

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

Government Bill

## **Explanatory note**

### **General policy statement**

The objective of this Bill is to update the Films, Videos, and Publications Classification Act 1993 (the **Act**) to allow for urgent prevention and mitigation of harms caused by objectionable publications.

The Bill provides additional regulatory tools to manage harms caused by content that is livestreamed or hosted by online content hosts. The Bill mostly relates to online publications, however, one aspect of the Bill (urgent interim classification assessments) will apply to all publications covered by the Act.

The Bill makes the key changes outlined below.

### **Bill makes livestreaming of objectionable content criminal offence**

The Bill makes livestreaming of objectionable content a criminal offence under *new section 124AB* of the Act. **Livestreaming** is the online transmission of events in real time. Any digital reproduction of a livestream is a recording and is therefore subject to existing provisions in the Act relating to publications.

The criminal offence of livestreaming objectionable content 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.

### **Bill confers additional authority on Chief Censor**

The Bill enables 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.

The Act sets out procedures for submitting publications to the Chief Censor as well as for how the Chief Censor examines a submitted publication to determine its classification status. Following these procedures takes time and does not suit the urgency of situations in which the availability and uncontrolled dissemination of objectionable content will be injurious to the public good. The need to notify the public as quickly as possible of the harm that this objectionable content can cause and to limit that harm has highest priority.

This mechanism provides the public, anyone who provides publications to the public (including, in the case of online publications, service providers and online content hosts), and enforcement agencies with immediate clarity on a probable classification status. This will minimise the rate at which objectionable content spreads and reduce its potential to harm. The interim assessment has the same effect as a classification decision and would be in place for a maximum of 20 working days before the Chief Censor would be required to issue a final written decision.

#### **Under Bill take-down notices can be issued requiring removal of objectionable online content**

The Bill authorises an Inspector of Publications to issue a take-down notice for objectionable online content. The take-down powers are aligned with current powers of seizure of objectionable publications under the Act.

Take-down notices will be issued to an online content host, directing the removal of a specific link, so that the relevant objectionable material is no longer viewable in New Zealand. An online content host that does not comply with a notice to take down content as soon as is reasonably practicable (without reasonable justification for delays) will be subject to civil pecuniary penalties. It is intended (but not required by the Bill) that the authority to issue a take-down notice will only be exercised in situations where other options for seeking the removal of objectionable content online have proven ineffective. The current collaborative practice of requesting online content hosts to voluntarily remove identified objectionable content will continue to be the first and preferred approach.

#### **Online content hosts will be subject to civil pecuniary penalty if they do not comply with issued take-down notice**

Although it is an offence against the Act to make, possess, supply, or distribute an objectionable (analogue) publication, the Act's provisions are not explicit in how they may apply to online publications and the hosting of objectionable content online. In addition, financial penalties for non-compliance by large multinational corporations are significantly small compared to their revenue, and therefore ineffective deterrents.

Under the Bill, a civil pecuniary penalty will be imposed on online content hosts that do not comply with an issued take-down notice in relation to objectionable online content. This change will bring online content hosts in line with the expectations of businesses operating in New Zealand as they relate to physical analogue content classified as objectionable.

### **Under Bill safe harbour provisions in Harmful Digital Communications Act 2015 will not apply to objectionable online content**

Section 24 of the Harmful Digital Communications Act 2015 (the **HDC Act**) states that online content hosts cannot be charged under New Zealand law for hosting harmful content on their platforms if they follow certain steps when a complaint is made. This creates the potential for exemption for online content hosts from any criminal or civil liability if they break the law under the Act (which is concerned with more serious content) but follow the steps outlined in the HDC Act. Under the Bill, section 24 of the HDC Act will not apply to the operation of the Act. No amendments will need to be made to the HDC Act. This will mean that enforcing the new offence or modified offences in the Act will not be limited by the HDC Act safe harbour provisions for online content hosts. It will ensure that online content hosts can be prosecuted for hosting objectionable content if they are liable for doing so.

### **Bill facilitates setting up of future mechanisms for blocking or filtering objectionable online content**

In New Zealand, the only current government-backed web filter is designed to block child sexual exploitation material (the Digital Child Exploitation Filtering System). This filter is voluntary and operates at the Internet service provider (**ISP**) level. It currently applies to about 85% of New Zealand's ISP connections.

The Bill facilitates the establishment of a government-backed (either mandatory or voluntary) web filter if one is desired in the future. It provides the Government with explicit statutory authority to explore and implement such mechanisms through regulations, following consultation.

Filters can be circumvented by those actively seeking content through tools such as a virtual private network. The limitations of a filtering system mean that there is a risk that a web filter could provide limited benefits, and impact on freedom of expression.

Accordingly, the regulation-making powers under the Bill require that any regulations to establish a filter must—

- clarify the criteria for identifying and preventing access to objectionable content that the filter would block:
- clarify governance arrangements for the system:
- specify reporting arrangements for the system:
- clarify the review process and right of appeal should an ISP, online content host, or other individual or entity dispute a decision to prevent access to a website, part of a website, or an online application:
- clarify the obligations of ISPs in relation to the operation of the system:
- provide detail of how data security and privacy provisions would be addressed.

Any filter established will be limited to addressing a specific form of objectionable content and would focus on web page filtering. The filter would not include messaging applications and other online services. It is intended to be designed so that the

impact on freedom of expression would not be extended past the existing justified limits.

Existing appeal pathways in the Act would apply, with necessary modifications, when challenging decisions relating to takedown notices. Review and appeal processes set out in regulations would apply to decisions relating to the blocking of websites, online application, or similar by the electronic system. Decisions relating to the blocking of websites can be also be challenged through judicial review.

### Departmental disclosure statement

The Department of Internal Affairs is required to prepare a disclosure statement to assist with the scrutiny of this Bill. The disclosure statement provides access to information about the policy development of the Bill and identifies any significant or unusual legislative features of the Bill.

A copy of the statement can be found at <http://legislation.govt.nz/disclosure.aspx?type=bill&subtype=government&year=2020&no=268>

### Regulatory impact assessment

The Department of Internal Affairs produced a regulatory impact assessment on 26 November 2019 to help inform the main policy decisions taken by the Government relating to the contents of this Bill.

A copy of this regulatory impact assessment can be found at—

- [https://www.dia.govt.nz/diawebsite.nsf/Files/Proactive-releases/\\$file/regulatory-impact-assessment-counteracting-violent-extremism-online.pdf](https://www.dia.govt.nz/diawebsite.nsf/Files/Proactive-releases/$file/regulatory-impact-assessment-counteracting-violent-extremism-online.pdf)
- <http://www.treasury.govt.nz/publications/informationreleases/ria>

### Clause by clause analysis

*Clause 1* is the Title clause.

*Clause 2* is the commencement clause. The Bill comes into force on **30 April 2021**.

*Clause 3* states that the Bill amends the Films, Videos, and Publications Classification Act 1993 (the **principal Act**).

## Part 1

### Definitions, application of Harmful Digital Communications Act 2015, and interim classification assessments

*Clause 4* amends definitions in section 2 of the principal Act. This includes adding, for avoidance of doubt, *new paragraph (e)* to the definition of publication. *New paragraph (e)* expressly includes a copy of images or sounds that have been livestreamed in the definition (although a copy of livestreamed content is already included under paragraph (d)). The livestreaming itself of those images or sounds is expressly excluded under *new paragraph (e)*. The distinction between a copy of livestreamed content

and livestreaming itself means that the latter is not subject to the provisions of the principal Act except where expressly included by the Bill. Livestreaming is expressly included for the purposes of *new Part 7A* (see the definition of online publication in *new section 119A* in *clause 9*) and in *new section 124AB*, which establishes a new offence of livestreaming objectionable content (see *clause 10*).

A corresponding amendment is made by the Bill to section 131(2B) (see *clause 11*) to include a reference to *new paragraph (e)* alongside the reference to paragraph (d) for the offence of possessing an objectionable publication.

*Clause 5* inserts *new section 4A*, which says that the safe harbour provisions in the Harmful Digital Communications Act 2015 do not apply to processes and proceedings under the principal Act.

*Clause 6* inserts *new sections 22A to 22D*, which provide for a new urgent interim classification assessment process. This new process applies to all publications covered by the principal Act in contrast to the rest of the Bill, which applies only to online publications.

The Classification Office may make an interim classification assessment that a publication is likely to be objectionable if the Chief Censor believes that there is an urgent need to—

- notify the public that the content of the publication is likely to be objectionable (on the basis of the interim assessment); and
- limit harm to the public.

An interim assessment has effect for 20 working days or until a classification decision is made. The effect of an interim assessment is that the Act applies to the publication as if the interim assessment were a classification decision. This includes the offence provisions in sections 123, 124, and 129. *New section 22C* provides immunity from civil or criminal liability to officials for actions taken in making an interim assessment. *New section 22D* provides immunity from civil or criminal liability to service providers and online content hosts who remove or prevent access to an online publication that is the subject of an interim assessment.

*Clause 7* amends section 38 to provide that reasons for an interim classification assessment must be given in the notice of the subsequent classification decision.

## **Part 2**

### **Measures to prevent harm from objectionable online publications**

#### *Take-down notices and establishment of electronic system to prevent public access to objectionable online publications*

*Clause 8* amends section 103 so that constables cannot exercise the power of an Inspector of Publications to issue a take-down notice.

*Clause 9* inserts *new Part 7A*, which provides—

- a new power for Inspectors of Publications (excluding constables) to issue take-down notices for particular online publications;
- for the establishment of an electronic system to be operated by the Department of Internal Affairs to prevent public access to objectionable online publications.

Online publication is defined in *new section 119A* more widely for the purposes of *new Part 7A* than the term publication in section 2, which applies for the purposes of the principal Act generally. Online publications, for the purposes of *new Part 7A*, include—

- publications under paragraph (d) and *new paragraph (e)* of the definition of publication in section 2 (but for electronic publications under paragraph (d), only if they are accessible online); and
- livestreamed content.

The livestreaming of images and sounds is expressly excluded from the definition of publication for the purposes of the principal Act generally (*see new paragraph (e)* of the definition in section 2). However, under *new Part 7A*, content that is being live-streamed can be the subject of a take-down notice or be blocked by the electronic system that can be established under *new sections 119L to 119O*.

The extended definition of online publication also applies to *new paragraphs (ab) to (ai)* that are added to the regulation-making powers in section 149 of the principal Act by *clause 12* and any regulations made under those new paragraphs.

*New section 119B* says that *new Part 7A* applies to—

- individuals present in New Zealand;
- service providers in New Zealand (which has the meaning given in section 122A);
- online content hosts both in New Zealand and overseas that provide services to the public in New Zealand.

The third category in the above list is intended to have extraterritorial application.

Under *new section 119C*, an Inspector of Publications can issue a take-down notice for a particular online publication if—

- an interim classification assessment has been made under *new section 22A* that the online publication is likely to be objectionable (*new subsection (1)(a)*); or
- the online publication has been classified as objectionable under section 23 (*new subsection (1)(b)*); or
- the Inspector believes, on reasonable grounds, that the online publication is objectionable (*new subsection (1)(c)*).

*New subsection (1)(c)* is based on section 108 of the principal Act which relates to the seizure of publications generally.

A take-down notice under *new subsection (1)(a)* has effect for 20 working days but becomes permanent if a classification decision is made that the publication is objec-

tionable. A take-down notice under *new subsection (1)(b) or (c)* has permanent effect immediately.

*New section 119D* sets out the required contents of a take-down notice. Under *new section 119D(3)*, a take-down notice may require an online content host to retain a copy of the publication for the purpose of an investigation or proceedings. Under *new section 119E(2)*, the copy must be provided to an Inspector of Publications on request.

*New section 119E* sets out the obligations of an online content host who receives a take-down notice.

*New sections 119F and 119G* provide immunity from civil or criminal liability for officials and online content hosts relating to actions taken when issuing or complying with a take-down notice.

*New sections 119H and 119I* relate to enforcement of take-down notices in the District Court.

*New section 119J* says that a take-down notice is only reviewable under the Act as part of the classification decision for the relevant online publication. A take-down notice continues to have effect until the completion of a review and any related appeals.

*New section 119K* requires the Secretary for Internal Affairs to report on the issue of take-down notices, including in the annual report of the Department of Internal Affairs.

*New section 119L* allows the Department of Internal Affairs to operate an electronic system to prevent public access to online publications—

- for which an interim classification assessment has been made under *new section 22A* that a publication is likely to be objectionable:
- that have been classified as objectionable under section 23:
- that an Inspector of Publications believes on reasonable grounds to be objectionable.

*New subsection (3)(c)* is based on section 108 of the principal Act relating to seizure of publications generally.

The electronic system may—

- prevent access by the public to a particular online publication in 1 or more of those 3 categories:
- prevent access by the public to the website, a part of the website, the online application, or similar on which an online publication in 1 or more of those 3 categories is accessible.

*New section 119M* sets out some requirements for the establishment and operation of the electronic system. The design and format of the system is subject to a consultation requirement. Other operational requirements will be provided for in regulations. Under *new section 119N*, the Secretary for Internal Affairs may approve the electronic system to begin operating if satisfied that—

- all requirements in the Act relating to the system have been met; and
- sufficient operational detail has been provided in regulations made under section 149; and
- review and appeal processes for the approval decision have been set up by regulations made under section 149; and
- review and appeal processes for decisions and actions relating to the operation of the system have been set up by regulations (*see new section 1190*).

*New section 1190* provides for review and appeal processes to be set up under regulations (made under section 149) for decisions and actions by the Department of Internal Affairs relating to the operation of the electronic system. If a review application or appeal is lodged, the relevant decision continues to have effect until the completion of the review and any related appeals.

### *Offences*

*Clause 10* inserts *new section 124AB* into the principal Act, which establishes a new offence of livestreaming objectionable content. A service provider or online content host does not commit an offence by reason only that they provide or host the platform on which objectionable content is livestreamed. The penalty is,—

- in the case of an individual, imprisonment for a term not exceeding 14 years;
- in the case of a body corporate, a fine not exceeding \$200,000.

This offence is not intended to have extraterritorial application.

*Clause 11* amends section 131(2B) so that the offence of possessing an objectionable publication refers to *new paragraph (e)* as well as paragraph (d) of the definition of publication.

### *Regulations*

*Clause 12* amends section 149, which sets out regulation-making powers in the principal Act. The new regulation-making powers inserted by the Bill relate to information to be included in take-down notices, various aspects of the establishment and operation of the electronic system to prevent public access to online publications, and for the setting up of review and appeal processes for 2 aspects: the approval of the system and of decisions and actions relating to its operation.

*Hon Tracey Martin*

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

Government Bill

## **Contents**

		Page
1	Title	3
2	Commencement	3
3	Principal Act	3
<b>Part 1</b>		
<b>Definitions, application of Harmful Digital Communications Act 2015, and interim classification assessments</b>		
4	Section 2 amended (Interpretation)	3
5	New section 4A inserted (Application of Harmful Digital Communications Act 2015)	3
	4A Application of Harmful Digital Communications Act 2015	3
6	New sections 22A to 22D and cross-heading inserted	3
<i>Interim classification assessments</i>		
	22A Interim classification assessments by Classification Office	4
	22B Notice, registration, and effect of interim classification assessments	4
	22C No action to lie against officials	5
	22D No action to lie against service providers and online content hosts	5
7	Section 38 amended (Decisions of Classification Office)	5

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

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**Part 2  
Measures to prevent harm from objectionable online  
publications**

*Take-down notices and establishment of electronic system to  
prevent public access to objectionable online publications*

8	Section 103 amended (Inspectors of Publications)	6
9	New Part 7A inserted	6

<b>Part 7A</b>		
<b>Take-down notices and establishment of electronic system to prevent public access to objectionable online publications</b>		
119A	Definitions for Part 7A	6
119B	Application of Part	6
<i>Take-down notices</i>		
119C	Issue of take-down notices	7
119D	Contents of take-down notices	7
119E	Online content host must comply with take-down notice	8
119F	No action to lie against officials	8
119G	No action to lie against online content host	9
119H	Enforcement of take-down notices	9
119I	Remedies and costs	9
119J	Review of take-down notices	10
119K	Reporting	10
<i>Electronic system to prevent public access to objectionable online publications</i>		
119L	Electronic system to prevent public access to objectionable online publications	10
119M	Establishment of electronic system	11
119N	Approval of electronic system for operation	12
119O	Review of decisions and actions relating to operation of electronic system	12

*Offences*

10	New section 124AB inserted (Offence to livestream objectionable content)	12
	124AB Offence to livestream objectionable content	12
11	Section 131 amended (Offence to possess objectionable publication)	13

*Regulations*

12	Section 149 amended (Regulations)	13
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The Parliament of New Zealand enacts as follows:

- 1 Title**  
This Act is the Films, Videos, and Publications Classification (Urgent Interim Classification of Publications and Prevention of Online Harm) Amendment Act **2020**. 5
- 2 Commencement**  
This Act comes into force on **30 April 2021**.
- 3 Principal Act**  
This Act amends the Films, Videos, and Publications Classification Act 1993 (the **principal Act**). 10

**Part 1**

**Definitions, application of Harmful Digital Communications Act 2015, and interim classification assessments**

- 4 Section 2 amended (Interpretation)**
- (1) In section 2, replace the definition of **Inspector** with: 15  
**Inspector** means an Inspector of Publications holding office under section 103(1) or (2), and includes a constable except for the purposes of **Part 7A** (*see* section 103(3))
- (2) In section 2, definition of **publication**, paragraph (d), after “statements,”, insert “sounds,”. 20
- (3) In section 2, definition of **publication**, after paragraph (d), insert:  
(e) a copy of images or sounds that have been livestreamed, but not the live-streaming itself of those images or sounds (**livestreamed** and **live-streaming** have the meanings given in **section 119A**)
- 5 New section 4A inserted (Application of Harmful Digital Communications Act 2015)** 25  
After section 4, insert:
- 4A Application of Harmful Digital Communications Act 2015**  
Sections 23 to 25 of the Harmful Digital Communications Act 2015, which relate to the liability of an online content host for content posted by a user, do not apply to processes or proceedings under this Act relating to online publications hosted by them. 30
- 6 New sections 22A to 22D and cross-heading inserted**  
After section 22, insert:

*Interim classification assessments*

**22A Interim classification assessments by Classification Office**

- (1) This section applies to a publication submitted to the Classification Office for classification under section 13.
- (2) The Classification Office may make an interim classification assessment that the publication is likely to be objectionable. 5
- (3) The Classification Office may do so only if the Chief Censor believes that there is an urgent need—
  - (a) to notify the public that the content of the publication is likely to be objectionable (on the basis of the interim assessment); and 10
  - (b) to limit harm to the public.
- (4) Sections 14, 15, and 17 to 22 apply to the making of an interim assessment. However, section 20 applies as modified by **subsection (5)**.
- (5) The Chief Censor may determine that submissions by the persons listed in section 20(1) must be made in a manner and within a time that the Chief Censor specifies after taking into account what is reasonable in the circumstances, including the need for urgency in dealing with the matter. 15
- (6) The making of an interim assessment is not a relevant consideration for the purpose of, and does not affect, the later examination and classification of the same publication under section 23. 20

**22B Notice, registration, and effect of interim classification assessments**

- (1) The Classification Office must give written notice to the submitter that an interim classification assessment has been made.
- (2) An interim assessment must be registered under section 39, and that section applies as if the interim assessment were a classification decision, except that the following information must be entered in the register (instead of the information in section 39(3)(a) to (c)): 25
  - (a) a statement that an interim assessment has been made of the publication and the date on which the assessment was made; and
  - (b) the date on which notice of the interim assessment was given under **subsection (1)** (if applicable); and 30
  - (c) the date of entry of the interim assessment in the register.
- (3) An interim assessment has effect for an interim period.
- (4) An **interim period** begins on the date an interim assessment is made and ends on the sooner of— 35
  - (a) 20 working days after the date of the interim assessment;
  - (b) the date on which a classification decision is made for the relevant publication.

- (5) The provisions of this Act, including sections 123, 124, and 129 (all being offence provisions), apply to a publication during an interim period as if it had been classified as being objectionable under section 23.

Compare: 1993 No 94 ss 38, 39

**22C No action to lie against officials**

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The following people are immune 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 making of an interim classification assessment:

- (a) the Chief Censor:
- (b) the Deputy Chief Censor:
- (c) a classification officer:
- (d) a member of the staff of the Classification Office:
- (e) a member of the staff of the Department of Internal Affairs:
- (f) an Inspector.

10

Compare: 1993 No 94 ss 119, 137

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**22D No action to lie against service providers and online content hosts**

- (1) A service provider or an online content host is immune from civil and criminal liability if they remove or prevent access by the public in New Zealand to an online publication that is the subject of an interim classification assessment.

- (2) In this section,—

20

**online content host** has the meaning given in **section 119A** as qualified by **section 119B**

**online publication** has the meaning given in **section 119A**

**service provider** has the meaning given in section 122A.

Compare: 1993 No 94 ss 119, 137

25

**7 Section 38 amended (Decisions of Classification Office)**

After section 38(2)(a), insert:

- (ab) the reasons why an interim classification assessment was made under **section 22A** (if applicable), including the reasons for the Chief Censor's belief described in **section 22A(3)**; and

30

## Part 2

### Measures to prevent harm from objectionable online publications

#### *Take-down notices and establishment of electronic system to prevent public access to objectionable online publications*

**8 Section 103 amended (Inspectors of Publications)** 5

In section 103(3), after “Act”, insert “except for the purposes of **Part 7A**”.

**9 New Part 7A inserted**

After section 119, insert:

### Part 7A

#### Take-down notices and establishment of electronic system to prevent public access to objectionable online publications 10

##### 119A Definitions for Part 7A

(1) In this Part and section 149(**ab**) to (**ai**), and any regulations made under those paragraphs,—

**livestream** means to transmit or stream over the Internet images or sounds as they happen, and **livestreamed** and **livestreaming** have corresponding meanings 15

**online content host**, in relation to an online publication, means the person who has control over the part of the electronic retrieval system, such as a website or an online application or similar, on which the publication is accessible 20

**online publication** means—

(a) a publication under paragraph (d) of the definition of publication in section 2, but only if the publication is accessible online; or

(b) a publication under **paragraph (e)** of the definition of publication in section 2 (a copy of content that was livestreamed); or 25

(c) livestreamed content

**service provider** has the meaning given in section 122A.

(2) The definition of online publication in **subsection (1)** does not limit the definition of publication in section 2 for other purposes of this Act.

##### 119B Application of Part 30

This Part applies to—

(a) individuals in New Zealand (the **public**); and

(b) service providers in New Zealand; and

- (c) online content hosts both in New Zealand and overseas that provide services to the public.

*Take-down notices*

**119C Issue of take-down notices**

- (1) An Inspector may issue a take-down notice relating to a particular online publication to an online content host if—
  - (a) an interim classification assessment has been made under **section 22A** that the online publication is likely to be objectionable; or
  - (b) the online publication has been classified as objectionable under section 23; or
  - (c) the Inspector believes, on reasonable grounds, that the online publication is objectionable.
- (2) Before issuing a take-down notice, an Inspector may, but is not required to, request that the online content host remove or prevent access by the public to the online publication.
- (3) A take-down notice issued under **subsection (1)(a)** has effect on and for 20 working days from the date it is issued unless **subsection (4)** applies.
- (4) A take-down notice issued under **subsection (1)(a)** has permanent effect if a classification decision is made that the online publication is objectionable on and from the date of that decision.
- (5) A take-down notice issued under **subsection (1)(b) or (c)** has permanent effect on and from the date it is issued.
- (6) In each case the Inspector must notify the Chief Censor that a take-down notice has been issued, and if it was issued under **subsection (1)(c)**, the Chief Censor may exercise the power under section 13(3) in relation to the online publication.
- (7) *See section 119J* for review of a take-down notice.  
Compare: 1993 No 94 s 108(1)

**119D Contents of take-down notices**

- (1) A take-down notice must—
  - (a) contain a description of the relevant online publication; and
  - (b) identify the URL of the online publication; and
  - (c) require the online content host to remove or prevent access by the public to the online publication as soon as is reasonably practicable after receipt of the notice and no later than the time and date specified in the notice (the **required period**); and
  - (d) inform the online content host of the right of review under **section 119J**; and

(e)	contain other information required by regulations made under section 149.	
(2)	When deciding on the length of the required period in a particular case, an Inspector must consider what period is likely to be reasonably practicable for the online content host to comply with the notice.	5
(3)	A take-down notice may also require an online content host to retain a copy of the relevant online publication for the purpose of an investigation or proceedings.	
(4)	A take-down notice may contain other information that an Inspector considers is useful or appropriate.	10
<b>119E Online content host must comply with take-down notice</b>		
(1)	An online content host that receives a take-down notice must remove or prevent access by the public to the online publication as soon as is reasonably practicable after receipt of the notice but no later than the end of the required period.	15
(2)	If a take-down notice requires an online content host to retain a copy of the relevant online publication for the purposes of an investigation or proceedings, they must retain a copy, hold it securely, and provide it to an Inspector on request.	
(3)	An online content host must destroy all copies of an online publication to or over which it has access or control as soon as is reasonably practicable after receiving a take-down notice unless—	20
(a)	<b>section 119D(3)</b> and <b>subsection (2)</b> of this section apply; or	
(b)	they intend to lodge or have lodged a submission under section 13 for the relevant online publication; or	25
(c)	they intend to lodge or have lodged an application for a review under Part 4 against the classification decision for the relevant online publication or a related appeal.	
(4)	If <b>subsection (3)(b) or (c)</b> apply, the online content host may retain a copy of the online publication for as long as it is needed to complete the relevant process but must hold it securely.	30
<b>119F No action to lie against officials</b>		
	The following people are immune 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 a take-down notice:	35
(a)	the Chief Censor:	
(b)	the Deputy Chief Censor:	
(c)	a classification officer:	
(d)	a member of the staff of the Classification Office:	

- (e) a member of the staff of the Department of Internal Affairs:
- (f) an Inspector.

Compare: 1993 No 94 ss 119, 137

**119G No action to lie against online content host**

An online content host is immune from criminal or civil liability— 5

- (a) if they remove or prevent access by the public to or destroy copies of an online publication that is the subject of a take-down notice:
- (b) if they retain a copy of an online publication for any of the reasons listed in **section 119E(3)** and hold it securely.

**119H Enforcement of take-down notices** 10

- (1) An Inspector may take enforcement proceedings in the District Court if an online content host fails or refuses to comply with a take-down notice within the required period.
- (2) In proceedings under this section, the court—
  - (a) must not examine or make any determination about the issuing or merits of a take-down notice: 15
  - (b) may determine whether the online content host had a reasonable justification for failing or refusing to comply with the notice within the required period or for any further delay after that period:
  - (c) may permit the Inspector, by order of the court, to obtain discovery and administer interrogatories: 20
  - (d) may order a remedy or costs under **section 119I**.

**119I Remedies and costs**

- (1) In proceedings under **section 119H**, the court may—
  - (a) order that the online content host comply with the take-down notice by a date specified in the order: 25
  - (b) order the online content host to pay a pecuniary penalty to the Crown:
  - (c) award costs as the court thinks fit:
  - (d) order interest to be paid in accordance with the court's rules.
- (2) A pecuniary penalty is payable in an amount that the court determines is appropriate, taking into account all relevant matters, and, in particular,—
  - (a) the nature and extent of the failure or refusal to comply with the notice; and
  - (b) the circumstances in which the failure or refusal to comply occurred (including whether this was intentional, inadvertent, or caused by negligence). 30 35

- (3) The standard of proof for the matters in **subsection (2)** is the balance of probabilities.
- (4) The amount of a pecuniary penalty must not exceed \$200,000.
- (5) Only 1 pecuniary penalty is payable in relation to the same take-down notice.

**119J Review of take-down notices** 5

- (1) A take-down notice may be reviewed under this Act only as part of a review under Part 4 of the classification decision relating to the relevant online publication.
- (2) No review is available under this Act for a take-down notice issued under **section 119C(1)(a) or (c)** unless and until a classification decision is made for the relevant online publication. 10
- (3) A take-down notice continues to have effect until the completion of a review and any related appeal.

**119K Reporting**

- (1) The Secretary must— 15
  - (a) make publicly available a list of all take-down notices issued that have been complied with; and
  - (b) publish the number of take-down notices issued and the number that were complied with each year in the annual report of the Department of Internal Affairs relating to that year. 20
- (2) The Secretary must, in the list referred to in **subsection (1)(a)**, in each case, include the reasons for issuing the take-down notice.

*Electronic system to prevent public access to objectionable online publications*

**119L Electronic system to prevent public access to objectionable online publications** 25

- (1) The Department of Internal Affairs may operate an electronic system to prevent access by the public to objectionable online publications.
- (2) The system must be established under **section 119M** and approved for operation under **section 119N**.
- (3) The system may prevent access by the public only to an online publication— 30
  - (a) for which an interim classification assessment has been made under **section 22A** that it is likely to be objectionable;
  - (b) that has been classified as objectionable under section 23;
  - (c) that an Inspector believes on reasonable grounds to be objectionable.
- (4) The system may— 35
  - (a) prevent access by the public to a particular online publication in 1 or more of the 3 categories in **subsection (3)**:

- (b) prevent access by the public to the website, a part of the website, the online application, or similar on which an online publication in 1 or more of those 3 categories is accessible.
  - (5) The system must be administered by the Department of Internal Affairs.
- 119M Establishment of electronic system** 5
- (1) When establishing the electronic system to be approved for operation under **section 119N**, the Secretary must consult the following on the design and the final form of the system:
    - (a) service providers; and
    - (b) technical experts and online content hosts to the extent the Secretary thinks necessary; and 10
    - (c) the public.
  - (2) When deciding on the design and form of the system, the Secretary must consider—
    - (a) the need to balance— 15
      - (i) any likely impact on public access to non-objectionable online publications; and
      - (ii) the protection of the public from harm from objectionable online publications; and
    - (b) any likely impact on performance for all other network traffic; and 20
    - (c) departmental and technical capacity to operate the system; and
    - (d) likely compliance costs.
  - (3) However, each of the factors in **subsection (2)** needs be considered only to the extent that it is relevant in the Secretary's view.
  - (4) The system— 25
    - (a) must have the capacity to both identify and prevent access to a particular online publication with reasonable reliability, based on criteria set out in regulations made under section 149; and
    - (b) is subject to governance arrangements required by regulations made under section 149; and 30
    - (c) is subject to requirements for administration and technical oversight prescribed by regulations made under section 149, including relating to data security and privacy; and
    - (d) is subject to reporting requirements required by regulations made under section 149. 35
  - (5) Obligations of service providers relating to the operation of the system may be prescribed by regulations made under section 149.

Compare: 1957 No 87 ss 86DB, 86DC

**119N Approval of electronic system for operation**

Before giving approval for the electronic system to begin operating, the Secretary must be satisfied that—

- (a) all requirements in this Act relating to the system have been met; and
- (b) sufficient operational detail has been provided in regulations made under section 149; and 5
- (c) review and appeal processes for the approval decision under this section have been set up by regulations made under section 149; and
- (d) review and appeal processes for decisions and actions by the Department of Internal Affairs relating to the operation of the system have been set up by regulations made under section 149 (*see section 1190*). 10

**119O Review of decisions and actions relating to operation of electronic system**

- (1) Decisions and actions by the Department of Internal Affairs relating to the operation of the electronic system are subject to review and appeal processes set up by regulations made under section 149. 15
- (2) If a review application or an appeal is lodged relating to a decision or an action referred to in this section, the decision continues to have effect and the action may continue until the completion of the review and any related appeal.

*Offences*

- 10 New section 124AB inserted (Offence to livestream objectionable content) 20**  
After section 124A, insert:

**124AB Offence to livestream objectionable content**

- (1) A person commits an offence if they livestream content knowing or having reasonable cause to believe that it is objectionable.
- (2) A person who commits an offence under **subsection (1)** is liable on conviction,— 25
  - (a) in the case of an individual, to imprisonment for a term not exceeding 14 years;
  - (b) in the case of a body corporate, to a fine not exceeding \$200,000.
- (3) A person does not commit an offence under this section by reason only that they are the service provider or online content host of the platform or similar on which the particular content was livestreamed. 30
- (4) In this section,—  
**livestream** and **livestreamed** have the meanings given in **section 119A**  
**objectionable** has the meaning given in section 3 (as if the content that was livestreamed were a publication) 35

**online content host** has the meaning given in **section 119A** as qualified by **section 119B**

**service provider** has the meaning given in section 122A.

Compare: 1993 No 94 s 124

- 11 Section 131 amended (Offence to possess objectionable publication)** 5  
In section 131(2B), replace “paragraph (d)” with “paragraphs (d) and **(e)**”.

*Regulations*

- 12 Section 149 amended (Regulations)**

After section 149(a), insert:

- (ab) prescribing information to be included in a take-down notice under **section 119D:** 10
- (ac) prescribing criteria for identifying online publications that are likely to be objectionable and for preventing access to those publications by the electronic system referred to in **section 119L:**
- (ad) prescribing governance arrangements for the electronic system referred to in **section 119L:** 15
- (ae) prescribing requirements for the administration and technical oversight of the electronic system referred to in **section 119L**, including relating to data security and privacy:
- (af) prescribing reporting requirements for the electronic system referred to in **section 119L:** 20
- (ag) prescribing obligations of service providers relating to the operation of the electronic system referred to in **section 119L:**
- (ah) setting up review and appeal processes for the decision approving the operation of the electronic system under **section 119N:** 25
- (ai) setting up review and appeal processes for decisions and actions referred to in **section 119O:**