

# PSGR

Physicians & Scientists for Global Responsibility

July 26, 2023

## Submission

Consultation: Safer Online Services and Media Platforms

### Submitted to the:

sosmp\_consultation@dia.govt.nz  
Department of Internal Affairs

### Address

PO Box 16164  
Bethlehem  
Tauranga 3147  
New Zealand

### Email

info@psgr.org.nz

### Website

www.psgr.org.nz

### Phone

Ph+64 27 505 0808

**PSGR would welcome an opportunity to speak to this submission.**

Physicians and Scientists for Global Responsibility Charitable Trust (PSGR) works to educate the public on issues of science, medicine, technology (SMT). PSGR work to encourage scientists and physicians to engage in debate on issues of SMT, particularly involving genetics and public and environmental health.

1. The PSGR does not support the Department of Internal Affairs' (DIA) proposal for Safer Online Services and Media Platforms regulatory system.<sup>1</sup> The proposals relating to a Regulator, a Code of Conduct and the 'safety objectives' are unsuitable and inappropriate and must be discarded. PSGR notes that the effect is to claim that regulatory activities can set aside peoples' constitutional rights. Thus, this proposal can be challenged to be unconstitutional – and the related statutory and regulatory system to constitute unlawful governmental overreach.
2. Such constitutional change would create extraordinary powers that would corrode and severely impair or destroy our constitutional democracy. The notional primary pillar of democracy is freedom-of-expression, which protectively guarantees other rights.
3. Such a statutory and regulatory system would create government powers over citizens' thoughts, conduct, through the power to prevent freedom of expression, including the effect of placing a chilling (restraining) effect on freedom of expression. It would breach the social contract between the governors and the governed. The effect may be to encourage conversations of a type that are associated with authoritarian regimes that can act freely as statutory tyrants.
4. We consider this proposal presents an opportunity for the abuse of power by the New Zealand government, and places immense power in the Department of Internal Affairs.
5. Those proposals contain direct potential for the regulatory powers to undermine free and frank speech in New Zealand. Arguably, the government has no constitutional right to advance any related statute into the House.
6. There is no need for a regulator nor a Code of Conduct. Existing structures and legislation continue to be fit for purpose as there are already limits on extreme content.
7. A robust democracy requires freedom of expression and that conflicting, contradictory and challenging information and opinion is shared by society. A major study of why nations fail or succeed was published in 2014 by Professor Fukuyama.<sup>2</sup> It found that a successful state requires three elements. These are competence; a strong rule-of-law; and democratic accountability.<sup>3</sup>
8. The effect would be to corrode our Nation's sense of community that provides 'the cement' that makes our rule-of-law work. Democratic government requires an informed citizenry who have autonomy to draw attention to arbitrary and tyrannical behaviour by governments and instances where the information produced by powerful (public and private) institutions may be narrowly contrived, inadequate for purpose, represent private interests, misleading or misrepresentative.

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<sup>1</sup> Department of Internal Affairs: Public Consultation: Safer Online Services and Media Platforms. <https://www.dia.govt.nz/safer-online-services-media-platforms-consultation>

<sup>2</sup> Chapter 3; Francis Fukuyama Political Order and Political Decay – From the Industrial Revolution to the Globalisation of Democracy Farrer, Straus and Giroux, New York, 2014.

<sup>3</sup> Acknowledgement:- Democracy in Aotearoa New Zealand : A survival guide by Geoffrey Palmer and Gwne Palmer-Steeds.

9. There is public good in sharing opinion and debating controversial information. Polarisation across communities and interest groups occur precisely when principles, values, contradictions, uncertainties and conflicts of interest are not brought to the surface. The veracity of a claimed fact, and sound judgement, can only arise when these issues are turned over.
10. In contrast, the DIA's proposals appear to reflect an intention to take explicit statutory powers to command peoples' thoughts and conversations.
11. We note that the [Online Services and Media Platforms submission form](#) is opaque and unsuitable for this consultation. The form prevents submitters from clearly expressing their opposition to this policy initiative.
  - a. The document fails to include the frank questions relating to whether the submitters support or do not support the proposal.
  - b. PSGR does not consider that the form's questions enable sufficient clarity of decision-making for either the public or the officials who then review the submission content, to understand the weight of public opinion.
12. The Safer Online Services and Media Platforms proposal reflects a 40-year trend of the administrative arms of western governments annexing statutory powers, that erode fundamental constitutional principles and freedom of thought and communication.
13. The Regulator will be a captured agency, i.e., unable to deviate from Cabinet and Crown policy:
  - c. The Regulator does not have inquisitorial powers to review information, nor judge the potential for information that might contradict the Government's position to be incorrect; misleading or unconstitutional.
  - d. There is little information and education available for officials to contradict the policy set by Cabinet and senior Ministers, few checks and balances for officials and no appeal processes for whistleblowers. New Zealand government officials are not broadly educated on principles of constitutional and administrative law. Our universities and research institutions lack scope to broadly research and critique government policy and would be reluctant to do so after four decades of funding that prioritises goals that align with economic growth.
  - e. There are no safe 'whistleblower' pathways for officials to counter and dispute government policy; and an explicit censorship statute would remove any role for the judiciary.
  - f. Due to the absence of pathways that are truly independent and impartial, that might speak up without fear of professional or personal harm, there is direct potential for abuse of power.
14. The independent regulator will ultimately reflect the political position and the institutional allegiances of the New Zealand government. Information that contradicts central government positions and messaging will likely become unwelcome and a

potential target - even if such information is intended to support democratic notions of accountability and transparency.

15. The independent regulator has no inquisitorial capacity to judge whether more nuanced and nebulous issues represent misinformation or disinformation. The independent regulator cannot possibly judge the weight of independent, public good science in complex, contradictory and highly dynamic situations; particularly if this information contradicts the financial or political position of the state, or of state-affiliated global institutions and/or private interests.
16. There is potential for arbitrary behaviour from the Regulator, not only in deciding on high or low risk content, but in allocating warning labels or in undertaking other activities which have potential to create a chilling effect of freedom of expression.
17. Therefore, who and how is the line drawn when freedom-of-expression and freedom to hold opinions may be disrupted? Who's values, who's 'facts' are most correct?
18. New Zealand Bill of Rights Act 1990 (s14):
 

“Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.”
19. International human rights law recognises a freedom to hold opinions, expressed in the International Covenant on Civil and Political Rights (ICCPR) as ‘everyone shall have the rights to hold opinions without interference.’
20. There is no precedent of a regulator in New Zealand that is charged to widely review information pertinent to his or her regulated industry/subject area, including international court cases which might draw attention to fraud and corruption. All regulators predominantly depend on private industry supplied and selected data to establish regulatory positions.
21. As such, the claim that the regulator would understand what information is correct, or untrustworthy or unsafe cannot be substantiated by the actions, expertise and experience of any regulator in New Zealand today.
22. Such a claim that content would be safer and in the best interests of society is speculative, while it is evident that the regulator has potential to act arbitrarily. This will potentially be increased should decision-making algorithms be incorporated in the back-end software.
23. While government officials widely discuss privacy, they do not discuss or review the evidence that restrictions on freedom-of-expression and related information management such as through algorithms may interfere and may contravene human rights.<sup>4</sup>
24. The proposal is frightening as it hands enormous powers of decision-making and rule-making to the Department of Internal Affairs (DIA).

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<sup>4</sup> Renieris, E.M. (2023). *Beyond Data: Reclaiming Human Rights at the Dawn of the Metaverse*. The MIT Press

- g. The powers and budget of the DIA have expanded considerably over the past decade.
  - h. The DIA supervises RealMe and the management of citizens private information across the backend of government.
  - i. This includes identity-proofing using biometric data. The Privacy Act does not limit the collection of biometric or identity information.
  - j. The DIA has potential for extraordinary information gathering and dissemination.
25. It is evident this is an initiative, in the very least, across Commonwealth nations, and that this is lead from the top down. UK's Online Safety Bill; Canada's Bill C-11 (Online Streaming Act); Ireland's Criminal Justice (Hate Crime) Bill 2020; and Australia's Online Safety Bill 2021 - passed in 2021.
26. There is increasing opacity and unaccountability in government actions. PSGR is concerned that governments are increasingly manufacturing consent for policy that increase the powers of central government, rather than letting new policy be led by the public interest.
27. Such manufacture of consent can be observed in the questions contained in the Safer Online Services and Media Platforms feedback document.
28. Governments are increasingly failing constitutional principles and any notion of democracy when they enact policy or hold a policy position that suppresses societies' freedom-of-expression to take issue with a policy position.
- a. Such conduct has been observed in mandating the BNT162b2 [mRNA] injection for members of society who were not at risk for COVID-19. By continuing to fail to methodologically review the scientific literature to assess why the Pfizer/BioNTech vaccine was neither safe nor effective as claimed by officials. Material contradictions for officials' 'safe and effective' claim resided in established scientific literature. That knowledge was ignored and branded 'misinformation' by governments.
  - b. The pandemic illustrated that governments actively silenced and restricted social media views for citizens, while agreements apparently required legacy media to not contradict the governments' position. This restricted information flows from expert scientists, interfering with the free and frank sharing of information.
  - c. The Disinformation Project (DP), funded by the Department of Prime Minister and Cabinet is an example of narrow-in-scope department. The DP does not have access to scientists working in New Zealand that review and analyse all *published* scientific and policy information to understand how the policy position of the government may be incorrect; may harm (rather than protect) citizens. The DP cannot possibly assess how dynamic and complex scientific information is, particularly in relation to the impact of technologies on human bodies that have broadly different vulnerabilities. One size can never fit all. Therefore, the DP is a political actor, and not a service to the public for its' protection.

29. The capacity for governments to act to protect human and environmental health, is directly related to robust administrative, Parliamentary and judicial systems that prioritise transparency and accountability, and prevent abuse of power by vested interests.
30. The protection of human and environmental health is directly associated with the frank exchange of information, and the guarding of research, science and information systems against corruption by political actors and vested interests who seek to limit enquiry, and prevent regulation that might limit an activity or policy outcome.
31. This proposal which harmonises with legislation in other Commonwealth nations is a top-down mechanism that reflects creeping authoritarian tactics across claimed democratic nations. Sir Geoffrey Palmer and Andrew Butler have stated:
- ‘The New Zealand style of government is already authoritarian.’<sup>5</sup>*
32. Therefore, such a proposal sets the stage for tyrannical conduct and abuse of power by both the nation state and the corporations that would follow regulatory instructions.
33. Without freedom-of-expression, inclusive of controversy, dissension and debate, there cannot be democracy. It is the role of the state to protect society from abuse of power and create the conditions where society might flourish. This is dependent on the free and frank exchange of information. PSGR proposes that the Safer Online Services and Media Platforms initiative is rejected and discarded.
- 34.
- “The peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.”

— John Stuart Mill, *On Liberty*

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<sup>5</sup> Palmer G. & Butler A. 2018. *Towards Democratic Renewal*. Victoria University Press. Page 8.