NEW ZEALAND LAW SOCIETY

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

1 April 2021

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

1 Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to make a submission on the Films, Videos, and Publications Classification (Urgent Interim Classification of Publications and Prevention of Online Harm) Amendment Bill (**Bill**).

1.2 The primary purpose of the Bill is to amend the Films, Videos, and Publications Classification Act 1993 (**FVPC Act**) to allow for urgent prevention and mitigation of harms caused by objectionable publications.

1.3 The Bill amends six key areas of the FPVC Act and is aimed at giving effect to the Government's Christchurch Call commitment (a commitment by several governments and technology companies to eliminate terrorist and violent extremist content online).[1]

1.4 The Bill amends the FPVC Act in the following broad ways:

a) It makes the livestreaming of objectionable content a criminal offence.

b) It enables the Chief Censor to make speedy, time-limited, classification assessments where viral distribution of material is injurious to the public good (**interim classifications**).

c) It authorises Inspectors to issue take-down notices to online content hosts and imposes civil pecuniary penalties for non-compliance.

d) It facilitates the establishment of a government-backed web filter if one is designed in the future.

1.5 The Law Society's submission:

a) Recommends the definition of "livestream" is clarified for the purposes of the proposed new criminal offence;

b) Proposes the wording of new section 22B(5) is clarified;

c) Recommends the review provisions relating to take-down notices are clarified; and

d) Recommends that the provisions authorising development of a filter system are deleted from the Bill and reconsidered.

1.6 The Law Society seeks to be heard.

2 Criminal offence of livestreaming objectionable content

2.1 Clause 10 of the Bill inserts a new section 124AB into the principal Act, establishing an offence of livestreaming objectionable content. The new section mirrors the existing offences in section 124 of making, distributing etc, an objectionable publication knowing, or having reasonable cause to believe that it (ie, the publication) is objectionable.

[1] See here: https://www.christchurchcall.com/

2.2 The proposed new offence only applies to the individual or group livestreaming the content. It does not apply to the online content hosts that provide the online infrastructure or platform for the livestream. The Bill's Explanatory Note states that the offence is only intended to apply to transmitters, and not to those receiving or watching the objectionable content, or those who expand the reach of the content by linking, sharing, retweeting, or otherwise amplifying it (**amplifier**).[2]

2.3 That being the case, the Law Society considers that there is a degree of ambiguity in the proposed definition of "livestream", inserted into the FVPC Act as part of new section 119A (clause 9 of the Bill). "Livestream" is defined as "to transmit or stream over the Internet images or sounds as they happen … ." The reference to "stream" is ambiguous because in common usage the subject of the verb "to stream" could be either the transmitter of images and/or sound or the watcher/receiver. The Law Society considers that the definition of "livestream" would remain complete and workable without the reference to "stream", and therefore recommends the deletion of "or stream" from the definition. The verb "transmits" adequately captures the idea that it is the person making the content available who commits an offence.

2.4 For completeness, we note that the conduct of amplifiers is addressed under the existing offence provisions. The Bill proposes to amend the definition of "publication" to include:

> (e) a copy of images or sounds that have been livestreamed, but not the livestreaming itself of those images or sounds (livestreamed and livestreaming have the meanings given in s 119A).

2.5 Thus any offence defined by reference to "publication" will include copies of a livestream (ie. a recording). An amplifier who shares a livestream could, for example, be charged with an offence under section 123 of the Act for distributing an objectionable publication.

Recommendation

2.6 Delete "or stream" from the definition of "livestream" in new section 119A(1), inserted by clause 9 of the Bill.

3 Interim Classification Assessments

3.1 The Bill provides for the Chief Censor to make interim classification assessments where there is an urgent need to notify the public that the content is likely to be objectionable and to limit harm to the public (proposed new section 22A). The assessment remains valid for 20 working days or until a final classification is made (interim period). Proposed section 22B(5) provides that the FVPC Act applies to publications during an interim period, including by listing some (but not all) offence provisions. The Law Society considers that the drafting of section 22B(5) could be clearer. At present, section 22B(5) could be interpreted as meaning generally that the FVPC Act applies to an interim classification, but the only offences that are applicable are those listed in the section. If that is the intent, then the underlying premise of

[2] Films, Videos, and Publications Classification (Urgent Interim Classification of Publications and Prevention of Online Harm) Amendment Bill, Explanatory Note at p 1.

the provision is wrong. Conversely, if all offences apply, then why have some been singled out in particular.

3.2 The Law Society notes that proposed section 22B(5) reflects an apparent assumption that there needs to have been a classification by the Chief Censor before the offence provisions relating to objectionable publications become operative. But the scheme of the Act is that publications are objectionable if they meet the definition in the Act: in a criminal prosecution that question may be referred by the Court to the Chief Censor if it has not been answered by dint of a classification already made (see section 29(1) and (3)). For that reason proposed section 22B(5) is perhaps not necessary, but the Law Society considers it is appropriate to be stated on a "for the avoidance of doubt" basis.

Recommendation

3.3 Clarify the wording of proposed new section 22B(5).

4 Take-down Notices to Online Content Hosts

4.1 Proposed new Part 7A provides for Inspectors to issue take-down notices requiring an online content host to remove or prevent access by the public to an online publication. A take-down notice may be issued in three circumstances:

a) If an interim classification assessment has been made that the online publication is likely to be objectionable (proposed new section 119C(1)(a));

b) If the online publication has been classified as objectionable under section 23 of the FVPC Act (proposed new section 119C(1)(b)); or

c) If the Inspector believes on reasonable grounds that the online publication is objectionable (proposed new section 119C(1)(c)).

4.2 A take-down notice issued under section 119C(1)(a) has effect for the interim period and only becomes permanent if a decision is subsequently made classifying the online publication as objectionable. A notice issued under new section 119C(1)(b) or (c) has permanent effect from the date it is issued.

4.3 Proposed new section 119J provides for review of take-down notices under Part 4 of the FVPC Act. Section 119J(2) provides, however, that no review is available for notices issued under section 119C(1)(a) or (c) unless and until a classification decision is made. While it may be expected that a classification decision will be made in all cases where an inspector has issued a take-down notice, there does not appear to be any requirement that this is the case. A person could trigger an assessment under the FVPC Act, but the Law Society considers that if review is not available unless and until a classification decision is made, the Bill should provide for classification decisions to be made in relation to online publications that have been subject to a take-down notice under section 119C(1)(c) within 20 working days of the notice being issued. Alternatively, take-down notices under section 119C(1)(c) should be treated in the same was as under section 119A(1)(a), and have effect only for 20 working days unless a classification decision is subsequently made that the publication is objectionable.

Recommendation

4.4 Either:

a) Insert a new subsection into proposed new section 119C to provide that where a take-down notice is issued under section 119C(1)(c), the Chief Censor must make a decision whether to classify the publication as objectionable or not objectionable within 20 working days of the date the take-down notice was issued; or

b) Amend proposed new section 119C(3) to read "A take-down notice issued under subsections 1(a) or 1(c) has effect …" and amend proposed new section 119C(5) to delete the reference to "or (c)".

5 Design of government-backed web filter

5.1 The Bill facilitates or authorises the design and establishment of a government-backed web filter if desired in the future. This would be operated by the Department of Internal Affairs. The system authorised may prevent access by the public to an online publication (proposed new section 119L(3)):

a) for which an interim classification assessment has been made under section 22A of the FVPC Act that it is likely to be objectionable;

b) that has been classified as objectionable under section 23 of the FVPC Act;

c) that an Inspector believes on reasonable grounds that the online publication is to be objectionable (proposed new section 119C(1)(c)).

5.2 It is doubtful whether legislative authority is needed for the Department of Internal Affairs to develop a government-backed web filtering system. The system could be developed and a fulsome and proper legislative process then undertaken to enable it to be rolled out. For example, Department of Internal Affairs has a child pornography web filter which does not appear to have a specific legislative establishment.

5.3 Proposed new sections 119M, 119N and 119O provide a broad set of parameters for the development and establishment of a web filter system. The provisions authorise a series of regulations to be devised (by amending section 149 of the principal Act) which will address operational matters including:

a) governance arrangements;

b) requirements for administrative and technical oversight;

c) reporting requirements (although it is not clear who should be reporting to whom and about what);

d) obligations of service providers; and

e) review and appeal processes.

5.4 It is not clear from the Bill's provisions what type of web filter is intended, but regardless the provisions are not prescriptive. Any web filter system will engage rights to freedom of expression as it will "operate at a higher level than the system of take-down notices by blocking entire web pages that host objectionable publications, as opposed to specified

content, and will operate at the Internet Service Provider level, in order to block public access to content that is being rapidly shared from host sites".[3]

5.5 The Law Society understands there are generally two types of web filters: DNS Filters and DPI filters.

5.6 A DNS (Domain Name System) filter acts by being able to see the website being accessed, eg, Wikipedia. It cannot see the particular page, eg, the Wikipedia entry on the New Zealand Parliament.

5.7 A DPI (Deep Packet Inspection) filter analyses the content being accessed. However, the problem with such filters is that users are required to install a special https certificate to enable the filter to see what website each individual user is actually accessing.

5.8 Given the specificity in section 119M(4) ("must have the capacity to both identify and prevent access to a particular online publication with reasonable reliability") it appears that a DPI filter is envisaged. This would engage a host of privacy, data protection and freedom of expression issues, if not constitutional issues, that the Bill makes no attempt to grapple with. The Law Society notes that the Ministry of Justice's advice on consistency with the New Zealand Bill of Rights Act 1990 addresses consistency with freedom of expression in a cursory way only and does not identify these broader concerns.

5.9 The Law Society considers that if a filter system ought to be established, it should be created in primary legislation which has the full scrutiny of a proper legislative process – investigation and detailed specification of a proposed policy, consultation and feedback, drafting of a bill, and public submissions via the select committee process. The Bill relegates the whole issue of rule development to an executive process that is inappropriate having regard to the important rights and issues at stake.

5.10 If the Bill applies to the whole rubric of "objectionable material" it is very broad and some of this will involve judgment calls and line-drawing including about written material and ideas (the latter if future prohibitions on "hate speech" are reflected also in the FPVC Act as classification criteria). It is doubtful whether any content filtering mechanism or process could exactly align with the current definition of "objectionable". The proposal for filtering that which an Inspector "reasonably considers" to be objectionable unjustifiably extends the intended scope of the exercise by permitting filtering of content that may not in fact be objectionable. If the Act is to properly specify a regime, it ought to specify one that filters out only manifestly objectionable material.

5.11 Given these concerns, the Law Society's primary recommendation is that proposed new sections 119L to 119O should be deleted from the Bill. The Law Society recognises the proposal as one worth exploring, but the proposed provisions are not an appropriate way to proceed. Before rolling out such a web filter, a fulsome and proper legislative process must be carried out.

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[3] Ministry of Justice, Legal Advice – "Consistency with the New Zealand Bill of Rights Act 1990: Films, Videos, and Publications Classification (Urgent Interim Classification of Publications and Prevention of Online Harm) Amendment Bill", 7 May 2020, at [17].

5.12 When actual proposals are considered, thought will need to be given to the fact that the category of "objectionable" is broad and extends well beyond livestreamed violence. A high proportion of objectionable content is sexual in nature and hosted on web sites located overseas.

5.13 Should the Law Society's primary recommendation not be adopted some alternative proposals are set out below.

Recommendation

5.14 Either:

a) Delete sections 119L to 119O from the Bill.

b) Alternatively, as a bare minimum, the following changes could be considered:

i) While the intention appears to be made clear by section 119L(4), section 119L(3) is missing an "or" at the end of each paragraph. These should be added for the sake of clarity.

ii) Insert into section 119L the following subjection: "The system may only be used for the purposes listed in subsection (3)".

iii) Insert into section 119M(1): "the Privacy Commissioner and Human Rights Commission".

iv) Insert into section 119M(2): "privacy rights and right of freedom of expression of New Zealanders".

v) Insert into section 119M(4) the following subsection: "must, to the extent possible, not prevent access to non-objectionable online publications".

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