1 April 2021

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

Submission to Governance and Administration Committee

Introduction

InternetNZ supports a better Internet for people in New Zealand

1. InternetNZ is a not-for-profit that is the home and guardian for the .nz domain. Our work includes the technical side of running .nz, funding Internet research and community projects, hosting events like NetHui to bring together the Internet community, and doing policy work to support an Internet for all and an Internet for good.

We welcome the chance to submit and do wish to appear

2. We welcome the opportunity to submit on the Films, Videos, and Publications Classification (Urgent Interim Classification of Publications and Prevention of Online Harm) Amendment Bill (the Bill). This is part of our work that contributes to an Internet for all and an Internet for good.

3. We wish to appear in person to speak to this submission. Please contact the policy team on james@internetnz.net.nz or call 0211565596.

Summary of submission

We support parts of the Bill which help to build a better Internet

4. The Internet is a communication tool which most people use in positive ways, and which has been a lifeline for many during the COVID-19 pandemic. But a small number of people deliberately abuse that same global connectivity to cause harm. The Bill aims to reduce the harms this behaviour causes, through legal rules that would apply to everyone following New Zealand law.

5. Our submission points to some areas where we do not support the Bill, and some places where we think it could be improved to work better. This is not because we disagree with the goals of the Bill, but because we support them.

6. We shared the horror and anger of people across New Zealand when we saw the Internet weaponised to harm more people and attack social cohesion in the Christchurch mosques terrorist attacks. We want to see effective policy responses that can stop similar abuses, reduce risks people and communities face from harmful behaviour, and support trust in our team of five million.

7. We are open to the parts of this Bill that are useful steps towards that goal, including provisions for new offences, interim decisions, and a take-down framework we think can be modified to work effectively online.

8. Our main concern is that proposals for Internet filtering will do more harm than good. We think government-mandated filtering is inconsistent with a free, open and secure Internet both globally and in New Zealand. At best, filtering will be an ineffective distraction from solving the social issues that drive harmful behaviour online. At worst, it will undermine social trust and make those issues even harder to effectively address in New Zealand.

We support fair and workable rules for liability and take-downs

9. We think current liability rules under the Harmful Digital Communications Act 2015 (HDCA) strike a fair and workable balance between the interests of hosts, users, and enforcing the law online. Instead of excluding all processes under the principal Act from these current rules, we recommend the proposed exclusion apply only to new Part 7A, to clarify ambiguous drafting, make take-downs enforceable, and avoid unfair liability for responsible actors. In practice, we expect major content hosts to remove this material without requiring a formal notice, so it may have mainly symbolic value.

10. A well-designed framework for take-down notices online can be a very effective tool. We support the idea of a take-down framework focused on formally classified materials, and propose changes to make compliance obligations clearer, and motivate cooperation by content hosts.

11. We recommend changes to make the take-down process clear and transparent, by requiring a reference to a formal classification decision, clearer ways to identify the online content targeted as objectionable material, and more frequent and detailed reporting for transparency.

We join others in opposing the Bill's approach on filtering

12. We strongly oppose the Bill's provisions on Internet filtering. We think mandated content filtering is inconsistent with a free, open and secure Internet. The Bill takes the extreme step of legislating to impose a filtered Internet for New Zealand with no set legal safeguards and no requirement for independent oversight, making the inherent problems of filtering even worse. Our engagement with a range of communities confirms these are shared concerns. We recommend that clauses 119L-O be removed from the Bill.

13. We think the opt-in model of Digital Child Exploitation Filter System (DCEFS) has worked well for its subject matter, but its oversight needs attention.

14. Instead of focusing on mandated technical filters, we think future policy work in this area should start from a focus on requiring and enabling independent, diverse, and community-based oversight, consistent with the Royal Commission's emphasis on social cohesion.

15. A broader review of media law is a better vehicle for addressing broader challenges of harmful behaviours from people and businesses online.

Recommendations

In this section we provide a summary of our recommended changes to the Bill.

R1 We recommend that proposed section 4A be limited to processes and proceedings under Part 7A which applies to "online publications".

R2 We recommend amending proposed section 119D to:

(a) Require clear identification of the relevant online publication;
(b) Require clear identification of specific material to be removed; and
(c) Identify material not covered where this is necessary to make the scope of the notice clear.

R3 We recommend adding a new subsection 119C(8) that requires actions under 119C to:

(a) Be consistent with rights and freedoms under the New Zealand Bill of Rights Act 1990; and
(b) Consider ways to preserve access for legitimate purposes.

R4 We recommend adding a new subparagraph 119C(1)(f) reading "identify a relevant entry on the register" as an element of take-down notices.

R5 Alternatively, we recommend that subparagraph 119C(1)(c) be removed from the Bill to ensure take-downs are based on formal decisions.

R6 We recommend requirements for quarterly public reporting and review of take-down requests by a diverse independent panel.

R7 We recommend the Committee ask the government for a briefing on the types of behavioural interventions being considered to reduce the harms from violent extremist activity online.

R8 We recommend that the Committee ask the government for a briefing on the independent oversight of the current DCEFS system and steps that could be taken to ensure it meets community expectations.

R9 We recommend removing clauses 119L-O from the Bill.

R10 We recommend that future policy work focus on building trust through community-based oversight, and on reducing unfair legal liability online for users, content hosts, and Internet service providers.

R11 We recommend that policy work to address harmful behaviours online be advanced through a broad review of media law

R12 We recommend that the committee request a briefing on any options being considered to address liability for ISPs.

Rules for online harm must work on the Internet

Proposed liability changes risk vagueness and overreach

16. We support rules that hold people responsible through clear rules that work for the Internet, including fair and practical responsibilities for content hosts.

17. Proposed section 4A would exclude all processes and proceedings under the Films, Videos and Publications Classification Act 1993 (FVPCA) from the notice process under sections 23 to 25 of the HDCA. We think the proposed drafting is vague and risks over-broad liability which will harm ordinary Internet users.

18. The vagueness arises because section 4A refers to "online publications", but falls outside Part 7A of the Bill where that term is defined under 119A(1).

19. We see a risk of over-broad liability from this change. The FVPCA sets out a broad definition for a "publication" designed for a pre-Internet world of books, magazines, and VHS tapes. The definition of "objectionable" under section 3 is open-ended, contextual, does not require a formal ruling from the Classification Office to apply, and goes far beyond violent extremist material. These broad and contextual definitions set the scope for strict liability offences which can be committed with no knowledge or intent.[1]

20. We think applying normal FVPCA processes online with no notice process creates a risk of over-broad liability for content hosts. This would ultimately harm ordinary Internet users through over-removal of content. This concern is recognised in section 122 of the FVPCA, which excludes unknowing or unintentional acts of distribution from strict liability offences, but does not cover possession offences which could apply to email and cloud services.

Current liability rules provide a fair and workable balance

21. The current HDCA notice process provides an optional way for content hosts to avoid direct liability for content that users have posted. This requires:

    a) Passing on a notice (which may be anonymised) to the author of the content within 48 hours of receiving the notice;[2] and

    b) If the author does not respond, removing access to the content "as soon as practicable" but no later than 48 hours after receiving a notice.[3]

22. In general, we think the HDCA notice process sets a workable balance between allowing content removal where required by law, upholding the free expression interests of people using online services, and setting out

[1] FVPCA s 131.
[2] HDCA s 24(2)(a).
[3] HDCA s 24(2)(b).

obligations that are practical for content hosts to comply with, consistent with the Manila Principles on intermediary liability.[4]

Only take-downs need a carve out from current notice rules

23. We think it is desirable to have a consistent framework for content hosts responding to content notices under New Zealand law, and pending further policy work, the model in the HDCA is the one that applies most broadly.

24. We agree that it makes sense to exclude the take-down processes under proposed Part 7A from the HDCA notice process, to allow enforcement of civil penalties against an uncooperative or irresponsible content host.

25. To resolve the vagueness in drafting, allow responsible content hosts to avoid unfair liability for user conduct, and ensure take-down notices are enforceable in a way that is fair and practical, we think proposed section 4 should be limited to processes and proceedings under Part 7A. Part 7A includes the proposed take-down provisions, defines the key term "online publication", and sets out the proposed filtering rules we think should be removed.

R1 We recommend that proposed section 4A be limited to processes and proceedings under Part 7A which applies to "online publications".

Take-down rules should be clear and transparent

Take-down requests can work with the Internet's architecture

26. We welcome the proposal for a take-down framework based on formal decisions that a publication is objectionable. This is a process that can be made transparent and support reasonable compliance obligations. Below we offer some suggested changes to improve the framework in this direction.

27. A well-designed take-down framework provides a useful legal tool and a clear signal that online services are expected to respect our community norms on access to harmful material. We would expect ready compliance from major online services, while the option of enforcement might be useful if faced with fringe online services who refuse to action a notice.

28. Take-down processes have a range of advantages compared with proposals to impose filtering on Internet access. In particular, take-down processes:

    a) Would apply more broadly than filters, covering international content hosts and services such as social media apps, not just websites;

    b) Would operate through clearly targeted and notified legal obligations rather than directly interfering with Internet connectivity;

[4] EFF, Manila Principles on intermediary liability (March 2015), <manilaprinciples.org>.

c) Clearly signal an expectation that online services will respond to objectionable material in line with New Zealand law;

d) Can be designed to impose reasonable compliance obligations on content hosts while upholding human rights and user interests;

e) Can be applied to the people and services most directly connected with making material available online rather than third parties like Internet service providers (ISPs);

f) Have legal precedents in the HDCA 2015;

g) Can be designed to operate in a way that supports transparency and accountability through oversight and public reporting.

But proposed take-down rules need clearer scope

29. We think the requirements for a take-down notice listed at clause 119D(1) could be amended to be clearer and more workable in practice.

30. To enable compliance and enforcement, it is vital that a take-down request can clearly identify the material covered in a way that does not remove too little or too much, but is just right.

31. In practice, the goal of just-right enforcement may require removing access to only part of an item or to multiple items online. For example, the Netflix documentary "the Social Dilemma" included a brief clip from the video of the Christchurch mosques terrorist attacks. It might be desirable to remove that clip while leaving the documentary online. On the other hand, a web page or social media post may look like a single publication, but will often be made up of dozens of distinct digital elements that each contain parts of the overall text, sound, images, and interactivity.

32. The goal of just-right removal may also be difficult to deliver because of the way existing definitions under the principal Act, designed for a world of books, magazines, and VHS tapes, combine with information flows on the Internet.[5] As defined under Part 7A, an "online publication" would refer to "a thing" which stores information and "is accessible online". This open-ended definition means it is important that notices clearly specify what they cover.

33. We suggest amending the requirements for a take-down notice to more precisely specify what is covered, by:

[5] As defined under section 2 of the current Act, a "publication" includes a broad range of physical media that can convey information. These move from more to less specific, with paragraph (a) covering "any film, book, sound recording, picture, newspaper, photograph, …"; (b) "any print or writing"; (c) paper with symbols; and (d) "a thing" that stores information "including, but not limited to, a disc or an electronic computer file".

a) Amending subparagraph (a) to read "contain a description of the relevant online publication which allows it to be clearly identified by a content host"

b) Amending subparagraph (b) to read "clearly identify the specific online material the notice relates to, for example by:

(i) specifying one or more URLs for material

(ii) specifying relevant timestamps for material with a duration"

c) Adding a new subparagraph (c) reading "identify material which is not covered where necessary to make the scope of the notice clear".

34. The main risk of any take-down framework is over-removal of content that people have legitimate reasons to access, for example when doing academic research and other independent work to understand and address harmful extremist and other behaviours. This concern is recognised by exemptions under section 44 of the Act, and by HDCA section 6. We recommend a new subsection 119C(8) explicitly requiring that actions under 119C must (a) be consistent with rights and freedoms under the New Zealand Bill of Rights Act 1990, and (b) consider ways to preserve access for legitimate purposes.

R2 We recommend amending proposed section 119D to:

(a) Require clear identification of the relevant online publication;
(b) Require clear identification of specific material to be removed; and
(c) Identify material not covered where this is necessary to make the scope of the notice clear.

R3 We recommend adding a new subsection 119C(8) that requires actions under 119C to:

(a) Be consistent with rights and freedoms under the New Zealand Bill of Rights Act 1990; and
(b) Consider ways to preserve access for legitimate purposes.

Take-downs should refer to a formal classification decision

35. We think it is a strength of the framework that it focuses on take-downs for publications that have a formal classification from the Office of Films and Literature Classification (OFLC), which has expertise, is legally independent from the executive government, and operates under established legal standards in a clear and transparent way. For example, section 39 of the FVPCA requires a public electronic register of classification decisions.[6]

36. Under proposed section 119C, take-down requests would be made by inspectors of publications who work for the executive government, through the Department of Internal Affairs (DIA). Proposed section 119C(1)(c) gives

[6] FVPCA, s 39.

inspectors a discretion to make a take-down request based on a subjective belief that a publication is objectionable, on reasonable grounds.

37. We think it is inappropriate to give such a broad operational discretion to inspectors, particularly with no requirement for detailed reporting or independent oversight of these decisions visible to the public. This is inconsistent with other aspects of the Bill, such as interim decisions in emergencies, which still require written reasons to be released by the OFLC.

38. To improve the certainty and clarity of the take-down rules, we recommend adding a new subparagraph 119C(1)(f) requiring that a take-down notice must refer to a relevant classification decision or interim classification decision recorded on the register of decisions under section 39.

39. We think the legitimate purpose of subparagraph 119(1)(c) is responding to situations where a publication that has been previously classified is slightly modified and is shared in a similar context for a similar purpose. Our proposed subparagraph 119C(1)(f) would limit the discretion under subparagraph 119(1)(c) to take-down notices in this sort of situation.

40. Alternatively, we recommend that subparagraph 119C(1)(c) be removed.

R4 We recommend adding a new subparagraph 119C(1)(f) reading "identify a relevant entry on the register" as an element of take-down notices.

R5 Alternatively, we recommend that subparagraph 119C(1)(c) be removed from the Bill to ensure take-downs are based on formal decisions.

Use the public register of decisions to support compliance online

41. We think that if take-downs focus on publications recorded on the existing register of decisions, there are opportunities for more efficient compliance.

42. The existing register records decisions about publications that are objectionable. We think this could be built upon by creating a database of online materials covered by these decisions, which could be shared with responsible online content hosts to enable quicker flagging of material for consideration, and easier compliance with take-down requests.

Require more frequent, granular, and open reporting

43. The Bill proposes reporting in the annual report of the Department of Internal Affairs. We think the take-down framework should have provision for timely reporting and independent oversight of take-down requests, which impose significant liabilities on content hosts and impacts on people in New Zealand.

R6 We recommend requirements for quarterly public reporting and review of take-down requests by a diverse independent panel.

Internet filters fail in practice and in principle

Mandatory filtering will not serve the goals of this Bill

44. The goal of this Bill is to allow for urgent prevention and mitigation of harms caused by objectionable publications online.[7] Provisions at clauses 119L-O of the Bill set out a legal framework for an electronic filtering system.

45. We think these provisions do not serve the goals of the Bill, and will undermine work that does. Below we set out technical and legal problems with mandated Internet filtering. We also see a real risk that filtering could undermine the social trust needed to combat COVID-19 and misinformation.

46. The most destructive behaviours online aim not only to harm people, but to undermine the trust people place in our communities and institutions. We think a law that can mandate Internet filtering makes these problems worse, by ignoring the social drivers of bad behaviour online, and by enabling a narrative that people are being blocked from seeing important information.

47. The Internet has become more central to New Zealanders' lives over time and particularly through the past year of living through COVID-19. This is a time where people need reassurance that the government will use technology in ways that are fair, transparent, and accountable. Even if filtering could work in practice, the process leading to this Bill has not built enough trust to justify it. But in reality, filtering cannot work and will not work on the model proposed (we outline why below).

48. We recommend removing clauses 119L-O from the Bill.

49. Instead of quick moves towards mandatory filtering, we think any future law reform in this area should be based on a foundation of trust built through broad consultation. This could deliver the type of oversight that people in diverse communities want to see, while fairly balancing practical and legal responsibilities for users, content hosts, and Internet service providers. We think broader problems of harmful behaviours online by people and businesses are better addressed through a broad review of media law.

There is no effective technology for mandated Internet filtering

50. Filtering at the level of Internet service providers is a blunt tool which is a mile wide and an inch deep. The Bill does not specify which technologies could or should be applied to Internet filtering. But regardless of the approach ultimately taken, rules to mandate a filtered Internet mean buying into bad choices for Internet users.

51. One bad choice is a purely symbolic filter which anyone can get around without much effort. This seems to be the model contemplated by the Bill, which acknowledges that filtering will not apply to messaging apps and other

[7] Explanatory note to the Bill, p 1.

online services, and will be easily circumvented by people using simple virtual private network (VPN) tools which are free and require no special skills.[8] This would undermine respect for the law and increase security risks.

52. Another bad choice is an intrusive filter which requires more inspection and surveillance of New Zealanders' Internet use, and while it could effectively block more access to content, it would break the end-to-end security model and undermine guarantees of privacy and trust in services like online banking.

53. Even in countries around the world with much more restrictive and authoritarian governments, Internet filtering is widely evaded. The Russian government attempted to ban the Telegram messaging service without success,[9] and free tools like Psiphon allow people to access the open Internet in other authoritarian places around the world.

Filters raise human rights concerns the Bill does not address

54. Mandatory Internet filtering as proposed is a disproportionate intervention into New Zealanders' use of the Internet that will have human rights ramifications which have not been considered or guarded against.

55. The European Court of Human Rights has repeatedly found that Internet filtering will overstep human rights interests, if it is applied without adequate legal checks.[10] Measures to support human rights include independent oversight and effective appeal processes, including informing people who try to access blocked locations on how to appeal the block.

56. The current DCEFS is meant to be subject to these independent oversight processes, but we note that the Independent Reference Group has not met or published minutes since November 2019.[11] This is a concerning failure of oversight and contributes to concerns about the lack of oversight required for the system proposed in the Bill.

57. This reference group is primarily made up of technical experts, and does not reflect the communities that would be most affected if the content covered expanded to include violent extremist material, explicit sexual material, or other types of objectionable content.

58. Asking so much of New Zealanders, to trust the government to handle their Internet traffic in their best interests, requires accountability and transparency measures that are not apparent in the Bill as drafted. Nor can we rely on regulations not yet written to do this work.

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[8] Explanatory note to the Bill, p 3.
[9] Kim Lyons, The Verge, "Russia lifts its ban on the Telegram messenger app" (18 June 2020) <theverge.com>
[10] Article 19, "Russia: European Court judgment is victory for freedom of expression" (23 June 2020) <article19.org>
[11] DIA, "Independent Reference Group" <dia.govt.nz>

59. The type of changes proposed here should be made through primary legislation with detailed rules and safeguards rather than left to unwritten regulations.

The current filter is opt-in and supported by behaviour change

60. The most pressing issues we have with this Bill do not arise for the current decade-old DCEFS system, which is opt-in for ISPs, targets a type of content that has clear definitions and is readily identifiable, and supports behavioural interventions through a landing page with referrals to social services.

61. We think comparable behaviour change interventions are vital to reduce harms from violent extremism online, a goal which will not be achieved by attempting to just block access to material people seek. While the Bill isn't the place to propose any such intervention, we recommend the Committee ask the Government for a briefing on any planned behavioural interventions.

R7 We recommend the Committee ask the government for a briefing on the types of behavioural interventions being considered to reduce the harms from violent extremist activity online.

62. According to the current Code of Practice, the DCEFS filter is subject to oversight by an Independent Reference Group (IRG) that meets at least three times a year.[12] However, the last minutes of the IRG published online relate to a meeting in November 2019, more than a year ago.[13]

63. Responses to the current process show that a broad range of people want to see a commitment to transparency and accountability for the operation of systems like the DCEFS. We recommend that the Committee seek a briefing from the government on its plans to reaffirm a commitment to independent oversight of the current DCEFS system.

R8 We recommend that the Committee ask the government for a briefing on the independent oversight of the current DCEFS system and steps that could be taken to ensure it meets community expectations.

A broad range of people have expressed concerns about filters

64. Cabinet papers acknowledged a range of concerns from community groups, which we have heard repeated and expanded on in our own engagements.[14]

65. People from a range of diverse communities are concerned that the Bill proposes a model for filtering driven by the executive government rather than an independent body such as the Classification Office. We have heard concerns about a lack of requirements for independent oversight by legal

[12] DIA, "Digital Child Exploitation Filtering System Code of Practice - July 2017" <dia.govt.nz>
[13] DIA <dia.govt.nz>
[14] Cabinet paper, "Films, Videos, and Publications (Urgent Interim Classification of Publications and Prevention of Online Harm) Amendment Bill: Approval for Introduction" (22 June 2020) <dia.govt.nz> at pp 3-4.

experts or affected communities, particularly on the application of open-ended and contested terms like “objectionable” or “violent extremist material”. We have signed on to a joint submission reflecting these concerns.

66. We anticipate that ISPs may support the filtering aspects of the Bill, as this will solve a problem for them where they risk legal liability for unjustified removal of access to material, where they choose to filter Internet access on an ad hoc basis. We think the Bill’s filtering proposals go far broader than is needed to address this concern.

67. Given broad concerns about filters, we think any more tailored moves to address the specific issue of liability for Internet service providers need scrutiny and community input. We recommend the committee request a briefing on options being considered to more specifically address ISP liability for impacts of filtering Internet access.

R9 We recommend removing clauses 119L-O from the Bill.

R10 We recommend that future policy work focus on building trust through community-based oversight, and on reducing unfair legal liability online for users, content hosts, and Internet service providers.

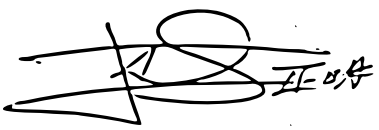
R11 We recommend that policy work to address harmful behaviours online be advanced through a broad review of media law.

R12 We recommend that the committee request a briefing on any options being considered to address liability for ISPs.

Conclusion

68. We support the goals of this Bill, and have suggested ways to improve it to work better for a free, open, and secure Internet. We think mandatory Internet filtering would only hinder progress on those goals.

69. We thank the Committee for its consideration.



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