LEGAL ADVICE

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7 May 2020

Hon David Parker, Attorney-General

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

Purpose

1. We have considered whether the Films, Videos, and Publications Classification (Urgent Interim Classification of Publications and Prevention of Online Harm) Amendment Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').

2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 22539/ 1.23). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.

3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (right to freedom of expression) and s 27(3) (right to civil litigation).

The Bill

4. The Bill amends the Films, Videos and Publications Classification Act 1993 ("the principal Act") to allow for urgent prevention and mitigation of harms caused by objectionable publications.

5. The Bill introduces regulatory tools to manage harms caused by content that is live streamed, and/or hosted by online content hosts. While the Bill's primary focus is online publications, one aspect of the Bill (urgent interim classification assessments) will apply to all publications covered by the principal Act.

6. Specifically, the Bill:

   a. creates an offence of livestreaming objectionable content;

   b. provides for the Chief Censor to make swift, time-limited, interim classification assessments of any publication in situations where the sudden appearance, and (in the case of online publications) viral distribution, of objectionable content is injurious to the public good;

   c. authorises an Inspector of Publications to issue a take-down notice to online content hosts for objectionable online content;

   d. provides for a civil pecuniary penalty to be imposed on online content hosts that do not comply with a take-down notice for objectionable online content;

e. removes the application of the 'safe harbour' protection for an online content host as provided for by s 24 of the Harmful Digital Communications Act 2015 in respect of processes or proceedings under the principal Act relating to online publications hosted by them; and

f. facilitates the establishment of parameters for setting up future mechanisms for blocking objectionable online content.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of Expression

7. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression including the freedom to seek, receive, and impart information and opinions of any kind in any form.

8. Various provisions introduced by the Bill *prima facie* engage the right to freedom of expression by:

   a. empowering an Inspector of Publications to issue a take-down notice to an online content host; and

   b. facilitating the establishment and operation of an electronic system that intends to block objectionable publications.

Take-down notices

9. Clause 9 of the Bill inserts new ss 119C-119O into the principal Act. Section 119C allows for an Inspector of Publications to issue a take-down notice to an online content host if an interim classification assessment[1] has been made that an online publication is likely to be objectionable; or the online publication has been classified as objectionable; or the Inspector of Publications believes, on reasonable grounds, that the online publication is objectionable.

10. A take-down notice mandates the online content host to remove, or prevent access by the public to, the online publication within a specified time period (s 119E(1)). If the online content host fails to comply with a take-down notice, enforcement proceedings may be brought against them in the District Court, under s 119H. This *prima facie* limits the right to freedom of expression of both content hosts and content consumers.

11. A provision found to limit a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of s 5 of that Act. The s 5 inquiry asks whether the objective of the provision is sufficiently important to justify some limitation on the freedom of expression, and if so, whether the limit on the right is rationally connected and proportionate to achieving that objective and limit the right no more than reasonably necessary to achieve that objective.[2]

12. The intent of New Zealand's publication classification regime, to protect the public from viewing objectionable publications, is clearly an important objective. Objectionable

[1] Clause 6 of the Bill establishes a process for the Classification Office, with the approval of the Chief Censor, to make an interim classification assessment that a publication is likely to be objectionable. This assessment has a maximum effect of 20 working days before a final classification assessment must be made.
[2] *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [123].

material is defined within the principal Act as content that describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good.[3]

13. Enabling an Inspector of Publications to issue a take-down notice to an online content host under s 119C is rationally connected to protecting the public from objectionable publications. The principal Act's mechanisms for suppression of objectionable content provide only for individual penalties to be imposed for distributing the material. These penalties are intended to deter the spread of objectionable publications, with the assumption that law enforcement will be able to quickly suppress the sharing of that objectionable publication once the offence comes to light. Given advancements in digital sharing technology, which enable rapid (and often, to an extent, anonymous) sharing of content, these measures are outdated and are no longer fit for purpose in managing the spread of an objectionable publication online. Measures to target online content hosts will have a much higher effectiveness in suppressing objectionable content.

14. We consider that the issuing of take-down notices is targeted and proportional to the objective of suppressing public access to objectionable publications because:

    a. the take-down notice only applies to specified content, with notices providing specific details and URLs of publications ruled to be objectionable, as well as the specified period for compliance;
    b. where a take-down notice is issued following an interim classification assessment, this notice must be confirmed or retracted within 20 working days following a final classification assessment; and,
    c. section 119J provides that for any take-down notice that is permanent or becomes permanent, rights of review and appeal are available under Parts 4 and 5 of the principal Act.

    These safeguards work to ensure that only material that the Classification Office consider injurious to the public good will be suppressed.

15. For these reasons, we consider that any restrictions on the right to freedom of expression posed by the take-down notice process within the Bill are justified under s 5 of the Bill of Rights Act.

Establishing electronic system to block objectionable online publications

16. Clause 9 of the Bill inserts into the principal Act s 119L, which provides for the Department of Internal Affairs (DIA) to design, establish and operate an electronic system designed to prevent the public from accessing objectionable online publications. The system will allow DIA to prevent public access to a website, a part of a website, an online application or a similar content depository.

17. The electronic system will only be effective once an online publication is identified as objectionable and may only prevent access by the public where an interim classification assessment has been made that a publication is objectionable, or where a publication has been classified as objectionable, or where an Inspector of Publications believes on reasonable grounds that an online publication is objectionable. This system may 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

[3] Films, Videos and Publications Classification Act 1993, section 3.

Internet Service Provider level, in order to block public access to content that is being rapidly shared from host sites. Clearly, operating this system engages the public right to freedom of expression.

18. Once again, this limit on the right to freedom of expression must be justified in terms of s 5 of the Bill of Rights Act.

19. As previously stated, the objective of the Bill, to protect the public from viewing objectionable publications, is an important one. Enabling DIA to establish and operate an electronic system to block objectionable publications is rationally connected to this objective. Where objectionable content is rapidly moving, the system of take-down notices may prove insufficient to suppress a publication, and a higher-level blocking system may be the only effective measure. There is precedent in New Zealand for using internet blocking technology to protect the public from viewing websites that contain child sexual abuse material, with the Digital Child Exploitation Filtering System in use since 2010.

20. We note that there is a high need for transparency in the implementation of such an electronic system as there is a risk that such a electronic system may impact non-objectionable publications.

21. The Bill puts a range of safeguards in place to ensure that. In setting up the system, the Secretary of Internal Affairs ('the Secretary') is required to consider the proportionality of the impact the system may have on freedom of expression and ensure that the system is sufficiently targeted in its blocking of online publications.

22. When deciding on the form and design of the system, s 119M requires that the Secretary must consider, on balance:

    a. any likely impact on public access to non-objectionable online publications; and,
    b. the protection of the public from harm from objectionable online publications.

23. Further, when establishing the electronic system to be approved for operation, s 119M requires the Secretary to consult with persons or organisations that the Secretary considers represent the interests of the public in relation to (i) public access to non-objectionable online publications; and (ii) protection of the public from harm from objectionable online publications. This is to ensure that the system is designed so that any impact on freedom of expression would not be extended past justified limits.

24. Section 119M also requires that before the Secretary may approve the electronic system, the Secretary must be confident that the system has the technical capacity to both identify and prevent access to a particular online publication with reasonable reliability.

25. Finally, s 119N(c) requires that review and appeal processes for the approval decision be set up by regulation before the Secretary may give approval for electronic system to begin operating, while s 119O provides that review and appeal provisions of the principal Act will apply to any action taken to prevent access made by the electronic system. This is a vital safeguard to ensure that actions taken by the system may be challenged by online content hosts and by the public and be scrutinised by an independent body.

26. We consider that these safeguards work to ensure the proportionality of the electronic system in limiting the freedom of expression by blocking objectionable publications. On this basis we consider that the limits that this electronic system will have on the freedom of expression are justified under s 5 of the Bill of Rights Act.

Section 27(3) - Right to bring civil litigation

27. Section 27(3) of the Bill of Rights Act affirms that everyone has the right to bring civil proceedings against the Crown and to have those proceedings heard according to law, in the same way as civil proceedings between individuals.

28. Proposed new ss 22C and 119F (as inserted by cls 6 and 10 of the Bill) provide specified persons[4] with immunity from civil and criminal liability for actions done in good faith and for the purpose of or in connection with their official duties relating to the issuing of take-down notices and the making of an interim classification assessment. These new sections may be seen to raise the issue of consistency with s 27(3) of the Bill of Rights Act.

29. Section 27(3) has been interpreted by the courts as protecting procedural rights.[5] The provision affirms the right of a person who sues, or is being sued by, the Crown to have that litigation conducted in the same way that litigation between two individuals would be conducted.

30. We consider the new provisions affect substantive law. They do not fall within the ambit of s 27(3) which protects procedural rights of persons litigating against the Crown. For this reason, we consider that the Bill does not engage the right to bring civil litigation.

Conclusion

31. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

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[4] Those persons are the Chief Censor, the Deputy Chief Censor, a classification officer, a member of staff of the Classification Office, a member of the staff of the Department of Internal Affairs, and an Inspector.

[5] *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at 55: "[s]ection 27(3) is a clearly procedural provision … aimed at procedures which govern the assertion or denial of rights in the course of Court or equivalent proceedings; and is not aimed at the creation of other rights in themselves … It cannot restrict the power of the legislature to determine what substantive rights the Crown is to have. Section 27(3) merely directs that the Crown shall have no procedural advantage in any proceeding to enforce rights if such rights exist."