



TCF Submission to:

Department of Internal Affairs on

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

17 February 2020

A. Introduction

1. Thank you for the opportunity to comment on the exposure draft of the Films, Videos, and Publications (Urgent Interim Classification of Publications and Prevention of Online Harm) Amendment Bill (the Bill).
2. This submission is provided by the New Zealand Telecommunications Forum (TCF). The TCF is the telecommunications sector’s industry body which plays a vital role in bringing together the telecommunications industry and key stakeholders to resolve regulatory, technical and policy issues for the benefit of the sector and consumers. TCF member companies represent 95 percent of New Zealand telecommunications customers. The forum facilitates the development of consensus-based, self-regulatory codes, that set standards and specifications for the way members follow procedures internally, and for the way industry interconnects on industry-wide issues. The TCF enables the industry to work together and to discuss issues and topics collaboratively, to reach acceptable solutions that can be developed and implemented successfully.
3. The TCF supports the aims of the Bill and has several comments. For reasons of expediency, we have kept our comments short, and are prepared to elaborate on any of the points raised if you would like to contact us.

B. General Comments

4. The TCF would like to make some general points which underpin its position in relation to the Bill:
 - i. Government must take the lead in identifying content which should be removed, blocked or taken down. It is not appropriate for the industry to identify inappropriate content, or to decide whether the content is objectionable.
 - ii. Notwithstanding that it is not the industry's role to identify objectionable content, staff of ISPs will be required to check websites and content, and therefore must be indemnified against breaches of the Act when viewing objectionable material when it is reasonably expected that they must do so in performance of their role, refer to s.22C.
 - iii. The Bill provides for the Government to issue Regulations relating to developing a national filter. The Bill should set out a maximum timeframe for the Regulations to be developed and implemented.
 - iv. An underlying principle should be that content is removed from the internet as close to the source as possible.
 - v. There are different types of blocking which have different levels of granularity and different costs associated for ISPs to implement and maintain. The TCF supports an approach which is easy to implement and low cost.

C. Specific Comments

5. Livestreaming

Part 5A: The definition of "livestream" includes the term "broadcast". The use of this term within the definition brings in the possibility of an additional regulator. The TCF proposes that "broadcast" is changed to "transmit" for clarification.

There should be consistency across the Bill that any provisions that apply to live streaming should also apply to publications. Once the live stream stops the content can then become a publication, therefore anything in relation (e.g. liability protections) which apply to live streaming should also include publications.

6. Cl.22C No action to lie against official

This clause provides protection for officials. This protection should be extended to ISP employees in the capacity of performing their duties, where they will be required to go to objectionable sites to confirm content has been removed as well as identify mirror

sites. Therefore, the TCF posits that ISP employees should also receive the same protection as officials.

7. Cl. 22D No action to lie against service providers and online content hosts

The protection offered to ISPs is in relation to actions concerning content removal which is subject to interim classification. The protection should apply to all classified content because actions taken by ISPs after the interim classification is confirmed could expose them to liability.

8. Cl 70E Issue of take-down notice

This clause includes a provision for the Government to ask a content host to remove particular content. The TCF agrees with the intent of the clause to enable a mechanism for DIA to contact non-complying websites and request the website to remove the non-complying content.

Increasingly ISPs are starting to play the role of content host to provide certain services to their customers. This activity provides benefits to New Zealanders and should not be dis-incentivised by placing onerous compliance requirements. We therefore request that:

- i. Take-down request should be made as close to the source as possible. For example if a broadcaster airs objectionable content it should be their responsibility to notify partners who may host their programming for end-users to access, for example with Vodafone TV.
- ii. Alternatively the information provided for a take-down notice of recorded broadcastings should include additional information such as the channel, date and time the programming was aired. It is inefficient for an intermediary content host to build capability to screen recorded broadcasts to find objectionable content.

9. Cl.70L Electronic Filter

The Bill provides for the establishment of an electronic filter possibly being established in the future, if it is considered necessary. The TCF is of the view that the filter is an essential tool to assist with preventing access to objectionable material. It therefore submits that a filter should be developed and that the Act, rather than being permissive, should prescribe that the filter must be developed and implemented. The Bill should set out a timeframe for the establishment of the filter, and also its scope.

The filter is necessary to provide certainty for ISPs. It is not the role of ISPs to identify, or search for objectionable content. Each ISP will approach the task of blocking objectionable content in different ways, and this could result in inconsistent results and gaps in blocking access.

The heading of Clause 70M refers to an electronic filter being established to “prevent” access to objectionable online content. Preventing access to objectionable content is virtually impossible. It would be more appropriate to refer to “reasonably prevent” access.

Factors to be considered in the design of the filter (cl.70M(1)(c)) should be extended to include implications to traffic. Different approaches to the way the filter is designed could have significant implications for general internet traffic and could result in all traffic being forced through the filter and slowed down.

10. cl.70M(1)(c)(ii)

The TCF notes that any electronic system should be careful not to create traffic implications if filtering of content is directed beyond the publication but to the filter itself - driving significant traffic to the filter will create its own issue.

This reflects the key principle that content removed from the internet should be targeted as close to the source as possible.

11. Additional Clause

We suggest that a further tool to minimise New Zealander’s exposure to objectionable content would be to notify service providers of websites that are not compliant with a lawful take-down notice. Service providers could be provided with liability protection if they choose to block these websites from ordinary access.

This tool would provide a means of immediately removing the worst actors from general public access, and provide a complement to the online filter in the longer term by providing another layer of protection.

To achieve this TCF suggests adding the following Clause after section 70G of the Bill:

“The Department of Internal Affairs shall provide service providers access to a confidential list containing details (identifying the URL, online content host and online publication) of entire IP addresses (as opposed to part of a website) for which –

a) a take-down notice has been issued to the online content host under section 70E in order to prevent access by the public to the online publication; and

b) the online content host has failed or refused to comply with the take-down notice within the required period.

A service provider is immune from civil and criminal liability if it restricts ordinary access by the public in New Zealand to such IP addresses.”

12. Schedule 1AB

A new schedule will list those ISPs which are subject to the filter. In the TCFs view, the filter if it were implemented, should apply to all ISPs. There are no criteria in the Bill for deciding which ISPs should be included, and given that there are over 90 ISPs it would be easier to make the filter mandatory. The definition of ISP could be referenced to the definition of Service Provider in the Films, Videos and Publications Classification Act 1993. It is noted that there is no policy support for the concept that a filter would apply to select ISPs.

13. The TCF is happy to answer any questions the DIA might have on the views set out in this submission.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'G. Thorn', followed by a horizontal line.

Geoff Thorn
Chief Executive Officer
New Zealand Telecommunications Forum (TCF)