

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

Global Partners Digital response

About Global Partners Digital

Global Partners Digital (GPD) is a social purpose company working to enable a digital environment underpinned by human rights.

Introduction

We welcome the opportunity to provide a written submission on the Films, Videos, and Publications Classification (Urgent Interim Classification of Publications and Prevention of Online Harm) Amendment Bill to the Governance and Administration Committee.

GPD recognises the legitimate desire of the New Zealand government to tackle unlawful and harmful content online, and we believe the majority of the proposals put forward in the Bill to be reasonable and sensible. Based on our analysis, however, we believe that particular aspects of the Bill, if taken forward in their current form, may pose risks to individuals' right to freedom of expression online and could be inconsistent with New Zealand's international human rights obligations.

In this submission, we set out our concerns and make a series of recommendations on how the proposals could be revised to mitigate these risks. We believe these considerations and recommendations, if incorporated into the final legislation, will help safeguard freedom of expression online.

Framework for analysis of the Bill

Our analysis of the proposals in the Bill is based on international human rights law, primarily the International Covenant on Civil and Political Rights (ICCPR).¹ The most relevant human right impacted by the proposals is the rights to freedom of expression. Article 19 of the ICCPR guarantees the right to freedom of expression, including the right to receive and impart information and ideas of all kinds regardless of frontiers. The right to freedom of expression is also protected in other relevant treaties, such as Article 13 of the Convention on the Rights of the Child.²

¹ New Zealand ratified the International Covenant on Civil and Political Rights (ICCPR) in 1978.

² New Zealand ratified the Convention on the Rights of the Child in 1993.

Restrictions on the right to freedom of expression are only permissible under international human rights law when they can be justified. In order to be justified, a restriction must meet a three-part test, namely that: (i) it is provided by law; (ii) it pursues a legitimate aim; and (iii) it is necessary and proportionate, which requires that the restriction be the least restrictive means required to achieve the purported aim.

It is important to remember that New Zealand's obligation to ensure that these rights are not unjustifiably restricted exists both in relation to restrictions which stem from the actions of the state itself as well as those caused by third parties, such as private companies. As such, it makes no difference from the perspective of the individual affected whether any restrictions are imposed and enforced directly by the state (e.g. through creating criminal offences which are enforced by the police and the courts) or through third parties, particularly when the third party is acting in order to comply with legal obligations.

Human rights analysis of the Bill

Interim classification assessments (clause 6)

Clause 6 of the Bill would amend the Films, Videos, and Publications Classification Act 1993 (the 1993 Act) by introducing a new power for the Chief Censor to make an "interim classification assessment" that a publication is "likely to be objectionable". This power could only be exercised if the Chief Censor believes that there is "an urgent need to notify the public that the content of the publication is likely to be objectionable (on the basis of the interim assessment), and to limit harm to the public". An interim assessment would be treated as a classification decision and would have effect for a maximum of 20 days (or sooner if a classification decision is made before then).

Decisions about whether a publication is "likely to be objectionable" for the purposes of the interim classification would, necessarily, be taken quickly and could therefore lead to publications being temporarily prohibited before later being permitted. While the maximum period that this could last would be 20 days, there is still a risk both that legitimate information is temporarily made inaccessible, and that even potentially objectionable information prevented from legitimate access and use, including by academics, journalists and others. Both of these present risks to freedom of expression.

While we do not oppose the system of interim classification assessments, we believe that these risks to freedom of expression could be mitigated in two respects:

- First, by providing the Chief Censor with the power to make an interim classification of "objectionable in certain circumstances", specifying the circumstances in which the publication is permissible, and therefore enabling the publication to be accessed in certain limited circumstances, for example for academic purposes.
- Second, for the legislation to explicitly require the Chief Censor to consider the importance of the right to freedom of expression when making a decision as to whether a publication is likely to be objectionable, or whether there is a risk of harm to the public. This could be done through a requirement that the Chief Censor "consider and

act consistently with the rights affirmed in the New Zealand Bill of Rights Act 1990, including the right to free expression under section 14”.³

Recommendation 1: New section 22A of the 1993 Act should be amended to enable the Chief Censor to make an interim classification of “objectionable in certain circumstances”, specifying the circumstances in which the publication is permissible, and therefore enabling the publication to be accessed in certain limited circumstances, for example for academic purposes.

Recommendation 2: New section 22A of the 1993 should be amended to require the Chief Censor to consider the importance of the right to freedom of expression when making a decision as to whether a publication is likely to be objectionable, or whether there is a risk of harm to the public. We propose the following new subclause:

“In performing functions or exercising powers under this section, the Chief Censor must consider and act consistently with the rights affirmed in the New Zealand Bill of Rights Act 1990, including the right to free expression under section 14”.

Liability of online content hosts (clauses 5 and 9)

Sections 23 to 25 of the Harmful Digital Communications Act 2015 (the 2015 Act) set out the liability regime for online content hosts when it comes to content posted by a user. In essence, an online content host is protected from liability for content posted by a user provided that they follow the requirements set out in section 24(2). That process requires an online content host which receives a notice of complaint to pass this on to the author of the content within 48 hours of and, if the author consents or does not respond, remove access to the content “as soon as practicable” but no later than 48 hours after receiving a notice.

Clause 5 of the Bill would insert a new section 4A into the 1993 Act providing that sections 23 to 25 of the 2015 Act do not apply to processes or proceedings under the 1993 Act relating to online publications hosted by them.

We recognise that, without a provision of this nature, a potential loophole would be created under which an online content host could refuse to comply with requirements under new Part 7A of the 1993 Act (inserted by clause 9 of the Bill) but be shielded from liability if it had followed the process set out in section 24(2) of the 2015 Act. However, new section 4A of the 1993 Act would not remove liability protections only in relation to new Part 7A, but the entirety of that Act. In doing so, it opens up the possibility for an online content host to be held liable for the existence of *any* objectionable content hosted, regardless of whether the Chief Censor has made a classification or interim classification that a particular publication is “objectionable” or “likely to be objectionable”. This is because section 3 of the 2015 Act contains a freestanding definition of “objectionable” publications which applies whether or not the Chief Censor has

³ We note that similar wording is used in section 6 of the Harmful Digital Communications Act 2015 which requires the Approved Agency (NetSafe), when “performing functions or exercising powers under this Act”, to “act consistently with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990”.

made a classification. An online content host could therefore be liable under, among others, section 131 of the Act which makes it an offence to “possess” an objectionable publication, an offence which can be committed even when the person is not aware of the existence of that publication or, if they are, that it is objectionable.

This risk of liability for merely hosting objectionable publications, without any classification having been made, creates a strong incentive for online content hosts to proactively monitor content and remove any content which is potentially objectionable. This would inevitably mean over-removal of content so as to err on the side of safety, creating a significant risk of interference with the right to freedom of expression.

Recommendation 3: New section 4A of the 1993 Act should only apply to processes and proceedings under new Part 7A of the Act. We propose re-wording clause 5 of the Bill as follows (new wording underlined):

“Sections 23 to 25 of the Harmful Digital Communications Act 2015, which relate to the liability of an online content host for content posted by a user, do not apply to processes or proceedings under Part 7A this Act relating to online publications hosted by them.”

Take-downs (clause 9)

Clause 9 would also introduce a new take-down regime through the addition of new Part 7A of the 1993 Act. In essence, an online content host would need to remove or prevent access by the public to a specified online publication as soon as is reasonably practicable after receipt of a take-down notice and no later than the end of the required period set out in the notice. Notices could be issued by Inspectors if:

- (a) an interim classification assessment has been made that the online publication is likely to be objectionable;
- (b) the online publication has been classified as objectionable; or
- (c) the Inspector believes, on reasonable grounds, that the online publication is objectionable.

While we are supportive of the use of take-downs where an online publication has been classified as objectionable or likely to be objectionable (although we refer to our recommendations in relation to the latter above), Inspectors would also be able to issue take-down notices where they “believe, on reasonable grounds” that an online publication is objectionable. Such a take-down notice would not be temporary, or dependent on the outcome of a classification by the Chief Censor, but would have permanent effect. The Bill provides for no requirement that the Chief Censor ultimately classify the publication or for any other form of oversight.

We believe that this lack of oversight and transparency poses a risk to freedom of expression. In contrast to the classification system operated by the Chief Censor which has independent, relevant expertise and is required to make public a register of classification decisions, no such safeguards apply when an Inspector makes a determination. Indeed, the determination would be a subjective one based on the Inspector’s “belief”.

Recommendation 4: New section 119C of the 1993 Act should only permit take-down notices where an interim classification assessment has been made that an online publication is likely to be objectionable or where the online publication has been classified as objectionable. It should not permit take-down notices simply on the basis that an Inspector believes that an online publication is objectionable. We propose removing new section 119C(1)(c) from clause 9 of the Bill.

Web filters (clause 9)

Clause 9 of the Bill would also amend the 1993 Act to enable the Department of Internal Affairs to “operate an electronic system to prevent access by the public to objectionable online publications”. This system - likely to be a web filter - may prevent access to the following online publications:

- online publications where an interim classification assessment has been made that is likely to be objectionable;
- online publications where a classification assessment has been made that it is objectionable; and
- online publications which an Inspector believes on reasonable grounds to be objectionable.

The explanatory notes confirm that any filter would be limited to addressing a specific form of objectionable content and would focus on web page filtering. The filter would not include messaging applications and other online services. 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 could also be challenged through judicial review.

While these new powers merely enable the government to establish a web filtering system, there is the potential for this to be a mandatory, rather than voluntary, system, and a lack of clarity over precisely how the web filtering system would work. We echo the comments made by, among others, InternetNZ, that mandatory filtering of internet access would be a disproportionate interference with the right to freedom of expression. In his 2016 report to the UN Human Rights Council, the then Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, highlighted concerns over the use of web filters by governments, noting that they can raise “both necessity and proportionality concerns” due to the risk of removal of legal or protected expression, both within that state and extraterritorially.⁴ It would also be impractical in that individuals would be able to bypass the system through the use of VPNs. We believe, therefore, that these provisions should be removed from the Bill.

Recommendation 5: We propose that sections 119L to 119O be removed from clause 9 of the Bill.

⁴ UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. A/HRC/32/38, 11 May 2016, Para 47.