

37. Film distributors submit films (for example cinematic or DVD releases) to the Labelling Body that can rate a film and issue a label if the film has:
- a. previously been rated or classified in NZ;
 - b. an Australian rating of G, PG or M (suitable for general to mature audiences);
 - c. a UK rating of U, PG, 12 or 12A (suitable for general to 12 years and over); or
 - d. upon viewing the film, the Labelling Body assesses the content as being unrestricted.
38. The Labelling Body will refer a film to OFLC if the film has been:
- a. classified as MA15 or higher in Australia (suitable for 15 years and over);
 - b. classified as 15 or higher in the UK (suitable for 15 years and over)²⁰;

¹⁹ The Governor General appoints the Chief Censor and Deputy Chief Censor upon recommendation from the Minister of Internal Affairs.

²⁰ Films that have a restricted UK rating and an unrestricted Australian rating, are currently not referred to OFLC. Priority is given to the Australian rating over the UK rating.

- c. refused approval for supply or exhibition in Australia or the UK; or
 - d. upon viewing the film, the Labelling Body assesses the content as being restricted.
39. This process may take about four weeks from submission to the Labelling Body to the provision of a label. Once a film is classified and appropriately labelled it can then be made available to the New Zealand public. Once the self-classification tool is completed, OFLC expect manual operation would take at most, five minutes to produce a label, assuming the operator is familiar with the content being classified.
40. New Zealand classifications and labels provided under this Act are: G, PG, M, R13, R15, R16, R18, RP13, RP16, and RP18. Descriptive notes that accompany labels are designed to help people when they are deciding whether to watch a film. These notes indicate whether there is content in a film such as offensive language, sex scenes, violence, cruelty, suicide or other potentially disturbing or offensive material. These descriptive notes are generally more detailed than what is currently provided on the Media Council's VoD code and by CVoD providers²¹. An example of this is the movie *Suicide Squad* which has descriptive notes from OFLC stating "violence, horror & cruelty". The same movie appears on Lightbox with the descriptive note "V".

The Broadcasting Act regulates broadcast content

41. While not directly affected by the proposed amendment to require CVoD to classify under the Classification Act, the Broadcasting Act has an important role in New Zealand's regulatory regime. It provides a framework to regulate broadcast content (including election programmes) on free-to-air television and pay television and radio.
42. The Broadcasting Act requires broadcast content to meet eleven standards outlined in the Act such as good taste and decency, children's interests, violence, balance, accuracy and privacy. The Broadcasting Act allows for the free-to-air television Adults Only watershed. The watershed generally restricts broadcasting of Adults Only content to time slots when children are significantly less likely to be watching TV, taking into consideration public holidays and school holidays.
43. It establishes the Broadcasting Standards Authority (the BSA), an independent Crown entity that provides an independent complaints' service and oversees the development and guidance of broadcasting standards. The BSA works with industry bodies to develop the four codes which govern broadcast content. Sky Television's Neon service currently adheres to the Pay Television Code through a Memorandum of Understanding with the BSA.

Commercial video on-demand content is not regulated under either Act

44. As mentioned in the previous section, CVoD content is not clearly regulated under either legislation, leading to the status quo where providers self-regulate in two ways by:
- a. self-classifying on their own volition (usually by using overseas ratings); or
 - b. using the Media Council's VoD Code to self-classify their own content.

²¹ Media Council's VoD Code has visual warning symbols that indicate whether content, language, violence and sexual material may offend (C, L, V, S). Netflix has five advisory notes for content: Language, Sex, Nudity, Violence and Use of Drugs.

45. The Media Council is an independent industry body that established the VoD Code in 2018 to provide some guidance around New Zealand classifications for CVoD and FVoD members. This voluntary scheme provides classifications that are based on the Pay Television Code which are also familiar to New Zealanders²². With approval from the Media Council, members of this scheme can use alternative classifications and warning symbols.
46. The Media Council also acts as an independent body when considering complaints regarding its members. If New Zealand consumers wish to complain about any of the VoD members, they need to raise the issue directly with the member first. If the issue is not resolved, the complaint can then be considered by the Media Council. All members are required to comply with the Media Council's direction if content needs to be re-classified. Other members are also required to adopt the new classification on their services.

Why is Government regulation preferable to private arrangements in this area?

47. Government regulation for visual media content ensures that content is classified in a way that is consistent with New Zealand standards and concerns. The system provides consistent classifications, ratings and descriptive notes for consumers to make informed decisions on what to view and watch. Content provided to the New Zealand market (traditionally movies and DVDs) is most often created overseas. If this content were to carry an overseas rating it may not be tailored to the specific standards of New Zealanders. Increasing numbers of self-produced content is being made available on CVoD platforms.
48. For private arrangements to be a workable solution, there would need to be full buy-in from industry members (e.g. all CVoD providers to be a member of the Media Council and abide by its VoD Code). A voluntary code of compliance lacks some of the benefits of an overarching regulatory framework. This includes enforceability for non-compliance from providers and consistency of information across a broader range of media types. The voluntary nature of current industry regulation means that providers, such as Amazon Prime, which has around 118,000 subscribers in New Zealand, are not required to comply with any form of New Zealand regulation.
49. We believe that overseas content providers will comply with regulation as they have a history of cooperation with regulators. Netflix already uses local classification schemes in several countries including Singapore, Germany and Brazil. To mitigate the risk of non-compliance the ability to use the OFLC self-classification tool or a system accredited by OFLC internal process for self-classification tool is being provided for. Utilising self-classification in this way allows the New Zealand classification regime to be imbedded in a provider's current processes potentially minimising monetary and time costs.

What other agencies have a role or other substantive interest in that system?

50. Organisations with a focus on the welfare and wellbeing of New Zealand children and young people have a substantive interest in any related proposals. This includes organisations like the Office of the Children's Commissioner and the Mental Health Foundation. Their interest lies in ensuring that children and young people are protected from viewing inappropriate content that may cause them psychological and physical harm.

²² Pay TV classifications display General, Parental Guidance, Mature and age-related ratings (16 and 18). Content warnings allude to content that may offend and language, violence and sexual references.

Has the overall fitness-for-purpose of the system as a whole been assessed? When, and with what result?

51. The overall fitness-for-purpose of the system has been assessed previously, resulting in many attempts to update the system since 2008 with the most recent work conducted by MCH in mid-2018. The increasing convergence between telecommunications, information technology, media and entertainment sectors in New Zealand has been a concern to Government and industry for the past 10 years. Changes in Government and shifts in Government priorities over that time have meant a constant movement in scope and work undertaken without a lasting solution.
52. In December 2017, the Minister of Broadcasting, Communications and Digital Media announced that work on the previous Government's Digital Convergence Bill (which was being led by MCH) was being put on hold to ensure the draft bill was fit for purpose. Following this announcement, MCH led a workshop in May 2018 with content providers, regulators and public interest groups. The outcome of this workshop was support (although not full consensus) for a new media content regulation system rather than further piecemeal change. The exact scope of what this new system would look like is unclear but was intended to provide one set of classifications and standards with industry self-classifying and a government regulator as a backstop.
53. DIA and MCH are jointly scoping work to reform New Zealand's media content regulation regime. This is expected to be a medium to long-term project that could take at least 18 to 24 months. It is an opportunity to ensure a fit for purpose system that is future-focussed and addresses all other gaps in the regulatory regime that cannot be addressed by this discrete proposal. Any decisions about the broader reform will be made jointly by the Minister of Internal Affairs and the Minister for Broadcasting, Communications and Digital Media.

2.3 What is the policy problem or opportunity?

Why does the Counterfactual constitute "a problem"?

54. The specific issue which this proposal is attempting to address is inadequate and inconsistent content warnings and classifications being provided to consumers of CVoD content²³. This problem presents a risk of psychological and physical harm to New Zealanders, particularly children and young people, from viewing inappropriate content. The risk of harm may be minimised if consumers are presented with standardised classifications and consumer warnings that are consistent across CVoD platforms as well as other forms of media and are well understood by the public. The lack of clarity and process for providers to classify using New Zealand-appropriate classifications or ratings, has resulted in a self-regulating industry and reliance on the Chief Censor's powers as a government backstop.

²³ For example, DC's film *Suicide Squad* has been classified in New Zealand as R13 with descriptive notes warning of violence, horror and cruelty. It is currently labelled as R13 on iTunes, and M on Google Play with no content warnings.

55. Industry has attempted to address this problem (for e.g. the Media Council's VoD Code). This is a voluntary scheme and only has partial buy-in from CVoD providers. As the scheme has no standing in law, refusal by the provider to comply with a direction by the Media Council would have little to no ramifications. It relies on members cooperating with the scheme and as mentioned earlier, does not include all the CVoD providers that provide services to New Zealanders. Its current CVoD membership includes Lightbox, Netflix and Stuff (StuffPix). TVNZ which runs the FVoD service TVNZ onDemand is also a member. Sky Television's Neon uses Pay Television Code classifications through a Memorandum of Understanding with the BSA.
56. The Online Media Association, a member of the New Zealand Media Association (which operates the Media Council) noted in its submission that the Media Council has not been referred any complaints about any of their CVoD members since its VoD Code was established in 2018. However, the reason for this is unclear.
57. At present, consumers who are dissatisfied with the classification (or lack thereof) on CVoD content can complain directly to the Chief Censor who "calls in" the publication for classification. This is not an ideal situation because the "call in" power is reactive, and harm may have already been caused to the viewer from seeing inappropriate content. Consumers can also complain directly to the CVoD provider, but no verifiable information is available on this.
58. It can also take time for the Chief Censor to appropriately classify a publication, which would remain available for consumption or viewing during this time. The publicity towards the relevant CVoD content could then result in more consumers watching the television series or movie before it is properly classified. This also tends to attract media attention especially when the Chief Censor reaches a classification decision and directs the CVoD provider to display the appropriate classification.
59. In recommending changes to the classification and warnings for the Netflix film *The Perfection*, the Chief Censor acknowledged that mid-teens will essentially watch what they want and will not necessarily turn away from an R18 rating, making it even more important that clear consumer information is displayed so they can make informed viewing decisions²⁴. More consistent classification would provide protections through concise information without denying access to content.

What is the nature, scope and scale of harm being experienced, or the opportunity for improvement?

60. Children and young people are at most risk of harm from viewing inappropriate content. The widespread use of the Internet and prevalence of smart devices (e.g. mobile phones and tablets, smart TVs) make CVoD content, and access to potentially inappropriate content, a lot easier.

²⁴ Retrieved from: <https://www.rnz.co.nz/national/programmes/ninetonoon/audio/2018698879/netflix-s-the-perfection-reignites-classification-storm>

61. A UK report released in February 2019 concluded that children are most attracted to content they can view on their own device, at their own choosing and directly related to the things that interest them²⁵. It also highlighted that children and young people prefer subscription video on-demand services like Netflix, user-generated content on YouTube and associate watching public broadcast television as a family-time activity. Most of the content consumed by study participants was online and on-demand, mostly on their own without parental supervision.
62. The effects of children and young people watching inappropriate content is an important focus of research overseas. International studies noted that children viewing violent media content showed a long-term increase in aggressive thoughts and behaviour, and angry feelings²⁶.
63. An OFLC study showed about 76 per cent of New Zealand respondents were moderately to highly concerned about children and teens exposure to content²⁷. Likewise, parents of participants in the UK study were more worried about what their children watched on Netflix on personal devices, than on public broadcast television²⁸.
64. Broader Reform which installs a platform neutral approach to content regulation is the preferred means for properly addressing the gaps in the current regulatory regime. Broader reform will take at least 18 to 24 months. In the meantime, an identified risk to children and young people would remain while the reform is underway.

How important is this to the achievement (or not) of the overall system objectives?

65. The objective of this work is to ensure that New Zealanders, particularly young people, children and their parents, are provided with consistent and trusted information to assist informed viewing decisions. Providing clear requirements for providers and industry to consistently adhere to, within an established classification regime that New Zealanders are familiar with, would help achieve the overall system's objective which ultimately seeks to prevent harm to consumers.
66. OFLC currently produce education resources to help students better understand the classification system and how it works. This allows students to better understand the classifications and how they can inform viewing decisions. By having these classifications used on CVoD platforms a better understood classification system can be extended to a greater range of platforms. This would include Amazon Prime which typically does not display any warning notes.

²⁵ Life on the small screen: What children are watching and why (2019). Ofcom. Retrieved from: https://www.ofcom.org.uk/data/assets/pdf_file/0021/134832/Ofcom-childrens-content-review-Publish.pdf

²⁶ Short-term and long-term effects of violent media on aggression in children and adults (2006). <https://research.vu.nl/en/publications/short-term-and-long-term-effects-of-violent-media-on-aggression-i>

²⁷ Children and teen exposure to media content, (2016). <https://www.classificationoffice.govt.nz/assets/PDFs/research-UMR-media-content-exposure-2017-2.pdf>

²⁸ Life on the small screen: What children are watching and why (2019). Ofcom. Retrieved from: https://www.ofcom.org.uk/data/assets/pdf_file/0021/134832/Ofcom-childrens-content-review-Publish.pdf

What is the underlying cause of the problem?

67. The underlying cause of the problem is content on new platform types not being subject to the New Zealand media content classification regime. CVoD providers are not required to display age-rating labels or content warnings on their content. The ratings they do show can be inconsistent with New Zealand standards and recognised classifications. Inconsistencies result, and a resultant potential for harm from viewing inappropriate content. It also means caregivers are also not properly informed when making viewing decisions for children and young people.
68. The increase of the CVoD market and original CVoD content is reflective of the trend of online and on-demand content becoming a preferred choice for entertainment. Some providers have been accused of tailoring original content to attract younger audiences. For example, shows starring teens in high school but exploring and depicting themes that are appropriate for older audiences than the obvious target market. If the advisory notes that accompany ratings for these shows do not make apparent that potentially harmful material is present in the content, then viewers will not know about it until they see it.
69. Big multinational CVoD providers like Netflix and Amazon Prime are available in around 200 countries. In comparison to other countries with larger CVoD subscription-bases, New Zealand's CVoD market is relatively small. There may not be much of an incentive for these big providers to tailor their classifications or ratings for New Zealanders or to reflect particular concerns that New Zealanders care about (e.g. advisory notes for suicide themes).

Why cannot individuals or firms be expected to resolve the problem themselves under existing arrangements?

70. Under existing arrangements, CVoD content will remain outside of the classification regime for films (e.g. cinema and DVD release) and CVoD content available to New Zealanders would continue to have inconsistent and varying classifications. Voluntary participation in the Classification Act regime is disincentivised due to the time it takes to complete which can be about four weeks. When content needs to be made available on a platform the same day it is received, this can be a significant barrier.
71. CVoD providers using the Media Council's VoD Code would continue to provide either the stipulated classifications or their own, while non-members would continue to self-label their own content based on overseas classifications. This would be further exacerbated as the CVoD market increases in New Zealand.
72. The New Zealand media content regulation regime seeks to prevent harm to New Zealanders from viewing inappropriate or harmful content. We acknowledge that the Media Council's Video on-demand Classification Code is based on the Pay Television Code, with classifications that New Zealanders are also familiar with. However, this scheme is voluntary, and members can opt out. It also does not include all CVoD providers that have a presence in the New Zealand market.

How robust is the evidence supporting this assessment?

73. There is evidence to show a risk of harm to children and young people from the media content they can access. This type of content can involve such themes as suicide, physical violence and sexual violence. There is sufficient research to show that media content can cause harm.
74. The evidence includes New Zealand-based research carried out by OFLC on children and teen exposure to media content, and overseas-based studies on the effects of media content on children. UK regulator Ofcom released a report in January 2019 which focussed on what children are watching and why.
75. We also carried out public consultation on proposed options to regulate CVoD content from 26 April to 26 May 2019 and received a range of views from industry, regulators, CVoD providers, other organisations and members of the public. Submissions from the Mental Health Foundation and the Office of the Children’s Commissioner provided local experience that supported evidence from international research.
76. There is evidence of an increasing amount of content being viewed on CVoD platforms accessed from personal devices which changes the location of risk.
77. Gaps do exist in the evidence. For example, we have been unable to find evidence to prove definitively that classification of media content is an effective way of preventing harm. Due to the constraints on time we have not been able to address this gap but rather have relied on the policy basis for New Zealand’s and other jurisdictions’ classification systems. This is something the broader reform could investigate further.

2.4 Are there any constraints on the scope for decision making?

What constraints are there on the scope, or what is out of scope?

78. Addressing the risk of harm to children and young people is one of the main priorities for the Minister of Internal Affairs. The Minister has directed DIA to progress work, including consultation, on options to address this regulatory gap immediately rather than wait for a broader reform of the media content regulation system.
79. The Minister of Internal Affairs has made implementing a solution to the gap in CVoD regulation a priority to be implemented within this parliamentary term. Broader reform which installs a platform neutral approach to content regulation is preferred but will take at least 18 to 24 months. In the meantime, an identified risk to children and young people would remain while the reform is underway.
80. The scope has been restricted to only content meeting the definition of “Commercial Video on-Demand”. This is any visual media content that is accessed online on-demand by a user who has paid a fee. This definition includes Subscription Video on-Demand which is visual media content that is accessed online on-demand by a user who pays an ongoing fee for access (e.g. Netflix or Lightbox) and Transactional Video on-Demand which is visual media content that is accessed online on-demand by a user who pays a one-off fee for access (e.g. Google Play or YouTube Movies).

81. FVoD services such as ThreeNow and TVNZ OnDemand are excluded from the scope. There is not a simple way to distinguish between these free services (that have a nominally commercial element), and all other free video on-demand on the internet (for example travel video blogs). The additional complexity introduced by covering this free content would require a significant extension to the timeframes of this project.
82. FVoD is also accessed online and providers are not required to classify content prior to making it available to consumers. FVoD does not require any payment to access and can be hard to define without also including free user-generated content on YouTube or any other free online video content. Providers or platforms such as TVNZ OnDemand and ThreeNow mostly provide content that has been previously aired and classified for television which, if inappropriate, is subject to a complaint process within 20 days of original airing. However, we note that content is increasingly streamed on these platforms without airing on television first.
83. We believe including user-generated content would require a longer timeframe due to the complexities around regulating such content. User-generated content is largely created by individuals for the platform they are using. This content is found on sites like YouTube and Facebook and usually contains individuals expressing their thoughts and ideas or sharing their interests. There would likely be significant considerations around the freedom of speech principles under the Bill of Rights Act 1990 as a consequence of trying to regulate this content, which could impact on delivering this Ministerial priority.
84. Cabinet agreed that the discussion document would seek feedback on three options. These options were subjecting CVoD content to the current film classification process, subjecting CVoD content to the current film classification process but allowing for self-classification and a third option of enhancing the current voluntary scheme and use of the Chief Censor's call in power. This has meant that the stakeholder feedback we have received and analysed has largely focused on these three options.

What interdependencies or connections are there to other existing issues or ongoing work?

85. The underlying cause of this problem is an outdated New Zealand media regulation regime that cannot easily adapt to cover content from emerging platforms (e.g. online and on-Demand). DIA and MCH are jointly working on scoping a broader reform of New Zealand's media content regulation regime. The scope for this work is likely to be quite broad and we expect will consider FVoD and user-generated content, including currently regulated content under both the Classification Act and the Broadcasting Act.

2.5 What do stakeholders think?

Who are the stakeholders? What is the nature of their interest?

86. Stakeholders for this work include the relevant regulators such as OFLC, the Labelling Body, the Film and Literature Board of Review and the Broadcasting Standards Authority. Other important stakeholders include the CVoD providers who may be faced with compliance requirements and costs, organisations with a relevant focus on children and young people²⁹, other industry bodies with an interest in video on-demand services, and New Zealand consumers.
87. We carried out public consultation between 26 April to 26 May 2019. Key stakeholders were contacted directly to advise them of the process and the consultation document was published on the DIA website inviting submissions on the proposed options. Prior to consultation, we worked closely with OFLC to determine context and background of the problem, and the three proposed options for consultation. There were 24 submissions received including from five CVoD providers.
88. Following initial consultation, we hosted a workshop with industry to discuss the definition of CVoD and how implementation of self-classification under option 2 might affect them. No changes were made to the definition of CVoD because of this workshop. There was some discussion around time allowances for implementation. There will need to be further discussion on this to find a sufficient time period.
89. We also consulted the problem definition and proposed options with other government agencies prior to seeking Cabinet agreement to the release of the consultation document. These agencies have a relevant interest in this work and included the Ministry for Culture and Heritage, Treasury, Ministry of Health, Te Puni Kōkiri, Ministry for Pacific Peoples, Ministry of Education, Ministry of Business, Innovation and Employment, Ministry for Women, Oranga Tamariki, and the Policy Advisory Group at the Department of the Prime Minister and Cabinet.

Which stakeholders share the Agency's view of the problem and its causes?

Some Government agencies expressed support to address the problem and its causes

90. The Ministry for Pacific Peoples, Te Puni Kōkiri, the Ministry of Education and the Ministry of Health expressed their support for this work to consult on the proposed options to standardise classifications for CVoD content.
91. The Ministry for Pacific Peoples specifically noted that Pasifika people have the fastest growing youth population in New Zealand and that on average, Pasifika people report higher psychological distress and depressive symptoms than others. Providing consistent classifications for CVoD content would mean Pasifika children and young people are better informed about content which may have the potential to cause psychological, physical or emotional harm.
92. The Ministry of Business, Innovation and Employment (MBIE) did have reservations regarding the scope of the project and whether it was necessary to do this work separate from the broader reform. However, MBIE is broadly supportive of what this policy is attempting to do.


²⁹ Such as the Mental Health Foundation and Office of the Children's Commissioner.

Certain stakeholders expressed agreement for the problem and its causes during consultation

93. There was general stakeholder support for the DIA's assessment of the problem. This included current regulators and statutory bodies under the Act: OFLC, the Labelling Body and the Film and Literature Board of Review.
94. The Office of the Children's Commissioner, the Mental Health Foundation, Family Planning New Zealand and other organisations that focus on the welfare and wellbeing of youth and children agreed that there needs to be better information and warnings provided to viewers of CVoD content.
95. The Mental Health Foundation's submission emphasised the potential harm that viewing inappropriate content can have on young people, specifically content with strong themes like suicide (e.g. Netflix's *13 Reasons Why*). It has been releasing guidance for parents and young people to help them navigate sensitive issues. This includes warnings on its website and social media channels for certain CVoD content and films to alert consumers to content that may cause harm to them (e.g. suicide themes).

Which stakeholders do not share the Agency's view in this regard, and why?

Some industry representative bodies and providers did not fully share our view of the problem

96. There was general agreement from CVoD providers and industry representatives that New Zealand's overall media content regulation regime is inconsistent as it is based on the platform on which media content is being shown (e.g. films, Pay TV, Free TV, and CVoD self-regulation). However, there was disagreement with the claim that CVoD content is providing inconsistent information to consumers creating a risk of harm.
97. Industry providers and the BSA are supportive of broader reform of New Zealand's media content regulation regime. There is very little support for this discrete fix. Reasons for this were the absence of complaints to the Media Council for its Video on-Demand Code as well as a concern that a legislative change now would create legislative fatigue when the broader reform takes place.
98. Some industry representative bodies and the BSA noted the Media Council's VoD Code is based on Pay TV Code classifications which are also familiar to New Zealanders. Viewers of content on platforms using the code will be as well informed as someone viewing traditional pay TV programming. Membership of the VoD Code is voluntary, and providers are able to use their own ratings. **S.9(2)(f)(iv)**

99. This partial fix is not considered by DIA to be sufficient for removing the identified risk. The current system is voluntary which allows providers to opt-out as Amazon Prime has. Ratings displayed by providers can be different from those prescribed by the Media Council (as is the case for Netflix) which means the ratings and content warnings are still inconsistent. Lastly, the Media Council's VoD Code, despite requiring use of the Pay TV classifications does not require providers to base these classifications on the BSA's eleven broadcasting standards which diminishes the effectiveness of these classifications.

100. There were further questions from industry participants about the evidence of harm being caused due to CVoD content. Lightbox's submission noted that initial issues with CVoD classification were possibly teething issues as new providers got used to the New Zealand market. As providers learn what is appropriate, Lightbox expects instances of insufficient content warnings to become increasingly rare. There is no indication that instances such as the re-classification of *13 Reasons Why* have led to any significant procedural changes that would avoid future risk. Some submissions noted the lack of complaints received by the Media Council about its CVoD members, since the VoD Code's release in 2018. As far as DIA is able to ascertain, complaints about CVoD classification are likely to be made to OFLC.
101. A workshop has since been held with industry to discuss the definition of CVoD and how self-classification can be achieved within their systems. Industry raised many of the concerns noted above at this workshop. The most notable concern raised here was the need for a broader reform instead of small changes.
102. The workshop did not result in any major changes to the CVoD definition. Some providers noted that a way to manage unintended capture, would be to list providers and/or services via a schedule or list that is maintained by DIA. Providers also advised they would require more information before they could estimate the cost and time requirement for implementing changes. This information is expected to be provided before final legislation drafting is completed by the Parliamentary Council Office.

Members of the public

103. We received four submissions from individuals who generally did not support Government intervention. Some noted that the responsibility should be on parents or caregivers to determine what to allow their children to watch, not Government.

Does the issue affect Māori in particular? Have iwi/hapū been consulted, and if not, should they be?

104. This problem and recommended proposal will affect all New Zealand communities including iwi and hapū. We consulted Te Puni Kōkiri on final policy proposals. They were supportive of this proposal and did not raise any concerns with the problem definition or options to address the issues. Our public consultation did not result in any submissions from specific Māori groups, iwi or hapū.

Section 3: Options identification

3.1 What options are available to address the problem?

105. We identified and publicly consulted on the following three options to address the gap in the current media content regulation regime. Two of these options require legislative change (options 1 and 2) and option 3 maintains the status quo while allowing for any enhancements to it.
106. Consultation received 24 submissions including five from content providers, six from other organisations (such as the Office of the Children's Commissioner and the Better Public Media Trust), four from regulators, four from other industry (such as TVNZ and the Interactive Games & Entertainment Association) and the remaining five were members of the public. Members of the public were generally against any form of government intervention.

Option 1: Subject CVoDs to current New Zealand Classification process

107. Under this option, CVoD content would be required to display classifications (ratings and descriptive notes) that are familiar to New Zealanders. CVoD providers would have to follow the current process and submit material to the Labelling Body for rating, which then forwards restricted content to OFLC for classification.
108. For the classification of films under the Classification Act, the Labelling Body cross-rates content that:
- a. has been previously rated in New Zealand; or
 - b. has an unrestricted rating in the United Kingdom or Australia (giving priority to an unrestricted Australian rating).
109. The Labelling Body would also rate CVoD content which, upon viewing, is classified as unrestricted. CVoD content that the Labelling Body deems to be restricted would be referred to OFLC for classification. This process currently takes about four weeks and will require CVoD providers to pay the current fees for film classification. These fees could impact the profitability of content which could then affect its availability to New Zealanders. However, no content providers mentioned this possibility in their submission.

Option 1 received little support during consultation

110. Submitters noted the following concerns with subjecting CVoD content to the current process:
- a. *Costly for providers:* current fees charged for the classification and rating of content, combined with the large library of CVoD content, would see providers' costs increase significantly. Prior to 2016, CVoD providers were classifying content using this process and a submitter noted that this process, despite efforts by regulators to streamline the process, was time consuming and costly for its size.
 - b. *CVoD providers may leave the New Zealand market:* Some submitters, particularly members of the public, had concerns about CVoD providers leaving the New Zealand market under this option due to increased compliance burdens (e.g. costs and operationally).
 - c. *Costly for regulators:* CVoD providers and industry bodies had concerns about OFLC and the Labelling Body's ability to handle the additional workload.
 - d. *Slow processing due to additional workload for regulators:* CVoD providers and industry bodies had concerns about the current processing times which they considered to be very slow. With the additional workload, CVoD content would be at risk of not being available to New Zealand consumers at the same time as international releases (e.g. the final season episodes of Game of Thrones were released on the same day on Sky TV's Neon as in the United States). Consumers expect content to be available at the same time as overseas. This option may mean even slower processing, resulting in delays to CVoD content being available on time to meet consumer expectations.

- e. *Enforcement issues with overseas providers:* Some CVoD providers are based overseas and do not have a physical presence in New Zealand (e.g. Amazon Prime, Netflix). This could create extra-territorial issues with enforcement especially when overseas-based providers fail to properly classify or display classifications on CVoD content available in New Zealand.
- f. One potential unintended impact of this option may be CVoD providers passing on costs to consumers, as cost-recovery for complying under the proposed system. There has been no indication from the large providers that this is likely to happen. This may be an issue for smaller providers.

Support for option 1 was for differing reasons

- 111. The Labelling Body expressed support for option 1 as they believe CVoD content does meet the definition of a film and therefore is subject to the current classification process. The Labelling Body noted that they have been classifying digital content since 2012. As they are currently classifying some CVoD content, the Labelling Body believes option 1 would be easy to implement and would provide the best level of protection from harm for children and young people.
- 112. The Office of the Children’s Commissioner supports option 1 as it will require a regulator to view and classify all CVoD content before it enters the market. By ensuring that no content is misclassified, option 1 is the best way to maximise prevention of harm through informed choices. No changes were made to Option 1 after consultation.

Option 2: Establish a mechanism for CVoDs to self-classify under the official regime

- 113. Similar to option 1, this option means CVoD content would be required to display classifications (ratings and descriptive notes) that are familiar to New Zealanders. The difference is that CVoD providers would be able to classify their own content.
- 114. Content that has previously been classified in New Zealand would use that previous classification. Self-classification ratings would be consistent with general classification standards as OFLC is prototyping and testing an online tool, which would allow CVoD providers to self-classify in a simple, cost-effective way. They may also be able to use their own system to self-classify content, subject to authorisation by OFLC.
- 115. CVoD providers that do not wish to self-classify under this option, would be able to meet compliance requirements by submitting content to the Labelling Body, as per current classification process for films (and outlined in option 1).

Option 2 addresses concerns highlighted by submitters regarding option 1

- 116. Consultation resulted in significantly more support for this option compared to option 1. Submitters from industry prefer self-classification in any form considerably more than being subjected to the current classification process. Non-industry supported this option’s capability to provide classifications that are consistent with the New Zealand classification scheme, therefore reducing the risk of harm to children and young people. In their submissions, both Netflix and Apple expressed support for option two.

117. This option addresses some key concerns highlighted with option 1, particularly the cost and time pressures for both CVoD providers and regulators. Like option 1, jurisdiction issues were raised for enforcing the classification regime against a foreign provider. Submitters doubted that regulators would be able to hold overseas companies to account for CVoD content they provide to New Zealand audiences without an approved label.
118. The Chief Censor has already used the “call in” power for content on an overseas-based CVoD providers platform. These instances have seen positive collaboration with the Chief Censor and adjustment to the content’s classification in line with the Chief Censor’s decision. Overseas-based providers have shown that having a good reputation is important to them and being provided with a clear regulatory framework will allow them to maintain their reputation. There will also be clear support and pathways to compliance with regulations. We do not believe extraterritoriality will be an issue due to the sector’s willingness to collaborate and comply.
119. Self-classification would reduce the time required to obtain a classification under the Classification Act. CVoD providers have a large volume of content frequently entering their platforms. Adding this content to the Labelling Body and OFLC’s current workload would result in delays to content release. Self-classification will allow content to be released at the same time as international releases and avoid strain on the current classification system.
120. Compared to option 1, this option could minimise compliance costs for CVoD providers as classification can be a streamlined process. As mentioned previously, providers that do not wish to self-classify would be able to use the current process of submitting content to the Labelling Body. This would incur the regular fees charged.

Self-classification under the classification regime can be adaptable and flexible

121. The consultation document, under option 2, only specified one manner of self-classification through using OFLC’s self-classification tool that was under development at the time. Submitters noted they would need more information about the self-classification tool in order to provide insights into costs. However, the Chief Censor’s submission noted that in addition to the self-classification tool, OFLC was open to working with providers to enable provider-systems to meet compliance requirements.
122. Therefore, we have further determined under option 2 that CVoD providers would be able to classify content by using a self-classification tool administered by OFLC or an alternative means that is approved by OFLC. A system approved by OFLC could be an internal system that providers already use which has been adjusted to provide accurate classifications and advisory notes under the Classification Act. The OFLC self-classification tool is expected to be a quick manual system which can be used to acquire a classification which is then easily replicated onto providers’ platforms.
123. These methods would produce official classifications under the Classification Act without requiring providers to submit content to the Labelling body or to OFLC. However, content that presents “objectionable” publication characteristics would be submitted to OFLC for full classification. Any issues with either system would be corrected through ongoing dialogue between OFLC and providers and updates to the tool. OFLC will work with providers to ensure compliance under the Act whether it is self-classifying using the tool or its own systems.

124. A reduction in the amount of content that is provided under this option is less likely. This would depend on results of a fees review also being conducted by DIA which could increase costs for providers. Any fees would be on a cost recovery basis and should therefore be minimal. However, this may affect the ability of smaller providers to acquire new content.

Option 2 received equal support to Option 3, with some reservations from industry and providers

125. As well as concerns about extraterritoriality, some submitters noted the following reservations with this option:

- a. *Lack of information about OFLC self-classification tool:* Some industry bodies and CVoD providers submitted that although they support the idea of allowing providers to self-classify their own content, the lack of information about the OFLC self-classification tool meant they were unable to comment fully. Lightbox noted from their use of the current version of the test version of the tool that it is a time consuming and manual process that is likely to require extra staffing to ensure classification is done properly.
- b. *Potential for human error due to human input required:* Lightbox also noted that the self-classification prototype tools manual input required created the potential for human errors when classifying using the tool.

126. This option would create more consistent classification for CVoD content. It is acknowledged that there will still be consistency issues with New Zealand’s media content regulation regime, including FVoD content not being covered by the regime. This option may cause regulatory fatigue that may negatively affect attempts at broader reform in the future. This fatigue would be dependent on how soon broader reform is conducted after this change.

127. As with option 1, an impact of this option may be CVoD providers passing on costs to consumers, as cost-recovery for complying under the proposed system. There has not been indication from the large providers that this is likely to happen, which may be an issue for smaller providers.

Option 3: Identifying enhancements to the voluntary self-classification scheme and call-in power and operating them in tandem

128. This option proposes maintaining the status quo while looking to improve how the Media Council’s voluntary VoD Code and the Chief Censor’s “call in” power operate in tandem. This would provide a system that resembles a statutory scheme, without requiring legislative change.

129. OFLC could work with the Media Council to improve the voluntary scheme. This could mean amending the Media Council’s VoD Code to reflect classifications used for films rather than using the Pay Television Code, including using descriptive notes used by the Labelling Body and OFLC. The Chief Censor’s “call in” powers would be relied on as the enforcement avenue for CVoD providers.

130. This option would have a considerable amount of buy-in from industry members, many of which are already members of the scheme. This option also covers FVoD providers as they are already part of the Media Council's scheme. Regulatory fatigue would not be an issue for the broader reform as this is a non-legislative option. There would not be any content that is not provided to New Zealanders as a consequence of this option because this is very close to the status quo.

Option 3 had equal support to option 2

131. Option 3 is well supported by industry. Industry representative bodies have pointed to the lack of complaints received by the Media Council since the VoD Code was implemented in 2018. However, CVoD content such as *The Perfection* has been classified after complaints to the Chief Censor, not the content provider. This indicates a lack of visibility of the Media Council complaints process in place. It could also show that there is an established understanding that OFLC is the organisation to approach with a classification issue instead of content providers.
132. Option 3 could address the recognised problem, but it would largely depend on what changes to the VoD Code the Media Council and CVoD providers would be willing to adopt. The Online Media Association has recommended the following changes to the current scheme:
- a. Change the current VoD Classification Code to require advisories about sexual violence and suicide; and
 - b. Publishing annual reports about the number of complaints and the outcomes of them.
133. Option 3 is still a voluntary scheme, and participation would be at the discretion of each content provider. If content providers continue to collaborate with OFLC as Netflix has done for the classification of *13 Reasons Why* and *The Perfection*, this option could be sufficient to address the potential harms of CVoD classification until a broader reform is underway. However, relying on the Chief Censor's "call in" power as a regulatory and enforcement avenue is not sustainable for OFLC. This additional work does not generate revenue to support this function and the current legislative settings do not allow for any related costs to be recovered from providers or complainants. Enhancing the current powers or requiring a means of payment or funding for this process would require legislative change.
134. The "call in" power also relies on the willingness of offshore providers to work with OFLC to amend their ratings and advisory warnings appropriately. There is an ongoing concern that offshore providers can choose not to work with OFLC to address any mis-classified or un-classified content. The Classification Act does not currently specify extra-territorial effect and does not offer a clear enforcement pathway for regulators to follow, especially in situations where providers are not based in New Zealand.

What relevant experience from other countries has been considered

135. In Australia, a recent two-year trial has led to the approval of self-classification for Netflix³⁰, in accordance with the Australian classification system. When the trial period finished it was found that in 96 per cent of cases the Netflix self-classification system produced ratings the same or one level higher than the Australian Classification Board. Although we do not know for what reason four per cent of content was not classified properly, we believe this is evidence of the industry's ability to work with regulators to self-classify in accordance with an official regime, in response to the large volume of original content (such as what is available on Netflix).
136. A similar approach is being trialled in the UK³¹. This is in response to the volume of content available on CVoD platforms as well as an acknowledgment that current UK legislation does not cover CVoD content. The proposed self-classification system would bring New Zealand in line with these overseas developments.

3.2 What criteria, in addition to monetary costs and benefits, have been used to assess the likely impacts of the options under consideration?

137. Our assessment of each option used the following criteria:
- a. *Ability to provide appropriate information to consumers*: if and how each option effectively addresses the risk of harm to children and young people (e.g. ensuring content has ratings and advisory notes that provide clear and consistent information to consumers across platforms);
 - b. *Timeliness*: how efficient it is to set up and establish the regime to ensure that the risk of harm is addressed (e.g. how quickly each option can be established);
 - c. *Timeliness in providing content to New Zealanders – market impact analysis*: how each option can ensure efficient classification processing, so content is not delayed for consumers;
 - d. *Impact on CVoD providers*: how each option impacts CVoD providers (e.g. financial, operational and other costs); and
 - e. *Impact on regulators*: how each option impacts current regulators like OFLC and the Labelling Body (e.g. financial, operational and other costs).
138. The highest priority criteria are the ability to provide appropriate information to consumers and the timeliness in providing content to New Zealanders. However, the overall impact of each option on the remaining two criteria (impact on providers and regulators) will need to be considered when assessing the effectiveness of an option.

³⁰ *Netflix gets approval to classify own shows after two-year trial*, 2019. Sydney Morning Herald. Retrieved from <https://www.smh.com.au/business/companies/netflix-gets-approval-to-classify-own-shows-after-two-year-trial-20190120-p50sim.html>

³¹ *Netflix to set its own age ratings for film and television programmes*, 2019. The Guardian. Retrieved from: <https://www.theguardian.com/media/2019/mar/14/netflix-to-set-its-own-age-ratings-for-film-and-television-programmes>

3.3 What other options have been ruled out of scope, or not considered, and why?

Including the Media Council into option 2 was considered

139. Consideration has been given to a hybrid option that would include the Media Council in option 2. This would include a requirement under the Classification Act for CVoD providers to self-classify their content, with the Media Council administering the self-classification tool. Membership of the Media Council would be mandatory but CVoD providers would be able to classify content in whichever way works for their systems and processes.
140. The Media Council will ensure the correct ratings are created by all providers. Quality checks would be achieved by using the OFLC self-classification tool to test some of the ratings for accuracy. The Media Council could then be a conduit for streamlined communication between OFLC and the CVoD industry.
141. This option would allow for an independent complaints process through the Media Council. The Media Council would be the first point of escalation for any complaints by consumers that are not initially resolved by CVoD providers. As an independent body, the Media Council could provide a free service for consumers who are dissatisfied by the classification of content³². Further escalation of consumer complaints and issues that providers have with the Media Council would be through OFLC and the Film and Literature Board of Review.
142. This option was ruled out as it would make the classification process more complicated than it would otherwise be. The need for an intermediary for communication between industry and OFLC appears unwarranted. Having a third party administer the self-classification tool may also hinder streamlining of the classification process and attempts to improve the tool.

Utilising the Mental Health Foundation's education role to inform consumers of potentially harmful media content

143. Although the information provided by the Mental Health Foundation is helpful for viewers of potentially harmful content, this education method cannot be relied upon going forward. The reach of the Foundation's social media presence would not be significant enough to be known by all potential viewers of content. Universal provision of information about potentially harmful content is covered by the classifications and advisory notes provided under the Classification Act. Classifications have the benefit of being on the platform and visible before watching where Mental Health Foundation educational material would need to be actively searched for to find.
144. OFLC have a legislative requirement to conduct research and provide education relating to media content. Entry of the Mental Health Foundation into this space could mean a doubling of effort that would take valuable resources away from other areas of the Foundation's work.

Extending the scope to cover FVoD services

145. Consideration was given to extending the scope to cover FVoD services. Including FVoD into this work adds the complexity of defining FVoD content in a way that would only capture services that would warrant classification. Creating a regulatory system for this material would add extra complexity that would require significant time and resource investment. It is not considered possible to achieve this within the timeframes DIA are working to with this project.

³² Complaints to OFLC are also free for both viewers making complaints and providers potentially subject to reclassification.

Section 4: Impact Analysis

Marginal impact: How does each of the options identified at section 3.1 compare with the counterfactual, under each of the criteria set out in section 3.2?

	Status quo	Option 1: Subject CVoD to current New Zealand classification processes	Option 2: Establish a mechanism for CVoDs to self-classify under the official regime	Option 3: Enhancing the voluntary self-classification scheme, and Chief Censor call-in power and operating them in tandem
Ability to provide appropriate information to consumers	0	++ Requires providers to classify according to NZ classification regime. The classifications have been tailored to New Zealand standards for over two decades and are well understood by New Zealanders.	++ Requires providers to classify according to NZ classification regime. The classifications have been tailored to New Zealand standards for over two decades and are well understood by New Zealanders.	+ Any improvement from enhancements to the current scheme are likely to be minimal. Effectiveness will depend on voluntary compliance for providers to be members of the VoD code, and offshore providers being willing to comply with the Chief Censor's directions where appropriate. Using OFLC classifications and warnings could make members' classifications more informative, but the risk of inconsistent labelling would still exist where providers choose to use their own labels,
Timeliness - setting and establishing the regime	0	- Currently there is a process in place that allows providers to submit content for labelling by the Labelling Body.	- The ability to submit content for labelling by the Labelling Body will be available, as per option 1. For providers that prefer to self-classify content, they will need appropriate lead-in time to be ready to comply with new requirements.	+ Amending the Code to reflect OFLC classifications could be done quickly.
Timeliness in providing content to New Zealanders - Impact on market from implementing option	0	-- This process can cause significant delays as the Labelling Body and at times OFLC will need to review content. Content could take about four weeks to be classified which could delay or even deter availability to the market.	0 Most content providers already self-classify as part of the status quo. Option 2 will change the regime under which they self-classify. The tool is expected to take about five minutes for an experienced user and an accredited system would be at least as quick as using the tool.	0 Most content providers already self-classify as part of the status quo. This would likely not change with enhancements to the current scheme.
Minimising cost to regulators	0	--	-	-

Updated RIA: CVoD definition analysis

		Increased financial costs to manage operations and additional workload. Additional workload may affect processing times. Regulators may need to reprioritise away from education and research work to manage uptake in workload.	OFLC estimated in mid-2018 \$250k annual running costs for the tool. Staff can continue current operations. Maintaining current relationships with providers may not require any more resources than are currently used.	Cost to OFLC because of time and process in Chief Censor use of call in power, at no cost to provider.
Minimising cost to providers	0	-- Increased financial costs from submission fees to regulators. Potential delays in content availability for NZ consumers affecting provider's attraction. Submitters from the public worried piracy would result from delays in content availability.	- Likely increased costs for providers to update systems and to pay appropriate CVoD fees ³³ . These costs would depend on the method used for classification.	- Possible costs to providers to upgrade their systems to implement the agreed upon enhancements. These costs would not be substantial.
Overall assessment	0	-- Option 1 provides information that is well recognised and understood by New Zealanders. This option can create significant time delays and has an expected high impact on regulators and providers.	++ Option 2 provides information that is well recognised and understood by New Zealanders. Time delays are avoided through self-classification. There are costs to regulators and providers, but these are not considered substantial.	+ Option 3, could provide more informative classification for consumers. The risk of inconsistent classifications would remain as providers would self-classify as currently. Costs to OFLC would likely increase, with no means to collect revenue for it to carry out this function. Minimal costs to providers to implement enhancements.

Key:

- ++ much better than doing nothing/the status quo
- + better than doing nothing/the status quo
- 0 about the same as doing nothing/the status quo
- worse than doing the status quo
- much worse than the status quo

146. The highest priority criteria are the ability to provide appropriate information to consumers and the timeliness in providing content to New Zealanders. However, the overall impact on the remaining two criteria is considered when assessing the effectiveness of the options.

³³ DIA is currently undertaking a review of fees payable under the Classification Act, as per Cabinet direction [CAB-19-MIN-0174.21]. Considering appropriate CVoD fee will be part of this work, which will likely have a separate RIA to come later in 2019.

Section 5: Conclusions

5.1 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

Where a conclusion as to preferred option is reached, identify it and set out reasons for considering it to be the best approach (by reference to the assessment criteria).

147. Option 2 is most likely to address the identified problem, while addressing anticipated concerns CVoD providers and industry would have around costs, processing and delivery. Establishing a mechanism to allow providers to self-classify under the current regime meets the criteria set out in Section 3.2 better than the other options, as noted in the table in Section 4.
148. Option 2 provides for CVoD content to be clearly regulated under New Zealand legislation and the regulatory framework. This approach helps minimise the risk of harm to children and young people by ensuring CVoD content is labelled consistently. It also provides the ability for CVoD providers to self-classify their own content, using OFLC's self-classification tool or their own OFLC-approved systems, which could make it quicker for them to process classifications and ratings.
149. We consider the costs to providers and regulators are reasonable, considering this approach's ability to better provide for the wellbeing and safety of children and young people. There may also be potential reputational benefits for CVoD providers utilising a trusted and familiar classification system, as viewers and consumers can trust their content is classified under New Zealand's classification regime.
150. We do not believe the risks identified outweigh the benefits of having consistent CVoD classifications that enable New Zealanders, particularly children, young people and their caregivers, to make informed decisions on what to consume. A broader reform would take between 18 to 24 months to complete, depending on Government priorities. The risk of inconsistent classifications for CVoD content is real and needs to be addressed immediately, rather than be delayed to accommodate the expected broader reform.
151. This approach is also consistent with Government priorities regarding the welfare of children and young people and meets New Zealand's obligations under the United Nations Convention on the Rights of the Child.

How much confidence do you have in the assumptions and evidence?

152. We are confident in the evidence showing the potential harm that can be inflicted from CVoD content. We do not have direct evidence to show that Government regulation will prevent this harm completely. As per the Chief Censor's comments regarding *The Perfection*, mid-teens will essentially watch what they want and will not necessarily turn away from an R18 rating³⁴. However, they may pay attention to specific warnings about the type of content they may not wish to see, making it even more important that clear consumer information is displayed. We are confident consistent classification would provide protections through concise information without denying access to content.
153. Due to time constraints the level of research has not been as extensive as it could have been. The evidence we do have indicates that there is a real risk of harm. We are confident that requiring self-classification under the Classification Act will reduce the risk of harm to children and young people as well as other vulnerable groups within New Zealand. Although this will not be a perfect solution, it will provide a good level of protection until a broader reform can be completed.
154. Based on preliminary analysis we are confident the impact on industry will be manageable. Self-classification is intended to streamline classification and reduce costs which we believe will be well-received by industry.

What do stakeholders think - in particular, those opposed? Why are they concerned, and why has it not been possible to accommodate their concerns?

155. The biggest concern for stakeholders that opposed option 2 (as well as some that supported it) was the need for the broader reform. Broader reform will address the issues this policy proposal is trying to resolve, as well as fix issues that submitters believe will occur from option 2. DIA and MCH are currently undertaking scoping work for a broader reform. However, the identified gap is considered too important to leave until the proposed reform is completed.
156. Option 2 received almost as many expressions of support as option 3. Other organisations (organisations that operate outside of content provision or regulation, which includes the Mental Health Foundation, Family Planning and others with a focus on children welfare) were the biggest stakeholder group to support this option. Submitters noted the practicality and efficiency of the option with it being a balance between providing classifications under the Classification Act while not burdening content providers with undue compliance cost.
157. Some support also came from content providers and regulators. Netflix noted that they already self-classify under official regimes in other countries and are happy to do it here if provided clarity and direction as to how it is to be done. OFLC were appreciative of the cost in time that the current classification process can require. The regulator supports option 2 due to the efficiencies it will provide while still creating accurate classifications.

³⁴ Netflix's 'The Perfection' reignites classification storm, 2019. Radio New Zealand. Retrieved from: <https://www.rnz.co.nz/national/programmes/ninetonoon/audio/2018698879/netflix-s-the-perfection-reignites-classification-storm>

158. Those opposed to option 2 were largely other industry members (those that provide media content but not specifically CVoD). Some of these submitters felt that option 2 was not the most cost-effective and would only cement the current inconsistencies of classification approach across the media content regulation system.
159. The BSA is the regulator for broadcasters under the Broadcasting Act. The BSA is opposed to this discrete fix and prefers a broader reform of media content regulation instead. The BSA noted in their submission that the inconsistency with labels provided by CVoD providers shows a need to provide support to the sector to provide a better understanding of appropriate classification settings in New Zealand. There is concern from the BSA that subjecting CVoD content to the Classification Act will further increase fragmentation by requiring film labels on content that is provided on televisions and mobile devices.
160. The Labelling Body also expressed opposition to option 2, noting it would create an uneven playing field favouring CVoD providers over traditional distributors (for cinema and DVDs). This would leave traditional content with a lengthy process and high compliance costs while CVoD providers have a streamlined self-classification process.
161. Some stakeholders believe this fix will further entrench inconsistency of information across media types. We do not believe this to be the case as a greater number of platforms will be covered by the Classification Act making it more likely for consumers to be viewing content classified by the regime.

Some stakeholders questioned the robustness of the CVoD definition

162. Four stakeholders expressed concerns with the definition of CVoD. These concerns range from issues with the current definition, to providing ways it can be further enhanced to capture more of the market. Concerns were as follows:
 - a. Lightbox questioned how well the definition holds up when services are packaged in alternative ways. In their example, Lightbox and Netflix are bundled as part of Spark's Unplan entertainment plan³⁵. Being provided free would mean these services are not CVoD as they lack a fee under this model.
 - b. Google raised the issue of paying a fee to remove advertisements from otherwise free content. YouTube premium allows users to access the traditionally free user-generated content without ads by paying a monthly fee. This brings user-generated content within scope of the current CVoD definition.
 - c. InternetNZ suggested defining content by whether they require a user login to access content. This would create issues with determining what would count as CVoD as many sites, including Facebook, require a log in and have video content on their services.

³⁵ Spark's Unplan Entertainment costs from \$75 - \$95 a month and includes Netflix Standard (HD) and Lightbox Standard.

163. We acknowledge how important it is to have a clear definition for CVoD content and have hosted a workshop involving OFLC, the Labelling Body and members of the industry to ensure we have a clear definition that does not unintentionally capture content we have determined to be out of scope (e.g. FVoD and user-generated content).
164. To address these concerns, we conducted supplementary analysis to clarify the CVoD definition, which involved two weeks of targeted consultation with key industry and regulatory stakeholders. Our findings from supplementary analysis are outlined below.

Supplementary analysis: clarifying the CVoD definition

165. *In the initial proposal presented to Cabinet, it was not clear which CVoD providers would be regulated under the new requirements. The Minister of Internal Affairs and the Minister of Finance agreed to officials doing more work in identifying and establishing criteria to determine which CVoD services should be regulated. This included considering how small and/or niche providers would be impacted. This additional analysis will accompany the Bill when it is considered by Cabinet in November 2019.*

We identified three objectives to assess our approach

166. *We identified three objectives to assess our recommended approach on the CVoD definition, based on the agreement between the Minister of Internal Affairs and the Minister of Finance, and our discussions with Treasury. These objectives are:*
- a) **Fair and appropriate:** *Considers the prevalence of online and on-demand services in New Zealand and ensure that content likely to be accessed by New Zealand-based consumers displays appropriate ratings and descriptive notes;*
 - b) **Clear for industry and regulators:** *Clearly indicate which providers and types of content are covered by the requirement to display adequate consumer information for New Zealand consumers; and*
 - c) **Cost-effective:** *Consider the compliance requirements for all stakeholders, including regulated parties and regulators (e.g. ease of compliance and administration under the new regime).*

We considered consulting on two options to CVoD provider criteria

167. *We identified two options for clarifying the CVoD definition. These two options are described below, with our initial assumptions on how each would impact providers.*

Option 1: Criteria based on business characteristics

168. *This option focusses on providers that are active in the New Zealand market and listing them in a Schedule to make it clear which providers are regulated. The criteria to determine which provider is listed would be based on the provider's availability of services to the New Zealand public, and their 'market reach' (below) which would have set thresholds:*

- a) *Presence in New Zealand – to make it clear that providers that do not actively operate in New Zealand (but whose content is accessible by New Zealand-based consumers via Virtual Private Network [VPN]) are not regulated or required to comply under the new requirements. The expectation is that providers that operate within the New Zealand market should comply with domestic media regulations.*
 - b) *Market reach – to help confirm a provider’s presence in New Zealand. We proposed that ‘market reach’ have thresholds based on subscription numbers or in relation to GST registration. Providers that meet either threshold would be required to classify content (both of these thresholds were included in targeted consultation). This would likely capture main providers with a significant consumer base in New Zealand and ensure that they are displaying appropriate ratings and descriptive notes on their content.*
169. *Providers that meet the criteria and are then listed in the Schedule would not be required to label the following content:*
- a) *Content that is described under the labelling exemptions for films outlined in section 8 of the Classification Act (section 8 exemptions)³⁶;*
 - b) *Content that fits the definition of ‘broadcasting’ under the Broadcasting Act 1989 (including online live-streaming). This would mean that broadcast content is not captured by the new labelling requirements, and is aligned with what is currently in place for films; and*
 - c) *Content that is available for free with advertisements but can be accessed without ads with payment. This would mean that YouTube Premium, which may meet the criteria and be listed in the Schedule, would not be required to label user-generated content on its platform.*

Our assumptions on how Option 1 impacts providers

- 170. *Smaller providers would not be regulated, as they are unlikely to meet the ‘market reach’ thresholds. Providers that offer niche content (e.g. a selection of art house films) may be required to label content but that would be dependent on whether or not they meet the ‘market reach’ thresholds.*
- 171. *The proposal would also mean that advertising-funded providers or niche content providers could meet the criteria and thresholds but would not be required to label the content that they provide because this content comes under the specified exemptions (e.g. a niche provider of documentaries would not be required to label this content because it is an exemption under section 8).*
- 172. *The Chief Censor’s ‘call in’ powers under section 13 of the Classification Act has been used to call in content for classification (e.g. 13 Reasons Why) and would continue to be applicable to providers that are not listed (e.g. small and/or niche providers).*

³⁶ [Section 8](#) provides for “Films exempt from labelling requirements”. This exempts any films that ‘mainly’ or ‘wholly’ depict documentary, travel, religious content and other types of content from **labelling** requirements (which activate the rating and classification processes that need to take place beforehand) before it is available in New Zealand.

173. As discussed earlier in this RIA (refer to paras 57 – 59), reliance on the Chief Censor’s call in power is not sustainable in the long term as it tends to be used after the content has been made available. The Classification Office would also carry the cost every time the Chief Censor calls in content. We do not think that the Chief Censor’s call in power would be used extensively for small and/or niche providers. The Chief Censor has only used it to call in content from providers that are likely to meet the criteria and any set thresholds (e.g. Netflix).

Option 2: Criteria based on content

174. This option focusses on content and uses section 8 exemptions as a basis to determine which providers need to adhere to the new requirements. It aligns with the current process and the treatment of ‘films’ which industry would be familiar with. Section 8 exemptions include content that tends to traditionally be broadcast (e.g. news/sports) or user-generated (e.g. home videos).

175. The proposal is for providers that primarily offer content described under the section 8 exemptions (e.g. news/documentaries) to not be required to label any of their content, even if they offer some content not described under section 8.

176. Providers that do not fit the above description (para 175) would need to label their content. But they would not be required to label content described under section 8.

Our assumptions on how Option 2 impacts providers

177. Providers that offer niche content may be regulated depending on the type of content they offer. This option would exclude providers that primarily offer documentaries and/or travel shows (described under section 8) from the labelling requirements. Providers that primarily offer niche content that is not currently exempted under section 8 (e.g. horror genre films) would likely need to label their content.

178. Providers that offer a variety of content would likely be regulated under this option, regardless of size. For example, a provider that offers a variety of content (e.g. Lightbox/Netflix) would likely be regulated unless they can prove that the ‘majority’ of their content fits the exemptions under section 8.

We conducted a preliminary assessment of the two options against identified objectives

Preliminary assessment of the two options against identified objectives

Objectives	Option 1: Criteria based on business characteristics	Option 2: Criteria based on type of content
<p>Fair and appropriate</p> <ul style="list-style-type: none"> - Does it consider how prevalent the service/content is in New Zealand? - Does the approach ensure that New Zealand consumers see appropriate ratings on content they are likely to access? 	<p>We think this option meets this objective because it:</p> <ul style="list-style-type: none"> • considers the prevalence of the provider’s services in New Zealand and proposes regulation based on proportion and the provider’s market presence (main providers would need to label their content and smaller provider would not). This would not inhibit growth and innovation in the industry; and • goes some way to ensure that the providers display consistent ratings under the Classification Act, albeit the main providers. The Chief Censor’s call in power can be used to call in content if smaller providers are providing problematic content. 	<p>We think this option does not fully meet this objective because it:</p> <ul style="list-style-type: none"> • may ensure that providers display consistent ratings under the Classification Act (main services provide a variety of content and would likely be regulated, unless they can prove otherwise); <p>however</p> <ul style="list-style-type: none"> • does not consider the prevalence, and therefore the size and market presence, of the provider’s services in New Zealand. This can create a barrier to entry in the market and inhibit innovation in the industry.
<p>Clear for industry and regulators</p> <ul style="list-style-type: none"> - Do providers clearly know whether they are regulated? - Can regulated providers clearly understand their obligations? - Can regulators clearly determine whether a provider should be regulated? - Any other matters that might make it unclear for all parties? 	<p>We think this option meets this objective because it:</p> <ul style="list-style-type: none"> • makes it clear which providers would be required to adhere to the new requirements by providing ‘criteria’ that will inform the list of providers that need to adhere to the new requirements; • makes it clear to listed providers which of their content requires labelling (by specifying content that is exempted from labelling requirements); and • gives regulators a clear basis to determine which providers should be listed and required to adhere to the new requirements, and which content will/will not be labelled. 	<p>We think this option does not fully meet this objective because:</p> <ul style="list-style-type: none"> • it would be confusing for regulated parties and regulators because of the constant change/turnover in content on on-demand platforms. Providers are constantly adding new content to their platforms to remain competitive. This option risks providers being regulated at different points in time, depending on the content they offer. <p>However, this option does provide some clarity for industry and regulators because it:</p> <ul style="list-style-type: none"> • makes it clear to providers that if the majority of their content is described under section 8, then they are fully excluded (e.g. Spark Sport will be excluded because sporting events content is exempted). If not, then they are included but are only required to label certain content. Providers would likely need to assess their content libraries to see whether they can be fully excluded from the new requirements; and • gives regulators a basis to determine which providers should adhere to the new requirements.

<p>Cost-effective</p> <ul style="list-style-type: none"> - Does it consider compliance cost challenges for providers? - Will costs prohibit regulators from effectively monitoring and enforcing the requirements? 	<p>We think this option meets this objective because it:</p> <ul style="list-style-type: none"> • sets criteria that would result in providers that have a larger 'market reach' and are likely able to afford compliance costs, being required to comply under the new requirements. These providers would be able to accommodate compliance costs better than smaller providers; and • ensures that the workload for OFLC is proportionate to the 'market reach' achieved by the main providers, and OFLC's resources are used efficiently to regulate the providers that are used by more New Zealanders. 	<p>We think this option does not fully meet this objective because it:</p> <ul style="list-style-type: none"> • sets criteria that cannot be easily adapted to situations where the provider is constantly adding new and/or different types of content to its library. This would not be cost-effective for providers because of the potential for them to be regulated one day and not regulated the next day; • would also capture providers that offer a variety of content, including smaller providers – creating potentially high costs for smaller providers, making it hard for them to comply and stay in the market. This could inhibit entry to the market; and • makes it difficult and costly for OFLC to monitor and enforce the new requirements on providers that may regularly shift from being regulated and not regulated depending on changes to the types of content they add to their libraries.
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179. Based on our preliminary assessment of the two identified options, we thought Option 1 met our objectives and Option 2 fell short of meeting the objectives. The Minister subsequently directed us to consult on only one option: Option 1.

We conducted targeted consultation on Option 1 from 16 – 29 September 2019

180. We invited submissions from 14 key industry stakeholders, including regulators. This included providers who attended our workshop on 10 July 2019. We also invited submissions from industry representative bodies including the New Zealand Media Council, the Australia New Zealand Screen Association, and regulatory bodies including the Broadcasting Standards Authority, the Film and Video Labelling Body and the Film and Literature Board of Review.

181. We received six submissions and followed up with all stakeholders that did not make a submission. We received confirmation from six stakeholders that they did not intend to make a submission on the proposed CVoD definition criteria, while two stakeholders did not respond.

182. We also met with OFLC's Youth Advisory Panel (the Panel) to discuss the proposed criteria and exemptions and sought their insight in how they use streaming and on-demand services. The Panel has an important role in helping to inform OFLC's processes and research by bringing a youth perspective into policy development. We met with the Panel and posed some questions to them about how they use ratings and descriptive notes, and whether they think the current level of consumer information is sufficient.

We identified four key themes from targeted consultation

Theme 1: The new requirements will increase inconsistencies in the application of the Broadcasting Act and the Classification Act to content

183. Submissions note that some providers are operating under the Broadcasting Act, and there will be challenges and increased costs in being required to comply with both regimes. For example, Sky NZ has pointed out that it currently applies the BSA's Pay Television Code across all of its services (including on its streaming service, NEON), but would be required to apply two classification systems to the same content depending on which service the content is shown on.

Theme 2: The proposed 'market reach' criteria could create an unequal regulatory environment

184. Some submissions acknowledged that a 'market reach' threshold would make the new requirements workable, and setting a threshold may be needed so smaller or new providers are not deterred from entering the New Zealand market. However, submissions also pointed out that smaller or niche providers will gain a competitive advantage because of the 'market reach' threshold (e.g. no compliance costs).

Theme 3: The proposed exemption of free and advertising-funded content from labelling requirements gives these providers an unfair advantage

185. Most submissions questioned the rationale for excluding free and/or advertising-funded video on-demand (FVoD and/or AVoD) content from the new requirements. They are concerned that this exemption unfairly benefits one business model (monetisation through advertising) over another (monetisation through paid subscription or transaction). Submissions note that a provider's business model has no bearing on the potential harm that content on their platforms could cause to New Zealand consumers.

Theme 4: The broader reform of the media content regulation system will better address existing inconsistencies and achieve policy intent

186. Submitters questioned why the new requirements only focuses on one subset of content. They note that a broader reform that looks at modernising the whole system would better provide consumers with consistent and clear classifications to help them make informed viewing choices.

In addition to targeted consultation, OFLC commissioned market research

187. OFLC commissioned a market survey from UMR of the paid subscription and transactional on-demand market in New Zealand in September 2019. The online general public survey sought responses from a representative group of 1,000 New Zealanders aged 18 and over on what on-demand services they use. Key findings from this survey are:

- a) More than 77 per cent of respondents use 'video on-demand' or 'streaming' services. Over 90 per cent of respondents aged 18-44 use these services;
- b) Only five subscription-based providers were used by 10 per cent or more of respondents (Netflix: 72 per cent; Lightbox: 30 per cent; YouTube Premium: 13 per cent; Amazon Prime Video: 11 per cent; and NEON: 10 per cent);³⁷

³⁷The total percentage exceeds 100 per cent as some respondents had more than one subscription.

- c) *Transaction-based providers (e.g. iTunes, Lightbox, Google Play Movies & TV/YouTube's paid content, and the PlayStation Store) have a lower, but still notable, level of market presence compared to subscription-based providers. Only four out of nine providers listed in the survey were used by 10 per cent or more of respondents at least once during a monthly period.*³⁸

We used feedback from submitters and the UMR market survey to inform our analysis and recommended CVoD definition

Having exemptions to the requirements will add to inconsistencies in the current regulatory environment, but are necessary to enact discrete change this term

188. *Most submissions expressed concern about the new requirements including exemptions for smaller or niche CVoD providers as well as free and/or advertising-funded providers (FVoD and/or AVoD). This is because they believe that a provider's market size or business model has no bearing on the potential for the content on their platforms to cause harm to New Zealand consumers.*
189. *Although submitters raised valid points, explicitly capturing FVoD and AVoD as well as smaller or niche providers would significantly broaden the scale of the policy work. It is not possible to undertake this broader scale of policy work within the timeframe for introduction of the Bill in 2019.*
190. *Furthermore, we do consider that a provider's market size has an impact on the potential for content on their platform to cause harm. Because bigger platforms are used by more of the New Zealand population, their wider reach means that there is a higher risk that more people may be harmed by viewing inappropriate content on their platforms as a result of inadequate labelling. We have factored this in to our recommended approach.*
191. *In addition, the UMR market survey has found that less than two per cent of respondents who use streaming services subscribe to smaller or niche providers. We therefore consider that the risk of not including smaller or niche providers in the new regime is small because they do not have large consumer bases in New Zealand, and the content on their platforms does not present the highest and most immediate risk of harm to New Zealanders. The Chief Censor's call in power can also be used to call in any problematic content provided on these smaller platforms, which further mitigates the risk.*

There will still be inconsistencies with ratings across all content, but providers with services likely accessed by most households will be required to display consistent ratings

192. *We acknowledge that exemptions mean that there will still be classification and rating inconsistencies for content made available in New Zealand. However, the providers that are likely being accessed by the majority of New Zealanders, and show more popular content on their platforms, will be required to classify their content according to a classification regime that is recognised and understood by New Zealanders.*

³⁸ *iTunes had the highest percentage of users in this period, with 16 per cent of respondents indicating that they rented or bought a movie or show from iTunes at least once in the past month. This was followed by Lightbox with 15 per cent, Google Play Movies & TV/YouTube (paid content) with 15 per cent, and the PlayStation Store with 10 per cent.*

193. As such, we consider that the new requirements will still promote the policy's fundamental objective of reducing the risk of harm to New Zealanders from viewing inappropriate content online through ensuring that consumers have enough information to make informed viewing choices. It does this by capturing the providers that the majority of New Zealand consumers are likely to use.

The new requirements will not address some concerns raised by submitters, which strengthens the need for a broader reform of the media content regulation system

194. Submissions from both providers and regulators expressed concerns about the new requirements only addressing a specific part of the online media environment, and not the broader media regulation system. We agree that the broad scope of a first principles review of the media regulation system would better address issues relating to the regulation of providers that are operating in an evolving media landscape. However, the intent of the CVoD proposal is to require the content that is likely to be most accessed by New Zealanders to be adequately classified in order to reduce the risk of harm from viewing inappropriate content.

195. We also acknowledge that our proposal is a discrete amendment to an Act that is outdated and is not fit for the increasingly digital media environment. However, we consider that the amendment is necessary to address the potential for harm to New Zealanders from the current gap where there is no requirement for on-demand content providers to classify content that they make available in New Zealand. We consider that this cannot wait until the broader reform to be addressed, as the broader reform will likely take at least 18 to 24 months to complete and is dependent on Government priorities.

We refined our three objectives for assessing our recommended approach following consultation feedback and further analysis

196. We assessed the proposed CVoD provider criteria and proposed labelling exemptions for targeted consultation against the three objectives of fair and appropriate, clear for industry and regulators, and cost-effective (refer to para 166).

197. In light of feedback that we received from submissions on these objectives, as well as our further analysis of the CVoD definition, we refined our objectives to:

- a) **Proportionate to risk of harm:** Our recommended approach should consider where the most benefit to New Zealanders will be from having trusted classifications to help them make informed viewing choices. It should also consider where the potential for most harm would be from having insufficient consumer information;
- b) **Clear for industry, regulators and consumers:** Our recommended approach needs to be clear on which providers are covered by the new requirements. Providers that are regulated should clearly understand their obligations, classifications should be clear and consistent to benefit consumers; and
- c) **Cost-effective and proportionate to provider size:** Our recommended approach should consider compliance and implementation requirements for both providers and regulators (e.g. ease of compliance, regulation and administration). It should not unduly act as a barrier to competition.

Our recommended approach to clarify the CVoD definition and providers

198. *Our findings confirmed the need to have a clear definition for CVoD content and a clear process to identify which providers would be required to label their content. Our recommendations to clarify these two matters are as follows:*

- a) **Define CVoD content** to focus on video on-demand content that is accessed by users in New Zealand through payment of a fee or as a reward (e.g. as part of a bundle offered by Spark). This will include subscription and transaction-based video on-demand services. It will exclude free and advertisement-based video on-demand services, which will be considered as part of the broader review work programme; and
- b) **Set a Schedule** to the Classification Act that will specify which providers of CVoD content are required to label content.

Specifying providers in a Schedule provides clarity for all parties

199. *We think the best way to make it clear which providers are regulated (and required to label their content) is by listing them in a Schedule. Amending the Schedule will be done via Order in Council (OIC) with the final decision being made by the Governor-General, upon recommendation from the Minister of Internal Affairs. Amending the Schedule will be done on an as-needed basis and the Minister will need to consult the Chief Censor before making recommendations.*

200. *There needs to be a basis for determining whether a provider should be added (or removed) from the Schedule. Findings from our targeted consultation have helped us shape what we think should be key considerations in this process.*

The key consideration should be the perceived ‘risk of harm’ to consumers due to CVoD content being available without appropriate labels under the Classification Act

201. *The main objective for this change to the Classification Act is to ensure that New Zealand consumers have enough trusted information to make informed viewing choices. This helps mitigate the potential risk of harm to consumers, including children and young people, from viewing inappropriate content.*

202. *We recommend that the principal consideration for whether a provider should be included or excluded in the Schedule should be the potential ‘risk of harm’ to consumers due to CVoD content not being appropriately labelled under the Classification Act.*

203. *To determine this, the Minister should consider the following criteria when amending the Schedule:*

- a) **Market presence:** *refers to a provider’s existing or expected share of the CVoD market in New Zealand. Existing market presence can be indicated through a survey asking consumers which CVoD providers they use. Such a survey was commissioned by OFLC during September 2019 (outlined in para 187). Based on the outcomes of this survey, providers could be considered to have a ‘sizeable’ market presence if approximately 10 per cent or more of survey respondents indicated they use that provider’s service. However, this assessment is limited as it is based on a single data point and therefore can be considered indicative only.*

Other useful sources of data that may be used to consider market presence include providers’ user numbers, and their revenues from providing their services in New

Zealand. However, this data is highly commercially sensitive and may be difficult to obtain.

Evaluating market presence may also include consideration of whether the provider is registered for GST in New Zealand, but this will not be a determining factor as previously proposed (refer to para 168b).

The various ways that existing market presence can be determined, and the limitations involved in each, demonstrate the difficulties in establishing a definitive market presence for each provider currently operating in New Zealand. We will continue to work with providers on implementation and will seek their views to ascertain the best methodology for sizing market presence. However, we do not propose including any specific or fixed thresholds for market presence. This approach will allow flexibility for the Minister to consider several data sources. It will also enable the Minister to consider the market presence criterion alongside the other two criteria outlined below when making a recommendation to amend the Schedule.

In addition to considering existing market presence, the market presence criterion will also consider a provider's expected market presence in New Zealand. This will enable the Minister to recommend adding a provider to the Schedule in anticipation of their likely high market impact in New Zealand. It reflects a likelihood that providers that have a large market presence overseas will also reach a sizeable presence in New Zealand; **and**

- b) **Compliance and commitment to another classification framework in New Zealand:** considers whether a provider is using a classification framework that provides consistent and appropriate information to consumers, as well as the extent and reliability of their commitment to that framework.

For example, this enables the Minister to consider whether a provider is satisfactorily complying under the BSA's regime, and whether this compliance is evidence of a reliable commitment to informing consumers about potentially harmful content through providing clear and consistent labelling of that content.

This consideration addresses concerns outlined by industry about compliance under two regimes. In particular, situations where a broadcaster in New Zealand has taken steps to formalise its CVoD service's compliance under the Pay/Free-to-air Television regime; **and**

- c) **Nature of content:** considers the nature of the content being offered by a provider, and the potential for this content to cause harm. It will enable the Minister to consider listing niche providers that provide content with a high risk of harm despite the provider having a very small market presence in New Zealand. This consideration is informed by feedback we received from consultation which note that a provider's business model has no bearing to the potential for their content to cause harm to consumers.

Specified providers in the Schedule will not be required to label all content

204. *Providers that are specified in the Schedule will not be required to label section 8 exempted content. This will align the new requirements with what is already in place for films. Content that is wholly or mainly of a certain type (e.g. news, most documentaries, sporting events, or content of a religious nature) will be exempt from the new labelling requirements.*
205. *In addition to the Schedule, we think that section 8(1) should be amended to make it clear that CVoD content provided by non-specified providers is not required to be labelled. This makes it clear to industry and providers that if they are not listed in the Schedule then there are no general requirements for them to label their content (even though it is clearly CVoD content). However, the Chief Censor's existing powers to require specified exempted content to be labelled in section 8(2) and section 8(3) of the Classification Act will apply, as well as the Chief Censor's ability to call in any content under section 13(3) if required.*

Our recommended approach is broader and more flexible than Option 1

206. *Option 1 prescribed specific criteria based on the provider's availability of services to the New Zealand public and 'market reach' (refer to para 168). It also proposed setting thresholds for 'market reach' (e.g. subscription numbers) where applicable.*
207. *Our recommended approach provides the Minister with three criteria to help determine whether a provider's inclusion on the Schedule mitigates their content's potential risk of harm (from lack of labelling). The three criteria allows the Minister to consider factors other than 'market reach' (as outlined in Option 1).*
208. *Our recommended approach is informed by feedback received from submissions, which noted that some providers already formally comply with the broadcasting regime. For example, Sky NZ has pointed out that it has a Memorandum of Understanding with the BSA for its NEON service, which is a step that it has taken to ensure its customers have a consistent experience, and information about the content they are viewing on all Sky services.*
209. *We refined our thinking on the proposed exemption to content that fits the definition of 'broadcasting' in the Broadcasting Act, as set out in Option 1 (refer to para 169b). This is in response to feedback received from some submitters, who were confused about what the proposed exemption meant and whether it would be workable.*
210. *Option 1's 'market reach' criteria for listing in the Schedule also included considering whether a provider is registered for GST in New Zealand. In consultation with Inland Revenue (IR), we were advised that a threshold based on revenues from selling CVoD services in New Zealand would be a more appropriate measure than GST registration. IR also noted that a threshold based on GST registration could impose additional regulatory compliance costs to providers and may make businesses less willing to comply with New Zealand regulations.*

Our recommended approach generally **meets** our three refined objectives

Objectives	Assessment
<p>Proportionate to risk of harm</p> <ul style="list-style-type: none"> - Does it consider where the most benefit will be to New Zealanders? - Does it consider where the potential for most harm is? 	<p>We think the recommended approach meets this objective because it:</p> <ul style="list-style-type: none"> • considers where the most benefit will be to New Zealanders. For example, the market presence criteria for listing in the Schedule considers how widely used a service is in New Zealand, so ensuring that the main providers being used by New Zealanders are subject to the new requirements will ensure that more New Zealanders will benefit from being provided with clear and consistent ratings and descriptive notes; • considers where the potential for most harm is. Because providers that have a larger share of the market have a larger reach of the New Zealand population, there is more potential for the content on their platforms to cause harm to New Zealanders. In addition, the nature of harm consideration allows the Minister to consider niche providers that distribute content with a high risk of harm to be listed in the Schedule if necessary; and • considers that the potential for harm from providers that are already complying with the BSA Pay Television or Free-to-air Television codes is lower compared to a provider that is not currently required to classify content under any regime.
<p>Clear for industry, regulators and consumers</p> <ul style="list-style-type: none"> - Do providers clearly know whether they are regulated? - Can regulated providers clearly understand their obligations? - Can regulators clearly determine whether a provider should be regulated? - Does it provide clear and consistent classifications for consumers? 	<p>We think the recommended approach partially meets this objective because it:</p> <ul style="list-style-type: none"> • enables providers to know whether they are regulated because regulated providers will be listed in the Schedule. Furthermore, the market presence criteria means that providers will be able to judge whether they are likely to be listed in the Schedule based on their current market share. Providers can also prepare for when they are likely to be listed in the Schedule by looking at their rate of growth. Providers that are already complying with the BSA regime will know that they are less likely to be required to comply with the new requirements; • enables regulated providers to clearly understand their obligations. It will be clear to providers that are listed in the Schedule which of their content is required to be labelled, and it will also be clear which types of content are exempted from labelling requirements; • provides clarity for regulators, as they will have a clear basis to determine which providers should be regulated by and required to adhere to the new requirements. Regulators will also have clarity on which types of content will not be required to be labelled by regulated providers; and • requires providers that are listed in the Schedule to comply with the classification regime, which will provide consumers with clear, well-understood and trusted ratings and descriptive notes; <p>however</p> <ul style="list-style-type: none"> • does not provide consistent classifications for consumers across all on-demand content that they consume.

<p>Cost-effective and proportionate to provider size</p> <p>- Does it consider compliance cost challenges for providers?</p> <p>- Will costs prohibit regulators from effectively monitoring and enforcing the requirements?</p>	<p>We think this option meets this objective because it:</p> <ul style="list-style-type: none"> • considers compliance cost challenges for providers, recognising that smaller or niche providers will face challenges and costs in complying with the new requirements. Smaller or niche providers may be deterred from entering or remaining in the New Zealand market if they are regulated. On the other hand, main providers, who would be able to carry compliance costs better than smaller providers, will be regulated; • recognises that there will be increased compliance costs for providers that already comply with the BSA regime (and pay a broadcasting levy). It provides a mechanism for avoiding duplication of costs or overlap in fees and levies paid by providers, while incentivising these providers to ensure their content continues to be effectively labelled and classified under the BSA regime; and • reduces the amount of workload for regulators to monitor and apply regulations. The criteria not only aligns the new requirements to the providers whose content has the most potential for harm, it also ensures that OFLC's resources are used efficiently to regulate providers that are used by more New Zealanders.
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The recommended approach will affect providers differently, depending on their business models, arrangements and sizes

211. **Main providers (indicated by the UMR survey):** The criteria would mean that providers that have a sizeable number of users in New Zealand would likely be included in the Schedule.³⁹ It would also likely cover new entrants providing CVoD content in New Zealand that reach a sizeable market presence (e.g. Disney is set to launch its subscription-based streaming service in late 2019).
212. **FVoD and/or AVoD providers:** These providers are excluded from the CVoD definition because their content is not accessed for a fee or reward, and they will not be listed in the Schedule.
213. **Small providers:** The market presence criterion would mean that smaller and/or niche CVoD providers that do not have a sizeable market presence would unlikely be listed in the Schedule and regulated under the new labelling requirements, unless the nature of their content is considered to pose a risk of harm despite their small market presence.
214. **Providers complying with the BSA's Pay Television or Free-to-air Television Code:** The consideration of compliance under the BSA regime addresses concerns raised in submissions about television broadcasters having increased compliance costs if they were to apply two different sets of classification to content that they make available across their services.
215. **While the consideration means that there is less uniformity in which code is applied to CVoD content, we consider that it still addresses the policy's fundamental objective of requiring the classification of CVoD content in order to reduce harm to New Zealand consumers. Providers that comply with the BSA regime are also subject to the BSA's complaints process, which is another system that is in place for mitigating harm.**

³⁹ Based on the UMR survey, outlined in para 187, this would likely include SVoD providers like Netflix, Lightbox, and Amazon Prime Video, and TVoD providers like iTunes, Lightbox, Google Play, and the PlayStation Store.

The Chief Censor’s call in power can still be applied for providers that are out of scope or not listed in the Schedule

- 216. *Five of the six submissions expressed concerns about the new requirements not covering all providers of streaming services. However, we consider that this is necessary for a discrete amendment to the Act that is intended to address CVoD content that currently presents the most likely risk of harm to New Zealanders. We believe that our recommended approach is the only viable option for addressing this risk of harm in the short term.*
- 217. *The Chief Censor’s ability to call in any content will still apply to these providers in cases where complaints are made by the public or the Chief Censor exercises their authority to call in a publication (under section 13 of the Classification Act). This means the Chief Censor has the ability to call in content provided by FVoD and/or AVoD providers (e.g. content on YouTube or TVNZ OnDemand), content from smaller and/or niche providers, and content from providers that comply with the BSA Pay/Free-to-air Television Codes.*
- 218. *While reliance on the Chief Censor’s call in power is unsustainable in the long term, we do not think that this power will be used extensively for content provided by FVoD and/or AVoD providers, smaller and/or niche providers, or providers that comply with the BSA regime. In addition, the Chief Censor will also be able to require the labelling of specified content from FVoD and/or AVoD or non-listed CVoD providers under sections 8(2) and 8(3) of the Classification Act.*
- 219. *As previously mentioned, (refer to para 173), the Chief Censor has only used the power to call in content from providers that are likely to meet the criteria for listing in the Schedule (e.g. Netflix). As such, we consider that this approach balances the potential for harm to consumers from these services without unduly impacting consumer access to content from these providers.*
- 220. *The planned broader reform of New Zealand’s media regulation system would address services that are deemed out of scope from this discrete piece of work.*

Further analysis on the compliance impact of the proposed new requirements on providers will be developed as part of DIA’s review of OFLC’s fees

- 221. *DIA is undertaking a separate workstream to review OFLC’s fees [CAB19-MIN-0174.21 refers]. The Minister of Internal Affairs and the Minister of Finance have agreed that the further analysis needed around the impact of the new requirements on providers, including costs of compliance and the extent to which these are likely to be passed on to consumers, will take place as part of the fees review. The review is expected to be completed by April 2020.*
- 222. *We have therefore not updated the summary table of costs and benefits below as part of our supplementary analysis work to clarify the CVoD definition.*

5.2 Summary table of costs and benefits of the preferred approach

Affected parties (identify)	Comment: nature of cost or benefit (eg ongoing, one-off), evidence and assumption (eg compliance rates), risks	Impact \$m present value, for monetised impacts; high, medium or low for non-monetised impacts	Evidence certainty (High, medium or low)
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Additional costs of proposed approach, compared to taking no action			
Regulated parties	Implementation costs. Appropriate CVoD classification fee (which will be part of DIA's fees review of fees payable under the Classification Act, due to be completed by April 2020).	Self-classifying using OFLC tool was estimated at S.9(2)(b)(ii) [REDACTED] [REDACTED] [REDACTED] No costs were received for providers self-classifying using their systems (but this would likely include design and build of self-classification capabilities) Submitting content to Labelling Body for classification would have set-up and compliance costs.	Low
Regulators	Establishment and ongoing costs for OFLC. Potential enforcement costs if providers are in breach of the Classification Act for the Department.	High end estimate of up to \$1.000m for establishment costs over two years (2019/20 – 2020-21). \$0.250 ongoing annual costs.	High
Wider government	No additional costs identified	-	-
Other parties	No additional costs identified	-	-
Total Monetised Cost	Implementation and potential classification charge for providers. Ongoing and establishment costs for regulators	High-end estimate of over \$1.000m for establishment costs.	Medium

Expected benefits of proposed approach, compared to status quo			
Regulated parties	Clarity around requirements when classifying under New Zealand system. Self-classification will allow for swift processing.	Medium	High
Regulators	Certainty with the regulation of CVoD content. Potential to work closely with industry to ensure compliance requirements suit business needs.	High	High
Wider government	-	-	-

Other parties; New Zealand viewers	Lower risk of harm.	High	High
Non-monetised benefits	Providers' self-classifying should prevent delays to content being made available to consumers. At the same time the risk of harm to children and young people from viewing inappropriate content is reduced.	Medium	High

5.3 What other impacts is this approach likely to have?

Other likely impacts which cannot be included in the table above, e.g. because they cannot readily be assigned to a specific stakeholder group, or they cannot clearly be described as costs or benefits

223. Subjecting CVoD providers to a self-classification scheme but excluding the traditional classification process would create an uneven playing field between CVoD providers and traditional film (such as cinema releases including film festivals and DVDs). The impact of this is unclear. However, the expected broader reform would consider traditional film and other out of scope content (e.g. user-generated and FVoD), in modernising New Zealand's media content regulation regime.
224. The biggest inequality issue between these forms of classifiable content will likely be around cost. The current process of film classification can be expensive whereas the cost of self-classification is currently unknown but is presumably less. This will be addressed by the work DIA is undertaking around a fees review/funding model review for OFLC.

Potential risks and uncertainties

225. We considered the risk of CVoD providers withdrawing from the New Zealand market due to an increased compliance burden. We did not receive any submissions from industry bodies or CVoD providers that raised this as an issue. However, we believe this would be a more likely risk under option 1 and not for our preferred option 2. Option 2 allows providers to classify their own content using the self-classification tool provided by OFLC or an OFLC-approved method, which should streamline and allow for an efficient process. This is in line with developments overseas which are showing a preference for industry self-classification by regulators.
226. There are also risks relating to the self-classification tool not being ready on time for any amendments to the Classification Act to take effect by mid-2020 and OFLC not receiving further funding to maintain the self-classification tool and process. We understand that OFLC are continuing to refine the tool with the aim of it being ready for implementation and we will work with their office to ensure its readiness. We will also work with OFLC to determine an appropriate fee for CVoD classification during our review of all fees payable under the Classification Act, and identify other funding means to enable the successful implementation of the proposed change.

227. The timing of implementation is a risk that will need to be managed. This will be done through further consultation with industry to discuss how self-classification will be achieved and how long would be required to properly implement for CVoD providers.
228. There is a risk of issues arising from attempting to enforce against overseas content providers. We do not believe extraterritoriality will be an issue due to the sector's willingness to collaborate and comply with OFLC's classification decisions.
229. As mentioned earlier, DIA is currently establishing a separate but related project to review OFLC's funding model and fees payable under the Classification Act. Establishing an appropriate CVoD fee will be part of this separate work and will be considered by Cabinet later this year. Any fee charged for the classification of CVoD content will be set via regulations and on a cost-recovery basis.
230. There is a potential risk of regulatory fatigue from this legislative change being followed closely by a broader reform. Requiring content providers to change their systems and get used to a new regulatory framework only to potentially have the broader review supersede that, could impact industry's willingness to partake in future reform in this area. The likelihood of regulatory fatigue is dependent on the timing and conclusions of a broader reform.
231. There is a risk that the broader reform could not go ahead. This is a small risk however as there is Ministerial will to progress the reform. The reform is considered a relevant link to the current work being undertaken around Countering Violent Extremist content online. If the broader reform were to not go ahead, it would not change our analysis of the proposed options for changes to CVoD Classification.

5.4 Is the preferred option compatible with the Government's 'Expectations for the design of regulatory systems'?

232. Yes.

Section 6: Implementation and operation

6.1 How will the new arrangements work in practice?

233. Amendments to the Classification Act will be required to give effect to proposed legislative changes. It is intended that the changes will be in effect by July 2020, with the Bill being passed into legislation by early 2020. This is however largely dependent on the House programme and priorities.
234. We acknowledge that it would be ideal to give OFLC, the Labelling Body and regulated bodies (CvOD providers) enough time to ensure their systems are updated to comply with new system requirements.
235. OFLC and the Labelling Body will be responsible for ongoing operation of the new arrangements. The DIA will continue to play an enforcement role under the Act and will work with OFLC to ensure a smooth implementation of new arrangements.

6.2 What are the implementation risks?

236. We note that the ease of implementing this option depends on a few factors like the readiness of the self-classification tool and how quickly CvOD providers can update their systems to the standard requirements. This was highlighted by submissions stating the need for providers to be given enough time to update their systems, should this option be progressed. Given this is a Ministerial priority with relatively short timeframes, officials would continue to work closely with OFLC and providers to ensure the tool is fit for purpose, and that providers are given enough information to prepare for when requirements come into effect.
237. The underlying assumption is that content providers will be willing and able to implement the required self-classification into their systems and processes. Overseas based providers do have the option of pulling out of our market entirely if they are not satisfied with their legislative obligations. We do not believe this to be particularly likely but has been considered as a risk.
238. Risks will be mitigated through continuous and proactive communication with OFLC and providers. Ensuring everybody is informed will allow issues with implementation to be dealt with early and proactively.

Section 7: Monitoring, evaluation and review

7.1 How will the impact of the new arrangements be monitored?

239. The current environment has different classifications across each CVoD platform. The most immediate sign of the desired impacts will be content on each platform displaying the same ratings and label notes.
240. OFLC can confirm the effectiveness of self-classification by conducting audits of content and maintaining dialogue with providers to ensure classifications are correct. Any adjustments that need to be made to the self-classification tool can be made through discussion between OFLC and industry.
241. Success of the system can be ascertained by the frequency of complaints to OFLC about the classifications generated from the use of the tool. These can be compared to the level of complaints received about films currently classified under the Classification Act. Ideally, there would be no difference in the level of complaint.
242. Recording reductions in harm is less certain. As no data is currently kept measuring how many children and young people are affected by CVoD content there would be no data to compare. In addition, many organisations that work with children and young people acknowledge that classification is only one aspect of protecting from harm. During a planned reform of the media content regulatory regime, organisation that focus on children's welfare and wellbeing will have an opportunity to provide feedback on any changes they are seeing from the people they work with.

7.2 When and how will the new arrangements be reviewed?

243. The effect of the policy proposal will be reviewed as part of the broader reform of the media content regulation regime, which is expected to be in place by late 2019 and could take at least 18 to 24 months. This reform will provide an opportunity to see if self-classification is a valid tool and what can be done to improve the system further. Stakeholders will have an opportunity to raise their concerns during the consultation for the broader reform.