Privacy Commissioner
Te Mana Mātāpono Matatapu

Privacy Commissioner's submission to the Governance and Administration Committee on the Films, Videos, and Publications Classification (Urgent Interim Classification of Publications and Prevention of Online Harm) Amendment Bill (268-1)

Executive Summary

1. I am pleased to provide a submission on the Films, Videos, and Publications Classification (Urgent Interim Classification of Publications and Prevention of Online Harm) Amendment Bill (the Bill).

2. The Privacy Act 2020 is New Zealand's main privacy law. One of the Privacy Commissioner's functions under the Privacy Act is to examine proposed legislation that may affect the privacy of individuals.

3. My concerns with the Bill relate to proposed new ss 119L to 119O of the Films, Videos, and Publications Classification Act 1993 (the Act). These new sections would allow a mechanism for blocking objectionable online content to be established. The Bill provides for the details of such a mechanism to be prescribed in regulations. In the absence of such details, I am unable to assess the privacy implications of the proposed mechanism.

4. I recommend that new ss 119L to 119O be removed from the Bill, and that the Government take more time to consider options for addressing objectionable online content, including the design of any proposed blocking mechanism. If these provisions are not removed from the Bill, I recommend the inclusion in the Bill of a requirement to consult the Privacy Commissioner about the design of the content blocking mechanism.

The Bill

5. The Bill would amend the Act to:

    a) make livestreaming of objectionable content a criminal offence

    b) enable the Chief Censor to issue interim classification assessments where there is an urgent need to limit harm from objectionable content

    c) provide for take-down notices for objectionable online content

    d) provide that the 'safe harbour' provisions of the Harmful Digital Communications Act 2015 will not exempt online content hosts from liability under the Films, Videos, and Publications Classification Act

    e) allow for the establishment of a system for blocking objectionable online content.

6. I have no privacy concerns to raise in relation to items (a) to (d) above. My concerns are limited to the Bill's provision for the establishment of a content-blocking mechanism.

Provision for a mechanism to block objectionable online content

7. Clause 9 of the Bill inserts new Part 7A of the Act. New ss 119L to 119O, which are included in this Part, would allow for the Department of Internal Affairs (DIA) to establish

and operate a system to prevent access by the public to objectionable online publications. The Bill provides for the creation of a content-blocking system should the Government wish to do so in future, but it appears that no decision to establish such a system has yet been made.

8. Under the provisions of the Bill, the content-blocking system could prevent access to a particular objectionable online publication, or to a website, a part of a website or an online application on which the publication is accessible. The system would be subject to requirements to be specified in regulations made under section 149 of the Act. Regulations would prescribe:

    - criteria for identifying online publications that are likely to be objectionable and for preventing access to those publications
    - governance arrangements for the content-blocking system
    - requirements for administration and technical oversight of the system, including in relation to data security and privacy
    - reporting requirements for the system
    - obligations of service providers relating to the operation of the system.

9. The Secretary for Internal Affairs would have the power to establish the content-blocking system, following consultation with service providers, technical experts and online content hosts, and the public. In establishing the system, the Secretary would need to consider certain factors, including the need to balance protection against harm from objectionable online publications and any likely impact on public access to non-objectionable online publications. Before giving approval for the system to begin operating, the Secretary would need to be satisfied that sufficient operational detail had been provided in regulations, and that review and appeal processes had been set up.

10. Review and appeal processes would be established under regulations. Both the decision to approve the system and the ongoing operation of the system would be subject to review and appeal.

Blocking of online content and privacy

11. The Bill has been prompted by concerns, in the wake of the terrorist attacks in Christchurch in March 2019, that existing controls on the online dissemination of objectionable material are inadequate. Following the attacks, New Zealand telecommunications providers blocked access to domains hosting the attacker's footage of the killings. The Bill would allow a system to be established whereby such content-blocking could be authorised by law.

12. At present, the only Government-mandated system for blocking objectionable online content is the Digital Child Exploitation Filtering System (DCEFS) administered by DIA. The DCEFS has a very narrow purpose of blocking access to known websites that contain images of child sexual abuse. It operates through the voluntary cooperation of Internet Service Providers. It is governed under a code of practice and with the oversight of an independent reference group.

13. I recognise the importance of protecting the public from harms resulting from the most objectionable online content, including child sexual abuse imagery and images of terrorist violence. However, any legislative mechanism to control access to such content must be proportionate, targeted, effective and subject to oversight and appeal.

14. My consideration of the Bill's provision for the creation of a mechanism to block objectionable online content is limited to the potential impacts on privacy. Because the Bill includes no details about how a content-blocking mechanism would work, I cannot be certain what those impacts would be. Potential areas of concern include the following:

    - At least some methods of blocking content involve risks to privacy and security of information about users of the internet. For example, both URL-based blocking and blocking based on deep packet inspection can either be rendered ineffective by encryption, or alternatively require internet traffic to be intercepted and decrypted, with significant implications for the privacy of end users.[1]
    - There is a risk of scope creep once a content-blocking system is in place. I recognise that the system proposed in the Bill would apply only to objectionable content as defined in the Act, which is a high threshold. However, I would be concerned if the system were to be subsequently extended to age-restricted material, with requirements for age verification to access certain sites. To be effective, age verification requires the collection of personal information, creating a risk of a data trail of individuals' sexual or other preferences.
    - I would want to be assured that any data about individual internet users collected as part of the system is subject to tight controls, including appropriate de-identification, and limits on retention and use of personal information.
    - As with the DCEFS, there should be provision for people to lodge requests for appeal or review of the operation of the system anonymously, so that individuals can challenge decisions to block certain content without needing to disclose the fact or nature of their interest in that content.

15. It may be that the design of the content-blocking system would adequately address these concerns, but the legislation should be as clear as possible about how privacy (and other) impacts will be managed. Key parameters for the system should be agreed before legislation providing for the establishment of the system is passed. Key parameters, which should set by primary legislation, include:

    - whether the system will be voluntary or mandatory
    - the method to be used to prevent access to objectionable content
    - criteria for identifying the online objectionable publications the system will prevent access to
    - governance, review and appeal processes for the system.

16. If clear proposals for the design of the system are provided, I can assess whether the public benefits outweigh any risks to privacy, and whether additional privacy mitigations are needed. In assessing the balance between public benefit and privacy risk I would

[1] Internet Society, *Perspectives on Internet Content Blocking: An Overview* (2017), pp. 14-17.

also consider the likely effectiveness of content-blocking in preventing harm from objectionable online publications. I note that all major forms of content blocking can be evaded, often relatively easily, by both end users and publishers of content.[2]

Conclusion

17. I believe the Bill should proceed without the provisions relating to the establishment of a system for blocking access to objectionable online content. Options for dealing with objectionable online content should be considered separately from the other proposals in the Bill, and should be subject to broad consultation over a longer timeframe. If a content-blocking system is considered to be the best option for addressing objectionable online content, the design of the system should also be considered carefully and its key parameters should be determined before legislation is introduced. Clarity about the design of the system will allow privacy and other impacts to be assessed and mitigated.

18. If the committee recommends that the provisions allowing for the creation of a content-blocking system remain in the Bill, I consider that the Bill should expressly provide for consultation with the Privacy Commissioner about the system. Consultation requirements should apply:

    - both to regulations prescribing features of the system and to the decision of the Secretary for Internal Affairs to establish the system
    - not only to technical details relating to privacy and data security but also to the broader design of the system (because broader design features could affect impacts on privacy).

19. I **recommend** that:

    - clause 9 of the Bill be amended to delete new ss 119L to 119O, or
    - if new ss 119L to 119O are not deleted from the Bill, new s 119M(1) (inserted by cl 9) and new s 149(ac) to 149(ai) (inserted by cl 12) be amended to require consultation with the Privacy Commissioner before approval of a content-blocking system and before making regulations for such a system.

20. I trust my comments are of use to the Committee. I do not seek to be heard on my submission but am happy to appear before the Committee if that would be of assistance.

John Edwards

Privacy Commissioner

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[2] Ibid., esp. pp. 21-22.