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

Government Bill

As reported from the Governance and Administration Committee

Commentary

Recommendation

The Governance and Administration Committee has examined the Films, Videos, and Publications Classification (Urgent Interim Classification of Publications and Prevention of Online Harm) Amendment Bill. The committee recommends that it be passed with the amendments shown.

Introduction

The bill would amend the Films, Videos, and Publications Classification Act 1993. The bill has been introduced in response to the online dissemination of objectionable content following the Christchurch mosque attacks on 15 March 2019.[1] It would provide additional tools to regulate objectionable publications and enable the urgent prevention of harm from those publications. The bill mostly relates to online publications, but the provisions regarding interim classification assessments apply to all publications covered by the principal Act.

The bill proposes amending the principal Act to address objectionable content that is distributed widely online. It acknowledges that current regulatory tools are insufficient in dealing with online objectionable content efficiently and effectively. Legislative changes are needed to reduce public exposure to this content and reduce the harm that may arise as a result of exposure.

The bill, as introduced, proposes:

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[1] "Objectionable" is defined in section 3 of the principal Act here.

- the means by which a filter for objectionable online content could be developed and implemented
- conferring additional authority on the Chief Censor to make time-limited interim classification assessments
- allowing take-down notices to be issued for the removal of objectionable online content
- creating penalties for failing to comply with an issued take-down notice
- making livestreaming of objectionable content a criminal offence
- clarifying the application of the Harmful Digital Communications Act 2015.

The livestreaming of the Christchurch mosque attacks brought attention to gaps in the legislation because of the way technology has developed and is being used since the Act was passed. The events highlighted the need to reduce the scope for objectionable content to be distributed widely online. When considering the bill, we kept in mind the need to consider possible effects of future technological developments.

Legislative scrutiny

As part of our consideration of the bill, we have examined its consistency with principles of legislative quality. We identified some issues relating to various clauses in the bill. However, after receiving advice, and in light of our recommendation that the electronic filtering provisions be removed, we are satisfied that our concerns have been addressed.[2]

One legislative issue we discussed at length is the extraterritorial applicability of some provisions in the bill. We focused particularly on issuing take-down notices to hosts of online content who are based in overseas jurisdictions.

We received advice that issuing a take-down notice to an online content host based in another jurisdiction would serve as a legal notice of New Zealand's desire for particular content to be removed. It would assert that there is a legal mandate in New Zealand for removing that content and clearly indicate that the content is illegal in New Zealand. We received advice that formal agreements with other jurisdictions would be needed to enforce the legal effect of take-down notices issued by New Zealand. However, issuing a take-down notice would make it more likely that overseas law enforcement agencies would help by attempting to remove the objectionable content.

We note that the Justice Committee reported back to the House in July 2021 on the international treaty examination of the Council of Europe Convention on Cybercrime—also known as the Budapest Convention—which seeks to increase international cooperation to combat cybercrime.[3] The report states that the Government intends the treaty to be implemented through a bill. We note that the outcome of rati-

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[2] This advice is available on the Parliament website at www.parliament.nz.

[3] The Justice Committee's report can be found here.

fying the Budapest Convention in New Zealand through domestic legislation may have an effect on the extraterritorial applicability of the provisions in this bill. It may provide a more formal avenue among signatories for pursuing the removal of objectionable content in overseas jurisdictions.

Another issue raised in our scrutiny was the right of review for online content hosts who receive a take-down notice under new section 119C(1)(c). We address that concern later in this report.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

Removal of electronic filtering provisions

Clause 9 of the bill would insert Part 7A into the Act. This part includes provisions relating to take-down notices, and provisions that would enable the creation of an electronic filtering system to prevent public access to objectionable online publications. We note that these provisions were commented on the most by submitters, with most submitters opposed to the establishment of an electronic filter.

Our recommended amendments—discussed later in this commentary—would completely remove sections 119L to 119O and all other references to an electronic filter, including in regulations. Part 7A of the bill as amended would only refer to take-down notices. We set out below our reasons for recommending the removal of these provisions.

Lack of detail and parliamentary oversight

As proposed in the bill as introduced, the electronic filter provisions would provide a framework to develop mechanisms for preventing access to objectionable online content. The filter could apply to content that:

- had been classified as objectionable
- had been given an interim classification assessment, or
- an inspector believed on reasonable grounds that it was objectionable.

The bill as introduced did not specify the design of an electronic filter or how exactly it would operate. The lack of detail about the filter's design, scope, and operation was a significant concern for us and for submitters.

Many submitters questioned the level of parliamentary oversight required to create an electronic filter. Under sections 119M and 119N, the Secretary of Internal Affairs would have responsibility for approving an electronic filter, following consultation about its design and format. A filter could be established through regulations rather than in primary legislation. The potential that a filter could infringe on rights regarding freedom of expression led to suggestions that developing and implementing a filter should require a higher level of oversight from Parliament.

Concerns about freedom of expression

Many submitters commented on the uncertainty about the scope of a filter and what content would be captured by it. Without the necessary detail describing how a filter would operate, it is difficult to consider how freedom of expression might be affected. Submitters indicated that they should be able to exercise their own judgement about what content they could access online. They were opposed to a government restricting public access to online material. Some suggested that allowing a government to filter material could result in an abuse of power and over-reach regarding what content would be filtered.

We note that the filter proposed by the bill would only apply to objectionable content, content subject to an interim classification assessment, and content that an Inspector believes on reasonable grounds to be objectionable.

Further, the Department of Internal Affairs already carries out internet filtering using the Digital Child Exploitation Filtering System (DCEFS). This protects New Zealand internet users from inadvertently accessing child sexual abuse material. It is important to note that DCEFS is voluntary for internet service providers (ISPs), although most ISPs in New Zealand choose to use the filter.

A filter may be an unworkable solution

The bill is aimed at stopping inadvertent access to objectionable content by internet users. We understand the reality that people who are determined to access objectionable online content will often find a way to do so, regardless of the barriers in place.

However, we still have concerns about the effectiveness of filtering online content and attempting to restrict public access to parts of the internet.

Filters can be circumvented by the use of a virtual private network (VPN), and setting up a VPN does not necessarily require advanced technical skills. Some submitters commented that advances in technology—such as the increase of encrypted internet communications protocols—could make particular types of filters ineffective. Others suggested that the identification and prevention of access to a particular online publication is not always possible because of limitations on technological capabilities.

Another problem raised was that a filter might unintentionally block legitimate online content due to incorrect application or technical limitations.

For these various reasons, we concluded that the provisions for electronic filtering proposed in the bill should be removed.

Requirements for interim classification assessments

Clause 6 of the bill would insert new sections 22A to 22D in the Act, establishing a process for making interim classification assessments for any publication covered by the Act. An interim classification assessment would operate in the same way a final classification does, but would only last for a maximum of 20 days or until a final classification was made. It would only be used when the Chief Censor believed there was an urgent need to notify the public that the publication is likely to be objectionable.

Considering potential harm for an interim classification

The bill as introduced states that an interim classification assessment could only be made if there was both:

- an urgent need to notify the public that the content of the publication is likely to be objectionable
- an urgent need to limit harm to the public.

This provision, in proposed new section 22A(3), means that the Classification Office would have to consider the potential for harm to the public twice when assessing whether to make an interim classification assessment. It would do so first when deciding if a publication is likely to be objectionable, and again when assessing the need to limit harm to the public.

To remove this duplication, we recommend amending section 22A(3) to remove paragraph (b), so that the Classification Office only needs to consider harm once when making an interim classification assessment.

Providing summary information when giving notice

Section 22B(1) would require the Classification Office to give written notice to the submitter of a publication that an interim classification assessment has been made. Although we agree that a notice should be provided, we believe that more context should be specified when giving the written notice.

We believe that supplying summary information would be useful to make it clear to the submitter of the publication why the interim classification assessment has been made.

We therefore recommend amending clause 6 to insert new section 22B(1A). Subsection (1A) specifies that a notice given when making an interim classification must contain a description of the publication, and a summary of the reasons for the interim classification assessment. We would expect it to explain why the Chief Censor considers an interim classification more appropriate than a final classification, and the nature of the harms being mitigated by the interim classification assessment.

We also recommend inserting new section 22B(6) to make it clear that any member of the public would be entitled to a copy of the written notice on request and on payment of any applicable fee. The submitter would receive a copy at no cost.

Take-down notices

Calling in publications for consideration

Clause 9 of the bill would insert Part 7A, containing provisions regarding take-down notices for online publications. New section 119C specifies that an Inspector of Publications (as defined under clause 4(1) of the bill) can issue a take-down notice to an online content host if:

- an interim classification assessment has been made, or
- a publication has been given a final classification as objectionable, or

- the inspector believes, on reasonable grounds, that the online publication is objectionable.

As introduced, new section 119C(6) requires an inspector to notify the Chief Censor that a take-down notice has been issued. If it was issued under the inspector's belief on reasonable grounds, the Chief Censor would be able to call in the publication for examination (under section 13(3) of the Act).

We note that this section may have been interpreted as restricting the Classification Office to call in publications for examination in the third case only. However, there are other instances where publications may warrant reconsideration of classification via the call-in power. One example is when a publication has been historically classified as objectionable but might now merit reconsideration.

We recommend amending proposed section 119C(6) to remove any doubt that the Classification Office could call in the publications underpinning take-down notices in all circumstances where this may be necessary.

Right of review available in all circumstances

As introduced, new sections 119C and 119J would create a situation where there is no review process for an online content host who has been issued a take-down notice under section 119C(1)(c). This is when an inspector has issued a take-down notice due to the belief, on reasonable grounds, that the online publication is objectionable. In this situation, the publication has not been classified by the Classification Office and no classification needs to be made. This means there is no opportunity to review the take-down notice because a review process cannot begin until a classification has been made.

We believe a right of review should be available to all who have received a take-down notice. We recommend amending section 13 of the principal Act, by inserting section 13(1)(ba), to allow an online content host who has received a take-down notice to have the right to submit the publication to the Classification Office and request that a classification decision be made.

Compliance with take-down notices at all stages

Proposed new section 119E describes the requirements for online content hosts to comply with a take-down notice. As part of this, it refers to the requirements for preserving a copy of the publication when necessary. An online content host who has been issued with a take-down notice can preserve a copy of the online publication if it has:

- submitted a publication for a decision
- applied for a review under Part 4
- lodged an appeal related to the application for review.

We believe it is important to make clear that if an online content host has legally preserved a publication for a legitimate reason it must still comply with the notice and take down the content. This requirement would remain until the final classification

decision is made and until the completion of any review and any related appeal. If the online content host has exhausted all review and appeal avenues, and the publication remains confirmed as objectionable, then the take-down notice has permanent effect and the publication cannot be preserved any longer.

We recommend inserting subsections (5) and (6) in proposed section 119E to provide this clarity and ensure that online content hosts comply with take-down notices in the applicable circumstances. We also recommend consequential amendments in section 119J.

Offence provisions for livestreaming or sharing

Clause 10 of the bill would create a new offence for livestreaming objectionable content or sharing objectionable livestreamed content (new section 132C, renumbered from 124AB in the bill as introduced).

In the bill as introduced, this offence would apply to the person livestreaming the objectionable content but would not include people sharing that livestream. We believe that people who share livestreams of objectionable content, or information about how to access livestreams, should also be covered by this offence. We recommend amending section 132C(1) to reflect this.

It is important to note that the intent behind sharing a livestream of objectionable content would be a material factor in deciding whether or not a person had committed an offence. We would not want a citizen's reporting of events for the purpose of fact-sharing or communicating knowledge of an event to fall under this offence provision. We considered as an example people sharing a livestream of an attack in the hope of letting people know to avoid the area and stay safe. In this situation there would be a practical benefit in sharing a livestream of objectionable content.

We note that intent can be difficult to determine and each individual case will need to be judged on the circumstances and take into account other background factors.

To provide as much clarity as possible, we recommend amending this offence provision by adding paragraph (b) to proposed section 132C(1). This would specify how the offence would relate to people who share livestreamed content or share how to access it. They would commit an offence if they shared content or information about how to access content:

- knowing or having reasonable cause to believe that the content is objectionable
- with the intent of promoting or encouraging criminal acts or acts of terrorism.

Both of these requirements must be fulfilled for an offence to have been committed.

We want it to be clear that people who may inadvertently view objectionable content online are not criminals and will not be captured under this offence provision if they do not fulfil the above requirements.

By its very nature, livestreaming is immediate and unpredictable. Content, and the nature of that content, can change unexpectedly and without warning. We do not want

to criminalise people who inadvertently view something that they would not have chosen to view if they had known the substance of that content in advance.

This is particularly important because of the effect of "auto-play" features provided by some online content hosts.[4] We are concerned that auto-play features can increase the chances of people inadvertently viewing objectionable content because no action is required for a video or livestream to begin playing. We are concerned that there is no standardised approach to auto-play features among online content hosts, particularly after many people inadvertently viewed the Christchurch mosque attacks due to auto-play.

Application of Harmful Digital Communications Act

We recommend amending clause 5 of the bill. This clause refers to sections 23 to 25 of the Harmful Digital Communications Act, regarding the liability of an online content host for content posted by a user. Section 24 is a "safe harbour" provision, allowing an online content host to take certain steps to ensure that they are not held liable when illegal content is posted on their platform without their knowledge. The bill as introduced would insert section 4A stating that the "safe harbour" provisions in the Harmful Digital Communications Act do not apply to processes or proceedings under the Films, Videos, and Publications Classification Act.

We recommend amending the bill so that these "safe harbour" provisions in sections 23 to 25 of the Harmful Digital Communications Act only do not apply in Part 7A when a take-down notice has been issued to an online content host. We do not want to remove safe harbour provisions for an online content host who is unaware that their platform is being used to distribute objectionable content. Rather, we want to remove safe harbour provisions for those who do have knowledge that their platform is being used and refuse to take that content down. A take-down notice provides knowledge and therefore there should be no safe harbour provisions if the online content host refuses to comply.

Other significant amendments to the bill

Process for online content hosts to submit publications

We recommend inserting clause 5C, to add new section 14A to the principal Act. This amendment would provide a process for online content hosts to submit online publications for a classification decision. It would set out more clearly the process for online content hosts who wish to submit a publication, and would align with the process for officials and others to submit publications (sections 14 and 15 of the principal Act).

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[4] Auto-play is a function that enables a file to play automatically without requiring any action from a user.

Future-proofing legislation

The bill as introduced states that to "livestream means to transmit or stream over the Internet images or sounds as they happen, and livestreamed and livestreaming have corresponding meanings". We recommend amending the definition of livestream in Part 7A to remove "images" and add "any other electronic medium". We believe this would help to future-proof the definition so it covers developments to the process of livestreaming in the future. We also recommend removing the reference to "live-streamed" and "livestreaming" as it is clear in existing legislation that the definition of a word applies to its different tenses.

Proposed new section 119D(1)(b) states that a take-down notice must "identify the URL of the online publication". We recommend inserting "or other unique identifier" after "URL". As with the above, this is mainly intended to future-proof this section and ensure that sufficient information is supplied to be able to identify the publication when issuing a take-down notice.

Appendix

Committee process

The Films, Videos, and Publications Classification (Urgent Interim Classification of Publications and Prevention of Online Harm) Amendment Bill was referred to the committee on 11 February 2021. We invited the Minister of Internal Affairs to provide an initial briefing on the bill. They did so on 7 April 2021.

The closing date for submissions on the bill was 1 April 2021. We received and considered 163 submissions from interested groups and individuals. We heard oral evidence from 22 submitters at hearings in Wellington and via videoconference.

We received advice on the bill from the Department of Internal Affairs. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office assisted with legal drafting.

Committee membership

Ian McKelvie (Chairperson, from 31 August 2021)

Rachel Boyack

Naisi Chen

Nicola Grigg

Barbara Kuriger (until 31 August 2021)

Deborah Russell

Tangi Utikere (until 25 August 2021)

Melissa Lee also participated in our consideration of this item of business.

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Jan Tinetti

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

Government Bill

Contents

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Films, Videos, and Publications Classification (Urgent Interim Classification of Publications and Prevention of Online Harm) Amendment Act **2020**.

2 Commencement

This Act comes into force on **30 April 2021**.

3 Principal Act

This Act amends the Films, Videos, and Publications Classification Act 1993 ~~(the **principal Act**)~~.

Part 1
Definitions, application of Harmful Digital Communications Act 2015, and interim classification assessments

4 Section 2 amended (Interpretation)

(1) In section 2, replace the definition of **Inspector** with:

Inspector means an Inspector of Publications holding office under section 103(1) or (2), and includes a constable except for the purposes of **Part 7A** (*see* section 103(3))

(2) In section 2, definition of **publication**, paragraph (d), after "statements,", insert "sounds,".

(3) In section 2, definition of **publication**, after paragraph (d), insert:

(e) a copy of images or sounds that have been livestreamed, but not the live-streaming itself of those images or sounds (**~~livestreamed and live-streaming~~** ~~have the meanings~~ has the meaning given in **section 119A**)

(4) In section 2, insert in its appropriate alphabetical order:

online content host has the meaning given in **section 119A** as qualified by **section 119B**

5 New section 4AA inserted (Application of Harmful Digital Communications Act 2015)

After section 4, insert:

4AA Application of Harmful Digital Communications Act 2015

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 ~~this Act~~ **Part 7A** relating to online publications hosted by them.

5A Section 13 amended (Submission of publications by others)

(1) After section 13(1)(b), insert:

(ba) subject to **subsections (1A) and (1B)**, an online content host who or that has been issued with a take-down notice relating to an online publication:

(2) After section 13(1), insert:

(1A) A submission by an online content host under **subsection (1)(ba)** must be submitted within 20 working days after they receive the take-down notice.

(1B) The Chief Censor may determine that an online publication submitted to the Classification Office under **subsection (1)(ba)** will not be examined or classified by the office if—

(a) the online publication has already been submitted to the Classification Office under this section; or

(b) the online publication has already been the subject of a classification decision; or

(c) the Chief Censor considers that the submitting of the online publication to the Classification Office is frivolous or vexatious.

5B Section 14 amended (How to submit publications (officials))

In section 14(1), replace "subsection (1)(a) or (b)" with "subsection (1)(a), (ab), or (b)".

5C New section 14A inserted (How to submit publications (online content hosts))

After section 14, insert:

14A How to submit publications (online content hosts)

(1) An online content host who or that wishes to submit a publication to the Classification Office under **section 13(1)(ba)** must lodge a notice of submission in the prescribed manner with the Classification Office.

(2) A notice of submission must be in the form provided for that purpose by the Chief Censor and must be accompanied by the prescribed fee (if any).

6 New sections 22A to 22D and cross-heading inserted

After section 22, insert:

Interim classification assessments

22A Interim classification assessments by Classification Office

(1) This section applies to a publication submitted to the Classification Office for classification under section 13.

(2) The Classification Office may make an interim classification assessment that the publication is likely to be objectionable.

~~(3) The Classification Office may do so only if the Chief Censor believes that there is an urgent need—~~

~~(a) to notify the public that the content of the publication is likely to be objectionable (on the basis of the interim assessment); and~~

~~(b) to limit harm to the public.~~

(3) The Classification Office may do so only 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.

~~(4) Sections 14, 15, and 17 to 22 apply to the making of an interim assessment. However, section 20 applies as modified by **subsection (5)**.~~

(4) The following sections apply to the making of an interim assessment:

(a) sections 14, **14A**, 15, 17 to 19, 21, and 22; and

(b) section 20, as modified by **subsection (5)**.

(5) The Chief Censor may determine that submissions by the persons listed in section 20(1) must be made in a manner and within a time that the Chief Censor specifies after taking into account what is reasonable in the circumstances, including the need for urgency in dealing with the matter.

(5A) The Classification Office may make an interim assessment on the basis of the information that is readily available to it if the Chief Censor considers it is reasonable in the circumstances, including the need for urgency in dealing with the matter.

(6) The making of an interim assessment is not a relevant consideration for the purpose of, and does not affect, the later examination and classification of the same publication under section 23.

22B Notice, registration, and effect of interim classification assessments

(1) The Classification Office must give written notice to the submitter that an interim classification assessment has been made.

(1A) The notice must contain the following:

(a) a description of the publication that was the subject of the interim assessment; and

(b) a summary of the reasons for the interim assessment.

(2) An interim assessment must be registered under section 39, and that section applies as if the interim assessment were a classification decision, except that the following information must be entered in the register (instead of the information in section 39(3)(a) to (c)):

(a) a statement that an interim assessment has been made of the publication and the date on which the assessment was made; and

(b) the date on which notice of the interim assessment was given under **subsection (1)** (if applicable); and

(c) the date of entry of the interim assessment in the register.

(3) An interim assessment has effect for an interim period.

(4) An **interim period** begins on the date an interim assessment is made and ends on the sooner of—

(a) 20 working days after the date of the interim assessment:

(b) the date on which a classification decision is made for the relevant publication.

(5) ~~The provisions of this Act, including sections 123, 124, and 129 (all being offence provisions), apply~~ This Act applies to a publication during an interim period as if it had been classified as being objectionable under section 23.

(6) A person, on request and on payment of the applicable fee (if any) as determined by the Classification Office, is entitled to a copy of a notice given under this section.

Compare: 1993 No 94 ss 38, 39

22C No action to lie against officials

The following people are immune from civil and criminal liability for actions done in good faith ~~and for the purpose of or in connection with~~ when carrying out or intending to carry out their official duties relating to ~~the making of an~~ interim classification assessments:

(a) the Chief Censor:

(b) the Deputy Chief Censor:

(c) a classification officer:

(d) a member of the staff of the Classification Office:

(e) a member of the staff of the Department of Internal Affairs:

(f) an Inspector.

Compare: 1993 No 94 ss 119, 137

22D No action to lie against service providers and online content hosts

(1) A service provider or an online content host is immune from civil and criminal liability if they remove, or prevent access by the public in New Zealand to, an online publication that is the subject of an interim classification assessment.

(2) In this section,—

online content host has the meaning given in **section 119A** as qualified by **section 119B**

online publication has the meaning given in **section 119A**

service provider has the meaning given in section 122A.

Compare: 1993 No 94 ss 119, 137

7 Section 38 amended (Decisions of Classification Office)

After section 38(2)(a), insert:

(ab) the reasons ~~why~~ an interim classification assessment was made under **section 22A** (if applicable), including the reasons for the Chief Censor's belief described in **section 22A(3)**; and

Part 2

~~Measures to prevent harm from objectionable online publications~~Take-down notices for objectionable online publications, offences, and regulations

Take-down notices ~~and establishment of electronic system to prevent public access to objectionable online publications~~

8 Section 103 amended (Inspectors of Publications)

In section 103(3), after "Act", insert "except for the purposes of **Part 7A**".

9 New Part 7A inserted

After section 119, insert:

Part 7A

Take-down notices ~~and establishment of electronic system to prevent public access to objectionable online publications~~ for objectionable online publications

119A Definitions for Part 7A

(1) In this Part ~~and section 149(ab) to (ai)~~, **section 149(ab)**, and any regulations made under ~~those paragraphs~~ **section 149(ab)**,—

~~**livestream** means to transmit or stream over the Internet images or sounds as they happen, and **livestreamed** and **livestreaming** have corresponding meanings~~

livestream means to transmit over the Internet or any other electronic medium images or sounds as they happen

online content host, in relation to an online publication, means the person who or that has control over the part of the electronic retrieval system, such as ~~a website~~ an Internet site or an online application or similar, on which the publication is accessible

online publication means—

(a) a publication under paragraph (d) of the definition of publication in section 2~~, but only if the publication is accessible online~~ that is accessible on an Internet site or an online application or similar; or

(b) a publication under **paragraph (e)** of the definition of publication in section 2 (a copy of content that was livestreamed) that is accessible on an Internet site or an online application or similar; or

(c) livestreamed content.

~~**service provider** has the meaning given in section 122A.~~

(2) The definition of online publication in **subsection (1)** does not limit the definition of publication in section 2 for other purposes of this Act.

119B Application of Part and regulations

This Part and any regulations made under **section 149(ab)** appli~~es~~y to—

(a) individuals in New Zealand (the **public**); and

~~(b) service providers in New Zealand; and~~

(c) online content hosts ~~both in New Zealand and overseas~~ that provide services to the public regardless of whether an online content host is resident or incorporated in New Zealand or outside New Zealand.

~~Take-down notices~~

119C Issue of take-down notices

(1) An Inspector may issue a take-down notice relating to a particular online publication to an online content host if—

(a) an interim classification assessment has been made under **section 22A** that the online publication is likely to be objectionable; or

(b) the online publication has been classified as objectionable under section 23; or

(c) the Inspector believes, on reasonable grounds, that the online publication is objectionable.

(2) Before issuing a take-down notice, an Inspector may, but is not required to, request that the online content host remove, or prevent access by the public to, the online publication.

(3) A take-down notice issued under **subsection (1)(a)** has effect ~~on and for 20 working days from the date it is issued~~ for the interim period referred to in **section 22B(4)** for the relevant interim assessment unless **subsection (4)** applies.

(4) A take-down notice issued under **subsection (1)(a)** has permanent effect if a classification decision is made that the online publication is objectionable on and from the date of that decision.

(5) A take-down notice issued under **subsection (1)(b) or (c)** has permanent effect on and from the date it is issued.

(6) In each case the Inspector must notify the Chief Censor that a take-down notice has been issued~~, and if it was issued under **subsection (1)(c)**, the Chief Censor may exercise the power under section 13(3) in relation to the online publication~~.

(7) *See* **section 119J** for review of a take-down notice.

Compare: 1993 No 94 s 108(1)

119D Contents of take-down notices

(1) A take-down notice must—

(a) contain a description of the relevant online publication; and

(b) identify the URL or other unique identifier of the online publication; and

(c) require the online content host to remove, or prevent access by the public to, the online publication as soon as is reasonably practicable after receipt of the notice and no later than the time and date specified in the notice (the **required period**); and

(d) inform the online content host of the right of review under **section 119J**; and

(e) contain other information required by regulations made under ~~section 149~~ **section 149(ab)** (if any).

(2) When deciding on the length of the required period in a particular case, an Inspector must consider what period is likely to be reasonably practicable for the online content host to comply with the notice.

(3) A take-down notice may also require an online content host to ~~retain~~ preserve a copy of the relevant online publication for the purpose of an investigation or proceedings.

(4) A take-down notice may contain other information that an Inspector considers is useful or appropriate.

119E Online content host must comply with take-down notice

(1) An online content host who or that receives a take-down notice must remove, or prevent access by the public to, all copies of the online publication that is the subject of the notice to or over which it has access or control as soon as is reasonably practicable after receipt of the notice but no later than the end of the required period.

(2) If a take-down notice requires an online content host to ~~retain~~ preserve a copy of the relevant online publication for the purposes of an investigation or proceedings, they must ~~retain~~ preserve a copy, hold it securely, and provide it to an Inspector on request.

~~(3) An online content host must destroy all copies of an online publication to or over which it has access or control as soon as is reasonably practicable after receiving a take-down notice unless—~~

~~(a) **section 119D(3)** and **subsection (2)** of this section apply; or~~

~~(b) they intend to lodge or have lodged a submission under section 13 for the relevant online publication; or~~

~~(c) they intend to lodge or have lodged an application for a review under Part 4 against the classification decision for the relevant online publication or a related appeal.~~

(3) An online content host may also preserve a copy of the online publication if they intend to lodge or have lodged—

(a) a submission under **section 13(1)(ba)** for a classification decision for the relevant online publication:

(b) an application for a review under Part 4 against the classification decision for the relevant online publication:

(c) a notice of appeal related to that application for review.

(4) If **subsection ~~(3)(b) or (c)~~ (3)** ~~apply~~ applies, the online content host may ~~retain~~ preserve a copy of the online publication for as long as it is needed to complete the relevant process but must hold it securely.

(5) A take-down notice continues to have effect, even if the publication that is the subject of the notice is received by the Classification Office under section 13 for a classification decision,—

(a) until the classification decision is made; and

(b) until, if the publication is classified as objectionable, the completion of any review and related appeal.

(6) If an online publication is confirmed as objectionable after the processes listed in **subsection (5)** have been completed or are no longer available, the relevant take-down notice then has permanent effect.

119F No action to lie against officials

The following people are immune from civil and criminal liability for actions done in good faith ~~and for the purpose of or in connection with~~ when carrying out or intending to carry out their official duties relating to ~~the issuing of a~~ take-down notices:

(a) the Chief Censor:

(b) the Deputy Chief Censor:

(c) a classification officer:

(d) a member of the staff of the Classification Office:

(e) a member of the staff of the Department of Internal Affairs:

(f) an Inspector.

Compare: 1993 No 94 ss 119, 137

119G No action to lie against online content host

An online content host is immune from criminal or civil liability—

(a) if they remove or prevent access by the public to ~~or destroy copies of~~ an online publication that is the subject of a take-down notice:

(b) if they ~~retain~~ preserve a copy of an online publication for any of the reasons listed in **section 119E(3)** and hold it securely.

119H Enforcement of take-down notices

(1) An Inspector may take enforcement proceedings in the District Court if an online content host fails or refuses to comply with a take-down notice within the required period.

(2) In proceedings under this section, the court—

(a) must not examine or make a~~ny~~ determination about the issuing or merits of a take-down notice:

(b) may determine whether the online content host had a reasonable justification for failing or refusing to comply with the notice within the required period or for any further delay after that period:

(c) may permit the Inspector, by order of the court, to obtain discovery and administer interrogatories:

(d) may order a remedy or costs under **section 119I**.

119I Remedies and costs

(1) In proceedings under **section 119H**, the court may—

(a) order that the online content host comply with the take-down notice by a date specified in the order:

(b) order the online content host to pay a pecuniary penalty to the Crown:

(c) award costs as the court thinks fit:

(d) order interest to be paid in accordance with the court's rules.

(2) A pecuniary penalty is payable in an amount that the court determines is appropriate, taking into account all relevant matters, and, in particular,—

(a) the nature and extent of the failure or refusal to comply with the notice; and

(b) the circumstances in which the failure or refusal to comply occurred (including whether this was intentional, inadvertent, or caused by negligence).

(3) The standard of proof for the matters in **subsection (2)** is the balance of probabilities.

(4) The amount of a pecuniary penalty must not exceed $200,000.

(5) Only 1 pecuniary penalty is payable in relation to the same take-down notice.

119J Review of take-down notices

(1) A take-down notice may be reviewed under this Act only as part of a review under Part 4 of the classification decision relating to the relevant online publication.

~~(2) No review is available under this Act for a take-down notice issued under **section 119C(1)(a) or (c)** unless and until a classification decision is made for the relevant online publication.~~

(2) *See* **section 13(1)(ba)**, which allows an online content host to submit an online publication to the Classification Office for a classification decision.

(3) ~~A take-down notice continues to have effect until~~ *See also* **section 119E(5)** for the effect of a take-down notice pending a classification decision being made and the completion of a review and any related appeal.

119K Reporting

(1) The Secretary must—

(a) make publicly available a list of all take-down notices issued that have been complied with; and

(b) publish the number of take-down notices issued and the number that were complied with each year in the annual report of the Department of Internal Affairs relating to that year.

(2) The Secretary must, in the list referred to in **subsection (1)(a)**, in each case, include the reasons for issuing the take-down notice.

Electronic system to prevent public access to objectionable online publications

119L Electronic system to prevent public access to objectionable online publications

(1) The Department of Internal Affairs may operate an electronic system to prevent access by the public to objectionable online publications.

(2) The system must be established under **section 119M** and approved for operation under **section 119N**.

(3) The system may prevent access by the public only to an online publication—

(a) for which an interim classification assessment has been made under **section 22A** that it is likely to be objectionable:

(b) that has been classified as objectionable under section 23:

(c) that an Inspector believes on reasonable grounds to be objectionable.

(4) The system may—

(a) prevent access by the public to a particular online publication in 1 or more of the 3 categories in **subsection (3)**:

(b) prevent access by the public to the website, a part of the website, the online application, or similar on which an online publication in 1 or more of those 3 categories is accessible.

(5) The system must be administered by the Department of Internal Affairs.

119M Establishment of electronic system

(1) When establishing the electronic system to be approved for operation under **section 119N**, the Secretary must consult the following on the design and the final form of the system:

(a) service providers; and

(b) technical experts and online content hosts to the extent the Secretary thinks necessary; and

(c) the public.

(2) When deciding on the design and form of the system, the Secretary must consider—

(a) the need to balance—

(i) any likely impact on public access to non-objectionable online publications; and

(ii) the protection of the public from harm from objectionable online publications; and

(b) any likely impact on performance for all other network traffic; and

(c) departmental and technical capacity to operate the system; and

(d) likely compliance costs.

~~(3) However, each of the factors in **subsection (2)** needs be considered only to the extent that it is relevant in the Secretary's view.~~

~~(4) The system—~~

~~(a) must have the capacity to both identify and prevent access to a particular online publication with reasonable reliability, based on criteria set out in regulations made under section 149; and~~

~~(b) is subject to governance arrangements required by regulations made under section 149; and~~

~~(c) is subject to requirements for administration and technical oversight prescribed by regulations made under section 149, including relating to data security and privacy; and~~

~~(d) is subject to reporting requirements required by regulations made under section 149.~~

~~(5) Obligations of service providers relating to the operation of the system may be prescribed by regulations made under section 149.~~

~~Compare: 1957 No 87 ss 86DB, 86DC~~

~~119N Approval of electronic system for operation~~

~~Before giving approval for the electronic system to begin operating, the Secretary must be satisfied that—~~

~~(a) all requirements in this Act relating to the system have been met; and~~

~~(b) sufficient operational detail has been provided in regulations made under section 149; and~~

~~(c) review and appeal processes for the approval decision under this section have been set up by regulations made under section 149; and~~

~~(d) review and appeal processes for decisions and actions by the Department of Internal Affairs relating to the operation of the system have been set up by regulations made under section 149 (*see* **section 119O**).~~

~~119O Review of decisions and actions relating to operation of electronic system~~

~~(1) Decisions and actions by the Department of Internal Affairs relating to the operation of the electronic system are subject to review and appeal processes set up by regulations made under section 149.~~

~~(2) If a review application or an appeal is lodged relating to a decision or an action referred to in this section, the decision continues to have effect and the action may continue until the completion of the review and any related appeal.~~

Offences

9A Section 131 amended (Offence to possess objectionable publication)

In section 131(2B), replace "paragraph (d)" with "paragraph (d) or **(e)**".

10 New section ~~124AB~~ 132C and cross-heading inserted ~~(Offence to livestream objectionable content)~~

After section ~~124A~~ 132B, insert:

Offence to livestream objectionable content or share objectionable livestreamed content

~~124AB~~132C Offence to livestream objectionable content or share objectionable livestreamed content

(1) A person commits an offence if ~~they livestream content knowing or having reasonable cause to believe that it is objectionable.—~~

(a) they livestream content knowing or having reasonable cause to believe that it is objectionable; or

(b) they share content, or information about how to access content, as it is being livestreamed—

(i) knowing or having reasonable cause to believe that the content is objectionable; and

(ii) with the intent of promoting or encouraging criminal acts or acts of terrorism.

(2) A person who commits an offence under **subsection (1)** is liable on conviction,—

(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.

(3) A person does not commit an offence under this section by reason only that they are ~~the service provider or online content host of the platform or similar on which the particular content was livestreamed.—~~

(a) the service provider who or that provided access to the Internet or other electronic medium on which the content was livestreamed to the person who livestreamed the content; or

(b) the online content host who or that has control over the part of the electronic retrieval system, such as an Internet site or an online application or similar, on which the content was livestreamed.

(4) In this section,—

livestream ~~and **livestreamed** have the meanings~~ has the meaning given in **section 119A**

objectionable has the meaning given in section 3 (as if the livestreamed content ~~that was livestreamed~~ were a publication)

online content host has the meaning given in **section 119A** as qualified by **section 119B**

service provider has the meaning given in section 122A.

Compare: 1993 No 94 s 124

~~11 Section 131 amended (Offence to posses objectionable publication)~~

~~In section 131(2B), replace "paragraph (d)" with "paragraphs (d) and **(e)**".~~

Regulations

12 Section 149 amended (Regulations)

After section 149(a), insert:

(ab) prescribing information to be included in a take-down notice under **section 119D**:

~~(ac) prescribing criteria for identifying online publications that are likely to be objectionable and for preventing access to those publications by the electronic system referred to in **section 119L**:~~

~~(ad) prescribing governance arrangements for the electronic system referred to in **section 119L**:~~

~~(ae) prescribing requirements for the administration and technical oversight of the electronic system referred to in **section 119L**, including relating to data security and privacy:~~

~~(af) prescribing reporting requirements for the electronic system referred to in **section 119L**:~~

~~(ag) prescribing obligations of service providers relating to the operation of the electronic system referred to in **section 119L**:~~

~~(ah) setting up review and appeal processes for the decision approving the operation of the electronic system under **section 119N**:~~

~~(ai) setting up review and appeal processes for decisions and actions referred to in **section 119O**:~~

Legislative history

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