



Submission

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

About the New Zealand Council for Civil Liberties

1. The New Zealand Council for Civil Liberties is a watchdog for rights and freedoms in New Zealand. The Council is a voluntary not-for-profit organization whose objects include promoting human rights and maintaining civil liberties.
2. We wish to appear before the Committee to make an oral submission.

Summary

3. We object to this Bill and recommend that it is withdrawn.
4. We do not believe this Bill will be effective at reducing harm.
5. We strongly object to the way that this Bill is deliberately vague and leaves the contentious decisions to be made by regulation.
6. We believe that the Bill sets up a dangerous internet censorship filter that will be ripe for abuse by future governments.

Introduction

7. This is an internet censorship bill. It provides the government wide-sweeping powers to quickly block people from accessing a wide range of internet content.
8. Freedom of expression is protected by the New Zealand Bill of Rights, Article 19 of the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights. By definition, censorship limits freedom of expression.
9. The internet is where a significant proportion of our freedom of expression happens - the place where we go to seek, receive and impart information. We increasingly rely on our ability to find and share information over the internet.

10. While we accept that these rights can be “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”, freedom of expression is a particularly important right as it is one of the cornerstones of that society.¹
11. Therefore we expect that restrictions on freedom of expression must pass a number of hurdles including:
 - a. That there is a real problem that the Bill addresses.
 - b. That the provisions of the Bill will effectively address this problem.
 - c. That the methods used will be possible to implement.
 - d. That the processes will be transparent and subject to suitable oversight.
 - e. That any harms done to civil liberties and society will be less than the harm that the Bill addresses.
12. Unfortunately we find that this Bill fails to clear these hurdles, with some sections of this Bill falling at more than one of them. In particular:
 - a. The Bill fails to define the problem that it addresses.
 - b. We do not believe the provisions of the Bill will be effective at resolving what we understand the problems to be.
 - c. The implementation has been left undefined to be left for later regulation.
 - d. Neither oversight nor transparency are defined.
 - e. That the creation of a government mandated internet censorship filter is a threat to our civil liberties which far exceeds the benefits mistakenly claimed by this Bill’s proponents.

Government overreach

13. While we expect that many of this Bill’s provisions will be ineffective, the dangerous precedent that they set will be able to be expanded on by future governments.
14. We note that worldwide experience shows that censorship regimes are frequently extended and used against already marginalised groups in their respective societies. Censorship cements power imbalances, perpetuates injustices, and by driving ‘unacceptable’ views underground risks making it harder to tackle the very issues that need to be confronted.
15. At a time when large parts of the world are turning to fascism and autocracy, we should be even more careful before giving our government more control of what we see, read, write, and speak.

¹ NZ Bill of Rights Act 1990, section 5

16. It is not enough to look at the current government and say that they wouldn't misuse these powers. Our own history contains examples, such as the 1951 Waterfront Dispute, when our government did abuse its power to censor in order to suppress dissent. We have no guarantee that future New Zealand governments will not expand upon and misuse these powers.

Current situation and effectiveness

17. Private companies and governments, including New Zealand, are already reacting to the problem of undesirable content on the internet.

18. The large companies through which most people access the internet, such as Facebook, Google, YouTube, Twitter and others, are already moving to impose new content standards.

19. The Christchurch Call and the Global Internet Forum to Counter Terrorism (GIFCT) are initiatives where government and private organisations have combined to block access to violent extremist content, while PhotoDNA helps find and suppress images of child sexual abuse.

20. While these measures have their own problems for civil liberties, particularly the tendency to over-censor and enforce foreign ideas of acceptability, these measures mean that most people will not encounter offensive material online by chance.

21. At the same time, the size and scope of the internet plus the availability of encrypted communications and virtual private networks (VPNs) mean that motivated people will always be able to find the worst types of material. For example, there was a concerted effort to block the sharing of the video from the 2019 Christchurch massacre and while that was eventually successful on mainstream sites, it is still easy to find a copy. Even a China-style deeply invasive and highly restrictive internet filter, which no one in New Zealand recommends, would be leaky enough that extensive additional surveillance and policing would be required to achieve the claimed outcome.

22. So with 'regular people' being largely protected by the content hosts, and 'motivated people' able to circumvent all but the most draconian systems, exactly what benefit will this law give, who will it protect, and what harms will it reduce?

Analysis

23. We address the following three major provisions of this Bill separately. The Bill:

- a. creates a legal framework for the establishment of a general internet censorship filter, with details to follow by regulation;
- b. makes the livestreaming of objectionable content a criminal offence; and

- c. establishes a takedown notice regime in which an order can be given to an online host to remove objectionable material, or block access to the material from New Zealanders.

General internet censorship filter

24. The New Zealand Council for Civil Liberties is opposed to the internet censorship filtering system put forward in this Bill.
25. We believe it will have an unduly negative effect on freedom of expression while failing to offer much, or even any, benefit to New Zealand.
26. The proposed internet censorship system is a very significant change to how New Zealanders use the internet. It implements a system where government officials can unilaterally block access to any content, while only making vague promises about oversight and governance. This seems like a unwarranted over-reaction in a free and democratic society like New Zealand.
27. When creating a regime that can have such harmful effects on our right to seek, receive and impart information, it is unacceptable to be presented with an enabling 'framework' Bill, where very important details of how this framework will be implemented in practice are left to regulations. Regulations by their nature are less scrutinised than primary legislation, so this Bill's structure further transfers power from our elected representatives (the Legislature) to the government and un-elected officials (the Executive).
28. We oppose this Bill because it establishes a precedent that government internet filtering is a good idea, in a way that we can only ever see being expanded and misused in the future.
29. We oppose it because it will play into the hands of conspiracy theorists who already believe that the government is controlling their access to information.
30. We oppose it because it fails to define robust processes for administering such a censorship system.
31. We oppose it because it fails to define meaningful independent oversight.
32. We oppose it because censorship blocks access to, or sharing of, content based on the values of the censors, not those of the public. The Bill fails to provide any mechanism for ascertaining the values of our heterogeneous and diverse population, assuming that the values of the government of the day are synonymous with those of the public.
33. We oppose the Bill because it fails to explain the technical scope of the system. For example, while the Explanatory Notes refer only to a web filter, the text of the Bill is not limited only to the web, and so could apply to email, real-time video, and many other technical protocols used for receiving and imparting information over the internet.

34. Finally we oppose it because the government has not even stated an intention to implement the internet filtering system, the Bill's Explanatory Note uses the phrasing "if one is desired in the future", and until such a point the Bill is unnecessary.

Technical

35. The Bill fails to engage with the significant technical issues involved with internet censorship. These include but are not limited to:

- The multiplicity of protocols and technologies used to share information.
- The vast number of content hosts around the world.
- The ease with which material is copied and renamed, thus requiring a new block.
- Overseas providers who will ignore NZ government orders.
- The increasing use of encrypted communications which cannot be examined.
- The ease of using a cheap VPN (virtual private network) to circumvent filters.
- The difficulty of targeting particular pieces of content on some applications.
- The impact on the stability and security of the internet in New Zealand.

Livestreaming of objectionable content

36. This Bill will criminalise innocent bystanders, journalists and legal observers who are livestreaming an event when a second, objectionable event occurs. We are strongly opposed to the idea that people might be punished for keeping society informed.

37. This provision will not pose any deterrent to someone committing an atrocity in order to livestream it. The penalties for committing the atrocity will far outweigh the additional penalty for livestreaming it.

38. This provision can be sidestepped by adding a brief delay between the event and the transmission of the video over the internet, as the definition "transmit or stream over the Internet images or sounds as they happen" will no longer apply. We will be in the odd situation where it may be against the law to livestream something but not to then reshare that exact same video a short time later.

39. The job of evaluating whether something is objectionable under New Zealand law is complex and takes into account context, motivation, format, likely audience, and a range of other considerations. It is unreasonable to demand that bystanders evaluate the potential objectionable-ness of events as they happen..

40. Livestreaming is an important development in the growth of political protest, citizen journalism, and holding the forces of the government to account. Recent examples of important video taken by bystanders include the killing of George Floyd in the USA, and the

killing of protesters in Myanmar. It is important that we don't pass laws that may have a chilling effect on responsible and valuable use of this technology.

41. The definition of 'livestream' in the Bill would capture live television and radio broadcasts too, since many television and radio channels are now shared with the public live by the broadcaster over the internet. The Bill's infringement of the right to freedom of expression therefore applies not just to individuals, but to media organisations. It is not just an internet censorship regime, but a significant extension of the existing general censorship regime.
42. Sharing objectionable content is already illegal under New Zealand law, including by livestreaming.

Take-down regime

43. As this is another form of internet censorship, many of our earlier comments about the proposed internet filter apply.
44. Once again, the responsible companies will take down content which doesn't match their standards, while other companies will refuse to. This Bill will have no effect on those companies overseas who choose to ignore the NZ government.
45. Similarly, these powers are likely ineffective against content creators who believe their content may be deemed objectionable, as they can easily place their content overseas. The content creators against whom the mechanisms in this Bill could be effective are domestic journalists and legitimate critics of government.
46. Material uploaded may be of significant value, e.g. videos that show crimes being committed. Due to the nature of data storage on the modern internet the hosted content may be the only copy. The possibility of a government being able to order the permanent deletion of material that shows the government in a bad light is obviously unacceptable in a democratic society.
47. The Bill tries to apply the same rules and procedures to both large and small hosting companies although their capacity to react, and the impact of that reaction, will be very different.
48. The Bill sets up a regime where complex decisions about what is objectionable are made by individual inspectors with no meaningful oversight. New section 119H(2)(a) specifically excludes the Courts from examining, or making any determination about, the issuing or merits of a take-down notice, thereby precluding any independent assessment of the notice's compliance with the NZ Bill of Rights Act right to freedom of expression.
49. The Bill's review process for take-down notices after they have taken effect appears to be slow and complex, relying on a pre-internet procedure that seems to have been developed for assessing physical goods.

Recommendations

50. The New Zealand Council for Civil Liberties believes that this Bill is badly conceived and dangerous to a free and democratic society. While we understand the motivations that led to this Bill, we think that it has failed to properly address the issues raised and its proposed solutions will be ineffective as well as creating harmful side effects.
51. This is a bad Bill which malicious actors can circumvent and mock, yet it provides the framework for an unreasonable and unjustified threat to our civil liberties. It will lessen trust in government and will play into the hands of conspiracy theorists and those who wish to spread disinformation.
52. Furthermore, this Bill shoehorns swift and pre-emptive measures against internet content into a censorship law that was written for a time when the spread of information was slower and more centralised.
53. The Council recommends that this Bill be rejected in its entirety.
54. The Council makes the following recommendations to ameliorate some aspects of this Bill. These recommendations do not indicate support of those particular sections.

General internet censorship filter recommendations

55. Drop this entirely.
56. If not, it is impossible for us to make concrete suggestions when so much of the contentious detail is left to be implemented in regulation. Rather the Bill should be sent back for re-drafting to lay out sufficient details of the scheme that the government wishes to implement. As part of the new Public Service Act's requirement for Chief Executives to 'foster a culture of open government' (section 12), we strongly urge the government to follow the example of the Policing Act 2008, which was developed in public using a wiki.² This would enable the government to draw on expertise from around the world, as well as enabling a discussion across New Zealand society about the underlying values at stake.
57. This reworking may need to be part of a review of current law with the intention to implement processes and oversight provisions suited to the internet age.

Livestreaming of objectionable content recommendations

58. Drop this entirely.
59. If not, make it only apply to livestreaming by the perpetrators and their accomplices.

² *Policing Act Wiki Launched*, NZ Police media release 25 September 2007.
<https://www.police.govt.nz/news/release/3370>

60. Or, add guidance that takes into account the motivation of the livestreamer and the public benefit of the livestream in question.
61. And/or exempt bystanders and victims from this provision.
62. And/or exempt journalists and legal observers from this provision when they are doing their job.

Takedown regime recommendations

63. Drop this entirely.
64. If not, provide different requirements for small and large content hosts that take into account their differing capabilities.
65. Provide oversight of the decisions being made by Inspectors, by amending section 119H(2)(a) to specifically require Courts to consider the compliance of each take-down notice with the provisions of the NZ Bill of Rights Act 1990.
66. Require all taken down material to be retained by the content host in case the decision is reversed, and as the material is required for oversight and potential legal proceedings.
67. Provide a way for decisions to be quickly reviewed.
