

Departmental Disclosure Statement

Films, Videos, and Publications Classification (Commercial Video on-Demand) Amendment Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Department of Internal Affairs.

The Department of Internal Affairs certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

This disclosure statement was finalised on 26 November 2019.

Contents

Contents..... 2

Part One: General Policy Statement..... 3

Part Two: Background Material and Policy Information 5

Part Three: Testing of Legislative Content..... 8

Part Four: Significant Legislative Features 10

Part One: General Policy Statement

The objective of this Bill is to reduce the potential for harm to consumers from viewing inappropriate content. The Bill will do this by requiring that commercial video on-demand (CVoD) content that is made available in New Zealand displays appropriate and consistent labelling, if the provider of that content is specified in the Schedule to the Bill. This labelling will provide information about that content's rating and description so that consumers can make an informed decision on whether to view it.

Providers of commercial (subscription and transactional) video on-demand content are displaying inconsistent ratings and descriptive notes (or no ratings at all) for content available on their platforms. This is because of the gap in current legislation where on-demand online content in New Zealand is not subject to mandatory rating requirements, as 'films' for cinematic or DVD release are. This Bill will ensure that consumers see more consistent ratings and descriptive notes across the main CVoD platforms in New Zealand.

The Bill will amend the Films, Videos, and Publications Classification Act 1993 (the Act) to clearly address the identified regulatory gap. Key changes the Bill will implement are:

Requirements for specified CVoD providers to label content before it is available in New Zealand

Providers of CVoD content will be required to comply by

- following the current process for the labelling of film. This involves providing content to the Film and Video Labelling Body (the labelling body) for rating and labelling. The labelling body will refer certain content to the Office of Film and Literature Classification (the Classification Office) for classification, before issuing a label; or
- self-rating content that they supply using systems which have been approved by the Classification Office. This can be achieved either by using the Classification Office's rating tool or using their own system, with approval from the Classification Office.

Once content is labelled under the Act, that label will be included in a public register and must be used by any other provider providing that content. These labelling decisions can be reconsidered by the Classification Office where necessary.

Establishment of criteria and process to identify and list regulated providers

Providers that are required to comply under the new requirements will be listed in a schedule of the Act. The schedule can be amended by an Order in Council, with the final decision being made by the Governor-General on the recommendation of the Minister of Internal Affairs.

The Minister will need to consult the Chief Censor before making a recommendation to amend the schedule. The Minister will also need to consider the potential 'risk of harm' to consumers from CVoD content being made available without appropriate labels before making a recommendation to amend the Schedule.

The Bill sets the following criteria that the Minister must consider in determining the potential 'risk of harm':

- *Market presence:* the share of the New Zealand market that a provider currently has or is expected to have; and
- *Compliance with and commitment to another classification framework established in New Zealand:* whether a provider is using a classification framework that provides consistent and appropriate information to consumers, as well as the extent and reliability of its commitment to that framework; and

- *Nature of content:* the nature of content being offered by a provider, and the potential of this content to cause harm to consumers.

Updated functions of Classification Office

The Bill will update the functions of the Classification Office to ensure that the new requirements for CVoD content are clearly within the scope of its operational work. The Classification Office will have the following new functions and powers:

- providing an online rating tool that specified CVoD providers may use to rate and label content they provide; and
- approving any Self-Rating Systems which are developed by specified CVoD providers to rate and label their content; and
- reviewing and monitoring the operation and outputs of both the online rating-tool and the any self-rating systems.

Amendment to definition of 'Film' to clarify that it includes video on-demand content

Video on-demand content falls within the existing definition of a publication, but it does not clearly fall within the definition of a film (which is a subset of publications).

The Bill replaces the definition of 'film' in the Act to clarify that it includes video on-demand content (CVoD is a subset of video on-demand content this is provided to consumers on a subscription or transaction basis).

Clarifying that video on-demand content is a film means that the requirements in relation to classifying and rating films will apply to any video on-demand content that is not specifically exempted from those requirements. The Classification Office's powers in respect of publications (e.g. complaints process, enforcement provisions and offences and penalties) will also apply.

Anticipated introduction of new fees for use of CVoD rating and labelling tools

The new regime introduced by the Bill will also permit new fees to be set for the use and review of CVoD rating and labelling tools.

Fees under the Act are set in the Films, Videos, and Publications Classification (Fees) Regulations 1994. Work is underway to update the fees framework, including the level of the CVoD fees for specified CVoD providers.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
<p>Title: Young New Zealanders Viewing Sexual Violence Authoring agency: Office of Film and Literature Classification, November 2016 Location: https://www.classificationoffice.govt.nz/assets/PDFs/research-young-people-sexual-violence-2017.pdf</p> <p>Title: Understanding the Classification System: New Zealanders' Views Authoring agency: Office of Film and Literature Classification, June 2016 Location: https://www.classificationoffice.govt.nz/assets/PDFs/research-public-understanding-2016.pdf</p>	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
2.2.1. If so, was a National Interest Analysis report prepared to inform a Parliamentary examination of the proposed New Zealand action in relation to the treaty?	NO

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>Title: The Films, Videos, and Publications Classifications Amendment Bill – Standardising classification for Commercial Video on-Demand content (9 August 2019) Authoring agency: Department of Internal Affairs Location: https://www.dia.govt.nz/diawebsite.nsf/Files/Proactive-releases/\$file/Cabinet-paper-Policy-proposals-Standardising-classification-for-Commercial-Video-on-Demand.pdf</p> <p>Title: The Films, Videos, and Publications Classifications Amendment Bill – Standardising classification for Commercial Video on-Demand content – with Supplementary Analysis (25 November 2019) Authoring agency: Department of Internal Affairs Location: https://www.dia.govt.nz/Resource-material-Regulatory-Impact-Statements-Index</p>	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	YES
<p>For the RIA dated 9 August 2019, the Quality Assurance panel provided the following statement:</p> <ul style="list-style-type: none"> • The panel considers that the RIA does not meet the Quality Assurance criteria. • The panel considers that the RIA is clearly written, and is transparent about the constraints on the analysis, and about many of the gaps in the analysis. Overall, the panel considers that there is sufficient analysis for Ministers to make an informed decision not to pursue Option 1 but does not provide sufficient analysis to inform the decision about whether Option 2 (the preferred option) or Option 3 is the best way of achieving the Government's objectives. Our concerns are summarised under the quality assurance criteria of complete and convincing, and consulted. <p>Complete and convincing</p> <ul style="list-style-type: none"> • There is limited analysis of the size of the problem, particularly the magnitude of the risk from misclassifying content and the degree to which other information offered by commercial video on demand providers (e.g. in the synopsis and genre label that a consumer sees before viewing) mitigates the risk. There is also limited evidence that the problem needs addressing now, instead of waiting for the intended wider review. • The RIA does not establish the criteria which will be used to determine which providers will be regulated, and whether consideration will be given to exempting small or niche providers. Other options could have been considered. For example, encouraging providers to join the voluntary system, with the chance that regulation might follow if that was unsuccessful. • Information about impacts of options is light. Two examples are: <ul style="list-style-type: none"> ○ Little information about the costs to providers, and the extent to which costs will be passed onto consumers – whether through higher prices or reductions in content (lower-profitability minority audience content might be at greater risk). ○ Whether Option 2 would increase, rather than decrease, inconsistency of classification when considered across all household video content – a point raised in submissions. • The RIA identifies risks of non-compliance with Option 3 but is not convincing that these risks will not also manifest for Option 2. The RIA could have assessed what factors might lead providers to comply and had an implementation plan for gaining compliance. <p>Consulted</p> <ul style="list-style-type: none"> • The RIA generally summarises and responds to the feedback from public consultation well. Consultation elicited many issues, and providers said they required more information before they could estimate the cost of options and the time required to implement them. Further, targeted, consultation would likely help, and ultimately result in sufficient analysis to inform Ministers' decisions. <p>Further to feedback on the RIA dated 9 August 2019, a Supplementary Analysis Report was prepared for consideration alongside the draft Bill. The Quality Assurance panel provided the following statement in respect of this report:</p> <ul style="list-style-type: none"> • The Quality Assurance Panel considers that the Supplementary Analysis Report meets the Quality Assurance Criteria. • The Panel considers that the Supplementary Analysis Report fully addresses the Panel's concern that the original RIA did not 'establish the criteria which will be used to determine which providers will be regulated, and whether consideration will be given to exempting small or niche providers'. • The Panel also considers that the SAR goes some way to addressing the Panel's concern that the regulatory proposals would 'increase, rather than decrease, inconsistency of classification when considered across all household video content'. 	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	NO
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Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO
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2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
(a) The potential costs and benefits of this policy are considered in the Regulatory Impact Assessment of 9 August 2019: https://www.dia.govt.nz/diawebsite.nsf/Files/Proactive-releases/\$file/Cabinet-paper-Policy-proposals-Standardising-classification-for-Commercial-Video-on-Demand.pdf	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES
<p>(a) The overarching objective of the policy to be given effect by this Bill is to reduce the potential for harm to consumers from viewing inappropriate content. The success of this objective will rely on compliance with, and enforcement of, the requirements set out in the Bill. Specified CVoD providers will be required to rate and label their content to indicate what maturity level it is suitable for, and to provide information about content likely to offend. Poor compliance will result in ineffective or inconsistent labelling and will require use of enforcement provisions under the Act.</p> <p>The costs associated with using enforcement provisions to respond to non-compliance will depend on OFLC's funding structure. This is the subject of a broader funding review of the Classifications System which is underway at present and will report to Cabinet on proposed options by April 2020.</p> <p>(b) Compliance and enforcement of obligations under the Bill will primarily be overseen by OFLC. Users of CVoD services will be able to report non-compliance to OFLC, and the Chief Censor will have powers to 'call-in' content that is considered inappropriately rated, or content that is not rated at all. The Bill also provides for the Classification Office to monitor specified CVoD provider's use of self-rating systems and the costs associated with this may increase if there are high levels of non-compliance.</p> <p>Engagement with CVoD providers through consultation on this Bill indicates that they are willing to comply and "do the right thing".</p>	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
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Consultation has been undertaken with the Ministry of Foreign Affairs and Trade to ensure that New Zealand is giving effect to its international obligations.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

Iwi/Māori are not disproportionately affected by the provisions contained in the Bill and the Department of Internal Affairs considers that the Bill is consistent with the principles of the Treaty of Waitangi.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?	YES
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The Ministry of Justice has reviewed the Bill and has provided advice to the Attorney-General who will notify the Minister of Internal Affairs directly about the outcomes of this advice. The Department considers the provisions of this Bill to be consistent with the BORA.
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Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	NO
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	NO

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	NO
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External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p>The Department conducted public consultation on the following three options to standardise the classification of CVoD content from 26 April to 26 May 2019:</p> <ol style="list-style-type: none"> Option 1: Subject CVoD providers to the current New Zealand classification regime that applies to films (e.g. theatrical and DVD releases); Option 2: Establish a mechanism for CVoD providers to self-classify their content under the classification regime that applies to films; and Option 3: Identify enhancements to the two existing regulatory mechanisms (the NZ Media Council's voluntary scheme and the Chief Censor's "call in" powers) and operate them in tandem to achieve better outcomes. <p>Submissions were received from CVoD providers, key industry stakeholders, regulators, agencies and NGOs with work that relates to the wellbeing of children and young people. Submitters were generally supportive of Options 2 and/or 3, they did not generally support Option 1.</p> <p>Officials held a follow up workshop with industry on 10 July 2019 to discuss the CVoD definition and how self-classification would work in practice. Results from this consultation informed the recommended proposal (progressing with Option 2) which was confirmed by Cabinet on 2 September 2019.</p> <p>Officials also undertook targeted consultation from 16 September to 29 September 2019 on the CVoD definition supplementary analysis, to make it clear which providers will be captured as part of these new requirements. This supplementary analysis is included in the RIA that accompanies the Bill.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	YES
<p>The Department of Internal Affairs has worked closely with the Office of Film and Literature Classification to test the development of the policy contained in this Bill and to ensure that all proposals are workable.</p> <p>The Department of Internal Affairs also consulted with the following Government agencies in the process of developing this Bill:</p> <ul style="list-style-type: none"> Ministry of Health Ministry for Women Ministry of Foreign Affairs and Trade Te Puni Kōkiri Ministry for Culture and Heritage Ministry of Business, Innovation and Employment The Treasury the Policy Advisory Group at the Department of the Prime Minister and Cabinet (DPMC) Ministry for Pacific Peoples, Oranga Tamariki Ministry of Social Development The Broadcasting Standards Authority 	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
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Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
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Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
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Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO
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Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	NO
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Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	YES
<p><u>Amendments to Schedule 4 via Order in Council</u></p> <p>Section 150A(1) provides that the Minister of Internal Affairs may recommend an amendment to Schedule 4 via Order in Council which will have the effect of altering the list of persons who are subject to the provisions of the Bill, either by adding or removing a person from this list.</p> <p>Section 150A(4) of the Bill sets out criteria that the Minister of Internal Affairs must have regard to when exercising their power under Section 150A(1).</p> <p>Sections 150A(2) and 150A(3) provide that the Minister must consult with the Chief Censor when exercising their power under Section 150A(1).</p>	

4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>The power to make Regulations is already contained in section 149 of the Act.</p> <p>Section 46F(4) of the Bill adds to this power by providing that Regulations under section 149 may prescribe fees that must be paid by providers to meet the costs of the Chief Censor's annual review. This addition is necessary to enable the Chief Censor to recover the costs of monitoring and enforcing compliance with the provisions of this Bill.</p>	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO