

Departmental Disclosure Statement

Films, Videos, and Publications (Urgent Interim Classification of Publications and Prevention of Online Harm) Amendment Bill

The departmental disclosure statement for a Government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Department of Internal Affairs.

The Department of Internal Affairs certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

29 April 2020.

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Part One: General Policy Statement

The objective of the Films, Videos, and Publications (Urgent Interim Classification of Publications and Prevention of Online Harm) Amendment Bill (**the Bill**) is to update the Films, Videos and Publications Classification Act 1993 (**the Act**) to allow for urgent prevention and mitigation of harms caused by objectionable publications.

The Bill provides additional regulatory tools to manage harms caused by content that is live streamed, and/or hosted by online content hosts. The Bill mostly relates to online publications, however one aspect of the Bill (urgent interim classification assessments) will apply to all publications covered by the Act.

The Bill makes the key changes outlined below.

The Bill makes livestreaming of objectionable content a criminal offence

1. The Bill makes livestreaming of objectionable content a criminal offence under new section 124AB of the Act.
2. Livestreaming is the online transmission of events in real time. Any digital reproduction of a livestream is a recording and is therefore subject to existing provisions in the Act relating to publications.
3. The criminal offence of livestreaming objectionable content only applies to the individual or group livestreaming the content. It does not apply to the online content hosts that provide the online infrastructure or platform for the livestream.

The Bill confers additional authority to the Chief Censor

1. The Bill enables the Chief Censor to make swift time-limited interim classification assessments of any publication in situations where the sudden appearance and (in the case of online publications) viral distribution of objectionable content is injurious to the public good.
2. The Act sets out procedures for submitting publications to the Chief Censor as well as for how the Chief Censor examines a submitted publication to determine its classification status. Following the full classification procedure takes time and does not suit the urgency of situations in which the availability and uncontrolled dissemination of objectionable content will be injurious to the public good. The need to notify the public as quickly as possible of the harm that this objectionable content can cause, and to limit that harm, has highest priority.
3. This mechanism provides the public, anyone who provides publications to the public including (in the case of online publications) service providers and online content hosts, and enforcement agencies with immediate clarity on a probable classification status. This will minimise the rate at which objectionable content spreads and reduce its potential to harm.
4. The interim assessment has the same effect as a classification decision and would be in place for a maximum of 20 working days before the Chief Censor would be required to issue a final written decision.

Under the Bill, take-down notices can be issued requiring the removal of objectionable online content

1. The Bill authorises an Inspector of Publications to issue a take-down notice for objectionable online content. The take-down powers are aligned with current powers of seizure of objectionable publications under the Act.

2. Take-down notices will be issued to an online content host, directing the removal of a specific link, so that the relevant objectionable material is no longer viewable in New Zealand. An online content host that does not comply with a notice to take down content as soon as is reasonably practicable, (without reasonable justification for delays), will be subject to civil pecuniary penalties.
3. It is intended (but not required by the Bill) that the authority to issue a take-down notice will only be exercised in situations where other options for seeking the removal of objectionable content online have proven ineffective. The current collaborative practice of requesting online content hosts to voluntarily remove identified objectionable content will continue to be the first and preferred approach.

Online content hosts will be subject to a civil pecuniary penalty if they do not comply with an issued take-down notice

1. Although it is an offence against the Act to make, possess, supply or distribute an objectionable (analogue) publication, the Act's provisions are not explicit in how they may apply to online publications and the hosting of objectionable content online. In addition, financial penalties for non-compliance by large multi-national corporations are significantly small compared to their revenue, and therefore ineffective deterrents.
2. Under the Bill, a civil pecuniary penalty will be imposed on online content hosts that do not comply with an issued take-down notice in relation to objectionable online content. This change will bring online content hosts in line with the expectations of businesses operating in New Zealand as they relate to physical analogue content classified as objectionable.

Under the Bill, the 'safe harbour' provisions in the Harmful Digital Communications Act 2015 (the HDC Act) will not apply to objectionable online content

1. Section 24 of the HDC Act states that online content hosts cannot be charged under New Zealand law for hosting harmful content on their platforms, if they follow certain steps when a complaint is made. This creates the potential for exemption for online content hosts from any criminal or civil liability if they break the law under the Act, (which is concerned with more serious content), but follow steps outlined in the HDC Act.
2. Under the Bill, section 24 of the HDC Act would not apply to the operation of the Act. No amendments would need to be made to the HDC Act. This would mean enforcing any new offence or modified offences in the Act would not be limited by the HDC Act 'safe harbour' provisions for online content hosts. It would ensure online content hosts can be prosecuted for hosting objectionable content if they are liable for doing so.

The Bill facilitates the establishment of parameters for setting up future mechanisms for blocking and/or filtering objectionable online content

1. In New Zealand, the only current government-backed web filter is designed to block child sexual exploitation material (the Digital Child Exploitation Filtering System). This filter is voluntary and operates at the Internet Service Provider (ISP) level. It currently applies to about 85 per cent of New Zealand's ISP connections.
2. The Bill facilitates the establishment of a Government backed (either mandatory or voluntary) internet filter, if one was desired in the future. It provides

Government with explicit statutory authority to explore and implement such mechanisms through regulations, following consultation.

3. Internet filters can be circumvented by those actively seeking content through tools such as a VPN (a virtual private network). The limitations of a filtering system mean that there is a risk that a web filter could provide limited benefits and impact on freedom of expression.
4. Accordingly, the regulation-making power under the Bill would require that any regulations to establish a filter, must:
 - clarify the criteria for identifying and preventing access to objectionable content that the filter would block;
 - clarify governance arrangements for the system;
 - specify reporting arrangements for the system;
 - clarify the review process and right of appeal should an ISP, online content host or other individual or entity, dispute a decision to prevent access to a website, or part of a website online application;
 - clarify the obligations of ISPs in relation to the operation of the system; and
 - provide detail of how data security and privacy provisions would be addressed.
5. Any filter established will be limited to addressing a form of objectionable content and would focus on web page filtering. The filter would not include messaging applications and other online services. It is intended to be designed so that the impact on freedom of expression would not be extended past the existing justified limits.
6. Existing appeal pathways in the Act would apply, with necessary modifications, when challenging decisions relating to takedown notices. Review and appeal processes set out in regulations would apply to decisions relating to the blocking of websites, online application or similar, by the electronic system. Decisions relating to the blocking of websites can be also be challenged through judicial review.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	[NO]

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	[NO]

2.2.1. If so, was a National Interest Analysis report prepared to inform a Parliamentary examination of the proposed New Zealand action in relation to the treaty?	[NO]
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Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	[YES]
Title: Countering violent extremism online – changes to censorship legislation to better protect New Zealanders from online harm (26 November 2019) Authoring agency: Department of Internal Affairs (the Department) Location: https://www.dia.govt.nz/diawebsite.nsf/Files/Proactive-releases/\$file/regulatory-impact-assessment-countering-violent-extremism-online.pdf	

<p>2.3.1. If so, did the Regulatory Impact Analysis (RIA) Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?</p>	<p>[YES]</p>
<p>The RIA panel found as follows:</p> <p>The Department’s Regulatory Impact Analysis (RIA) panel (the panel) has reviewed the ‘Countering Violent Extremism’ RIA (the RIA) in accordance with the quality assurance criteria set out in the CabGuide. This was a joint review by the Department and the Treasury.</p> <p>The panel members for this review were:</p> <ul style="list-style-type: none"> • John Sutton, Principal Policy Analyst (Chair) • Rowan Burns, Senior Policy Analyst (Policy member) • Killian Destremau, Senior Analyst, The Treasury (External member) • Harry Boam, Policy Analyst (Secretariat member) <p>The panel considers that the information and analysis summarised in the RIA partially meets the quality assurance criteria.</p> <p>The panel acknowledges the high level of public and political interest in these proposals. The Government’s desire for a quick response to the Christchurch terror attacks has constrained both the scope and the time available for the analysis described in the RIA. Similarly, the focus on legislation administered by the Department has limited the policy and regulatory options available for assessment.</p> <p>The RIA is complete and includes all necessary information. Consultation with stakeholders was focussed primarily on the regulatory proposals, due to the time and scope constraints on the analysis. Discussions from this consultation informed refinement of the proposals and a commitment to release an exposure draft of the amendment Bill.</p> <p>The RIA would have been more convincing if it had clearly and concisely set out the contextual constraints, and how these have impacted the scope and analysis of the defined problem, and the identification and assessment of policy options. Without this clarity, the descriptions and justifications of the different elements of the preferred option are uneven and not fully convincing. The analysis of options could also have presented a clearer picture of the relative merits of urgent amendments to address regulatory gaps in the Films, Videos and Publications Classification Act 1993 against reliance on voluntary co-operation with industry stakeholders pending the planned broader review of media regulation.</p> <p>Finally, the RIA indicates that some detailed aspects of the proposed mechanisms are to be designed in subsequent stages, including through collaboration with industry. It acknowledges design and implementation challenges and sets out mitigation strategies which will be important in this critical dimension of the proposals.</p>	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	[NO]

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	[NO]

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	[YES]
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	[NO]
<p>The potential costs and benefits of this policy are considered in the Regulatory Impact Assessment of 26 November 2019: https://www.dia.govt.nz/diawebsite.nsf/Files/Proactive-releases/\$file/regulatory-impact-assessment-counterering-violent-extremism-online.pdf</p>	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	[YES]
(b) the nature and level of regulator effort put into encouraging or securing compliance?	[YES]
<p>To develop the policy proposals being given effect by the Bill, the Department conducted several workshops with stakeholders, in addition to conducting consultation on the exposure draft of the Bill.</p> <p>Major online content hosts have generally indicated a willingness to be 'good corporate citizens' and comply with their legal obligations. This helps to mitigate the risk of over-reaction and non-compliance with regulation, by technology industry groups. Through existing relationships with several industry stakeholders, the Department is aware that several affected businesses already put in voluntary compliance measures, ahead of the Bill being passed. This suggests that compliance costs for these businesses are likely to be small.</p> <p>Some of the Bill's provisions (e.g. the take-down notice) represent a formalisation of current practice. This allows the Department to leverage existing relationships with online content hosts and to use the most appropriate non regulatory/regulatory levers, depending on the situation. It also suggests that regulatory non-compliance is unlikely.</p> <p>More detail on this issue can be found in the RIA of 26 November 2019: https://www.dia.govt.nz/diawebsite.nsf/Files/Proactive-releases/\$file/regulatory-impact-assessment-counterering-violent-extremism-online.pdf</p>	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?

Consultation has been undertaken with the Ministry of Foreign Affairs and Trade to ensure that New Zealand is giving effect to its international obligations.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

Māori are not disproportionately affected by the provisions contained in the Bill, as the Bill is intended to mitigate harm from objectionable content for all New Zealanders. The Department considers that the Bill is consistent with the principles of the Treaty of Waitangi.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

[YES]

The Ministry of Justice has reviewed the Bill and has provided advice to the Attorney-General who will notify the Minister of Internal Affairs directly about the outcomes of this advice. The Department considers the provisions of this Bill to be consistent with the BORA.

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:

(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?

[YES]

(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?

[YES]

Clause 10 inserts *new section 124AB* into the principal Act, which establishes a new offence of knowingly livestreaming objectionable content. A service provider or online content host does not commit an offence by reason only that they provide or host the platform on which content is livestreamed. The penalty is:

- (a) in the case of an individual, to imprisonment for a term not exceeding 14 years:
- (b) in the case of a body corporate, to a fine not exceeding \$200,000.

This offence is not intended to have extraterritorial application.

Clause 11 amends section 131(2B) so that the offence of possessing an objectionable publication applies to a publication under *new paragraph (e)* as well as paragraph (d) of the definition of publication.

3.4.1. Was the Ministry of Justice consulted about these provisions?	[YES]
The Ministry of Justice was consulted on the provisions during initial development of the policy proposals, as well as being formally consulted through the offences and penalties vetting process of the Bill development.	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	[NO]

3.5.1. Was the Privacy Commissioner consulted about these provisions?	[NO]

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	[YES]
<p>Immediately following the Terror Attacks in March 2019, the Department interacted extensively with affected community groups, regulators and technology industry stakeholders. These interactions informed the problem definition as set out in the Regulatory Impact Statement.</p> <p>Department officials subsequently led engagement with industry, community groups, civil society and young people on problem definition and policy proposals in October and November 2019.</p> <p>In addition to the stakeholders noted above, the Department consulted with OFLC, as well as the following agencies on the policy proposals being implemented by the Bill: Ministry for Culture and Heritage (MCH); Ministry of Foreign Affairs and Trade (MFAT); Ministry of Business, Innovation and Employment (MBIE); Ministry of Justice (MoJ).</p> <p>Their feedback has informed development of options and analysis.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	[YES]
<p>Policy details being given effect by this Bill have been tested through an exposure draft of the legislation with industry stakeholders and representatives (online content hosts and ISPs), to test that any changes are workable in practice and to estimate the impacts on their businesses. Stakeholders have provided feedback which informed the final version of the Bill.</p>	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	[NO]

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	[NO]

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	[NO]

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	[NO]
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	[NO]

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	[YES]
<p>Sections 119F and 119G provide immunity from civil or criminal liability for officials, service providers, and online content hosts relating to actions taken when issuing or complying with a take-down notice. Section 22C provides immunity from civil or criminal liability to officials for actions taken in making an interim assessment.</p> <p>Section 22D provides immunity from civil or criminal liability to service providers and online content hosts and their employees and staff who remove or prevent access to an online publication that is the subject of an interim assessment.</p>	

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	[NO]

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	[NO]

4.8. Does this Bill create or amend any other powers to make delegated legislation?	[YES]
<p>Section 119(M) outlines the regulations (made under section 149 of the Act) which will apply to an electronic system (a "filter") to identify and prevent access to objectionable online publications.</p> <p>These regulations would only be implemented if further stakeholder engagement and policy work on the appropriateness of filtering demonstrates it as an effective mechanism to prevent harm from objectionable content online.</p> <p>Due to the potential misuse of a filtering mechanism, resulting in an encroachment of freedom of expression rights, the regulations to establish a filter will:</p> <ul style="list-style-type: none">(a) set out criteria to ensure the filter has the capacity to both identify and prevent access to an online publication with reasonable reliability; and(b) set out the filter is subject to specified governance arrangements;(c) set out the filter is subject to specified requirements for administration and technical oversight, including relating to data security and privacy; and(d) specify the use of the filter is subject to specified reporting requirements.	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	[NO]