

PSGR

Physicians & Scientists for Global Responsibility

November 10th, 2021

Submission

Te koke ki tētahi Rautaki Matihiko mō Aotearoa
Towards a Digital Strategy for Aotearoa.

Submitted to the:

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PSGR would welcome an opportunity to speak to this submission.

Physicians and Scientists for Global Responsibility Charitable Trust (PSGR) work 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 Physicians and Scientists for Global Responsibility (PSGR) welcome an opportunity to contribute to the discussion document *Towards a Digital Strategy for Aotearoa*.¹ However our concern evolves around the discussion relating to mahi tika, or trust and the capacity of the state to institute both as policy and as obligations in law, in particular the obligations to:
 - 1.1. Ensure that Aotearoa New Zealand codified constitutional law has a platform for trustworthy digital developments;
 - 1.2. Ensure human rights are protected;
 - 1.3. Prioritise the data sovereignty of inhabitants of Aotearoa New Zealand;
 - 1.4. Protect against opportunistic activities by powerful institutional actors; and appropriately regulate and tax foreign entities.

Enforceable legal framework

2. Aotearoa New Zealand currently lacks the constitutional underpinnings to ensure that the suggestions in the Discussion Document would support the structuring of a ‘safe’ digital space for New Zealanders. That is, the Document provides little assurance that fundamental rights of the individual would be protected – and prioritised – especially against claims of a ‘generalised public interest.’
3. Any necessary protections must be assertable. The digital sphere is a tool – a public space, or commons. Constitutional certainty to underpin and protect from the potential dangers (erosion, weaponization, exploitation) inherent in this powerful new tool – is essential. Positive rights must be upheld – the state must provide good service.
4. Constitutional structure can provide the civic space essential for civic participation. As Bellamy acknowledged ‘membership, rights and participation [which] go together’.² – without enforceable rights
5. Importantly, this includes incorporation of principles considered the norm in constitutionalist thinking, the need to control, limit and restrain state power. The Crown has a responsibility to protect the individual.
6. Ignorance concerning the law and the constitution in New Zealand is an ‘eternal problem’. In a 2006 speech, following the Bill of Rights debate in the 1980’s Sir Geoffrey Palmer described the debate as being ‘bedevilled by ignorance on all sides concerning New Zealand’s civics’.³
7. There is no doubt that a constitutional approach will be complex,⁴ but it should also produce a robustness produces a structural integrity moving forward, effective future proofing.

¹ NZ Government. Te koke ki tētahi Rautaki Matihiko mō Aotearoa Towards a Digital Strategy for Aotearoa.

<https://www.digital.govt.nz/assets/Digital-government/Strategy/Towards-a-Digital-Strategy-for-Aotearoa-discussion-document.pdf>

² Bellamy, Richard. 2008. *Citizenship: A Very Short Introduction*. Oxford: Oxford University Press

³ Palmer G. The Bill of Rights Fifteen Years On. Keynote Speech Ministry of Justice Symposium: The Zealand Bill of Rights Act 1990

⁴ Lex et al. 2015. *Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights*. Berkman Klein Center for Internet & Society Research Publication 2015-15. <http://nrs.harvard.edu/urn-3:HUL.InstRepos:28552582>

8. Such a framework could be upheld by a codified constitution and reinforced Bill of Rights. The current Bill of Rights is a model with very limited insurance for rights protection.⁵ The Bill of Rights can have much broader application in fields beyond criminal law.
9. Where any challenges made we would recommend, in the public interest, establishing an inquisitorial system. The ‘inquisitorial model, because it relies on trained judges committed to determining the truth, is in theory less susceptible to appeals to passion and the obfuscatory practices of counsel, either for the prosecution or the defense.’⁶

Human Rights

10. We consider that the role of human rights have been undervalued in the Discussion Document, that protection of human rights must be stated at a high level in policy and that there should be a greater human rights-based discussion that threads through any future policy and legislation.
11. This is because the digital transition potentially places enormous amounts of data in the hands of foreign institutions (commercial and public sector) and in the hands of New Zealand government actors. This data can be weaponised for financial, social and political gain. As Michelle Bachelet the UN High Commissioner for Human Rights has stated:

“The digital revolution is a major global human rights issue. Its unquestionable benefits do not cancel out its unmistakable risks.”
12. We believe that *trust* is insufficiently articulated in the Discussion Document. There a lack of clarity regarding the obligation on the state to act transparently and accountably and to protect human rights in order to promote and protect trust.
13. Contemporary institutional environments have created deeply pragmatic science and research cultures that have been directed by state policy to prioritise research that can promote commercial and economic growth. For a very long time, government has defunded ethics-based research that questions power, explores ethics and in general, asks difficult questions about the commercial neoliberal and democratic-capitalism. Innovative initiatives that are complex and based on public good outcomes, are much more difficult to fund than initiatives that is directed towards a market outcome. This funding ‘skew’ has in turn, reduced a space for academia and research to explore the upstream drivers of harm, that could draw attention to the actions (and harms) of dominant commercial interests. Western English speaking nations have en masse produced a generation of researchers that have been directed by a system, to only ask questions, if it can serve economic interests.
14. Therefore it is not unexpected that *trust* would be presented in the Venn diagram as follows:

Trust: We have the right foundations to sell our products and services to the world with confidence, while all New Zealanders embrace the digital future because they feel safe and secure

⁵ Kelly, J.B. Judicial and political review as limited insurance: the functioning of the New Zealand Bill of Rights Act in ‘hard’ cases. *Commonwealth & Comparative Politics*, 49:3, 295-317, DOI: 10.1080/14662043.2011.582736

⁶ Myers 2011. Adversarial Counsel in an Inquisitorial System. *N.J.J. Int’l L.* 411:37:2:4

At a later stage, trust is defined:

Trust: Firm belief in the reliability, truth, or ability of someone or something. In the digital environment, people, organisations and communities need to have confidence that the environment they are using is safe and secure.

15. Digital strategies and digital identification systems are socially structured. They are a function of the questions that we ask. If we ask only economic questions relating to trade, or only questions that enable a digital system to be promoted to different cultural differences, this is how the potential frameworks will be structured. In the above text trust is the ‘confidence that the environment they are using is safe and secure.’
16. Safe and secure for whom? Will the responsible legal systems and related stewards protect the individual from the actions of government that might seek to impose behavioural nudges on that individual? To pay a bill, take a medical treatment, or even not speak out in a way that might differ from the state narrative? Will they protect the human rights of that individual from the actions of the state? Will choice and individual freedoms be retained in the government after the next, who may interpret their role in a representative democracy differently? Such questions may sound mean-spirited, or excessive, but they reflect ancient principles of justice and fairness.
17. The document discusses the requirement for a secure digital landscape and articulates those safe and secure digital environments ‘includes cybersecurity, online safety, and protection of personal information. The document emphasises that ‘Partnerships with the private sector, non-government organisations and the international community are needed.’
18. At this stage security is insufficiently articulated and a minor component of the vision moving forward, and not discussed at all with respect for human rights. Yet, trust, can only be a function of an appropriately stewarded and regulated security framework. While trust is a ‘great’ word to use, it infers a hope, rather than iterates at a meaningful level, the challenge of the construction of the ‘foundations’.
19. We emphasise this because stewardship and governance of the digital landscape involves more than a secure environment to ‘sell our products to the world with confidence’.
20. Aotearoa New Zealand has not been strong on public interest stewardship of new technologies which have arisen in the neoliberal era. Instead, there has been an historic tendency or techno-optimism that encourages self-regulation, often based on the fact that responsible New Zealand institutions are granted little funding to appropriately govern the governed. Nor have scientific funding streams been ring-fenced to undertake the appropriate research to ‘poke a stick’ at the technology and understand the ways in which there are off-target or unanticipated effects. We believe this document contains a similar *cyberoptimism* that envisages that a little bit of security might ‘do the job’.
21. At the same time, there has been a commitment to offshoring, sub-contracting and contracting out both the development of knowledge and the development of intellectual and physical assets. This perpetuates dependency by officials and elected members on external actors and ensures a deficit in local knowledge (and local autonomy).⁷

⁷ Mazzucato, M. *Mission Economy A Moonshot Guide to Changing Capitalism*. Penguin, 2021.

22. We quote Elizabeth Renieris:

‘governments are increasingly relying on the private sector for the provision of certain economic and social services and activities, including through the increasing privatization of education, healthcare, and other traditionally public sector-based functions. But increasing reliance on the private sector vis-à-vis digital tools and technologies does not provide an excuse to depreciate human rights. While businesses are increasingly cognizant of their independent responsibilities to respect human rights, states are ultimately responsible for human rights violations when procuring the products or services of private companies, and for providing effective accountability and oversight of the private sector. As a result, an expansive view of human rights in relation to digital technologies, including a heightened emphasis on ESCRs [economic, social, and cultural rights], is a vital safeguard against the eventual commercialization of everything.’⁸

23. Renieris has also drawn attention to the way that technology differently impacts by age, gender, culture and life stage:

‘It is widely recognized that women and minorities are disproportionately targeted, harassed, excluded, and silenced in the digital public sphere, while populations in the Global South either are prevented from exercising and enjoying a wide array of rights due to digital exclusion or else suffer human rights harms as a result of predatory inclusion.’

24. While there is an obvious narrative of inclusivity in the Discussion Document and the document has discussed the importance of improving access Māori through making technologies affordable and providing access to leadership, the Discussion Document has not drawn attention to Māori rights and sovereignty.

Data Sovereignty & Multinational Corporate Power

25. The Discussion Document does not address the asymmetric power (the power differential) between the potential actors (as large multinational corporations) that are envisaged as being part of a Digital Strategy. Stewardship and governance measures should be developed with one eye directed towards the other small nations with a legacy of democratic stewardship, who may also cast a ‘jaded’ eye on powerful players, such as the ID2020 cohort⁹.

26. Stewardship and governance ensures that both the architecture itself is created in a transparent process; that the funding is not only supplied to ensure best current technologies and skills are applied, but that ongoing funding is supplied to enable the digital landscape to evolve.

27. Multinational actors are much more able to take advantage of a future Digital Strategy through their capacity to take strategic high level action outside of the public realm. This includes directing funding to political parties, securing private meetings with officials and elected representatives, and exploiting trade agreements and tax regimes.

28. Jane Kelsey has recently discussed the challenges of the digital economy as cross border digital transactions and tax minimisation strategies are more easily exploited by multinational

⁸ Renieris E. Discussion paper. Human Rights and the Pandemic: The Other Half of the Story How our approach to technologies deployed during the Covid-19 pandemic demonstrates a need to recalibrate our view of human rights in the digital age. Carr Center for Human Rights Policy Harvard Kennedy School, Harvard University. Oct 2, 2021. Page 11.

⁹ ID2020 Alliance partners. <https://id2020.org/alliance>

corporations. These multinational digital service providers are effectively able to ‘control and operate the digital ecosystem from outside the country’.¹⁰ Kelsey has stated:

‘Digital trade rules are, on their face, neutral and apply equally to all parties. They purport to establish a level playing field that belies asymmetries of development, size, capacity, and access to technology. However, their practical effect is to enhance and entrench the market dominance of major developed countries and their digital firms, especially the US.’¹¹

29. In addition, international trade agreement rules often appear to increase power for the participating organisations; create barriers to contestation or public interest litigation; and uphold measures which constantly increase the economic and political leverage of the multinational corporations, while de-fanging governments. For example, Kelsey notes that the e-commerce chapter built into the Regional Comprehensive Economic Partnership (RCEP) is not enforceable. Trade agreements hold the potential to undermine work that is designed to empower, employ and encourage local innovation and design. Extraction of resources is the primary goal of data mining, and it cannot be inferred or implied that legal steps to ensure that the data, and ownership of the data is retained in Aotearoa New Zealand.
30. It is of the essence that a Digital Strategy speaks to this demonstrable threat, rather than implying or inferring that such issues will be handled.

31. In closing we make the following recommendations:

- 31.1. Enable and empower all people, including Treaty partners, to co-design Aotearoa New Zealand’s unique identity as a digital nation, and make this co-design process transparent and continuous. (Recommendation 1 of the Veracity submission summary¹²).
- 31.2. Entrench human rights obligations into the overarching policy and all related legislation, however we remain uncertain that New Zealand human rights are effectively underpinned by supreme law.
- 31.3. Digital environments are profoundly dynamic and politically vulnerable. Recognise the very strong relationship between information and power, and that all protections in place: political, legal, social and cultural, will be vulnerable to ongoing contestation and erosion by powerful predatory actors, and that stewardship and guardianship of data requires ongoing vigilance in order to preserve transparency, ensure accountability and promote public trust.
- 31.4. Establish a first-of-its-kind, high-veracity, digital infrastructure for the nation, based on Te Tiriti, to foster agile, fair, just, and equitable digital innovation. (from Recommendation 2 of the Veracity submission summary¹³)

¹⁰ Kelsey J. Reconciling Tax and Trade Rules in the Digitalised Economy: Challenges for ASEAN and East Asia. ERIA Discussion Paper Series No. 395. August 2021. Page 5

¹¹ Kelsey J. Reconciling Tax and Trade Rules in the Digitalised Economy. 2021 Page 14

¹² Within our reach: Becoming a global leader on a values- based and human-centred approach to digital technologies for a fair, just, and equitable digital future. A submission to the Digital Strategy for Aotearoa consultation by the Veracity Lab community.

¹³ Within our reach: Becoming a global leader on a values- based and human-centred approach to digital technologies for a fair, just, and equitable digital future. A submission to the Digital Strategy for Aotearoa consultation by the Veracity Lab community.

- 31.5. Ensure people remain in control of all their data and digital traces, and have their digital identity and assets protected, irrespective of where they use digital services, consistent with the principles of Māori data sovereignty. (Recommendation 5 of the Veracity submission summary¹⁴)
- 31.6. Establish a Ministry of Digital Affairs or other entity that becomes a custodian of the nation's digital architecture. Ensure that firstly, transparency and accountability is built in at a high level in the parent legislation, and that secondly, protection of human rights is built in at a high level in the parent legislation. (from Recommendation 6 of the Veracity submission summary¹⁵)
- 31.7. Create a separate Commissioner of Digital Privacy tasked with independent oversight of digital activities, and the funding and capacity to conduct investigations across all theatres of government.
- 31.8. Ensure all decisions and actions taken in government that are subject to Administrative Law are explainable, auditable, and appealable, in real time (or as close as possible thereto), with automatic digital traceability to relevant legal authorities, available to all New Zealanders. (Recommendation 7 of the Veracity submission summary¹⁶)
32. The underfunding of public law, of mechanisms to facilitate access to the law, and the underfunding of critical policy, sociology and ethics and the relationship of law (and wellbeing) – and education - produces a situation of ignorance that leads to weaker policy that is less likely to be protective of the individual. The underfunding creates a precarious situation where academics and researchers are less likely to engage with civil society, particularly when issues are controversial.
33. This is a timely document, however all future work must be sheltered under a broad constitutional framework that provides a line of sight to enable individual rights to be upheld.
34. For such an endeavour to succeed and for it to be robust, a state commitment to broadly resourcing a broader civic space – inclusive of digital expertise, law, ethics and an inter-cultural and future oriented perspective is required.

¹⁴ Within our reach: Becoming a global leader on a values- based and human-centred approach to digital technologies for a fair, just, and equitable digital future. A submission to the Digital Strategy for Aotearoa consultation by the Veracity Lab community.

¹⁵ Within our reach: Becoming a global leader on a values- based and human-centred approach to digital technologies for a fair, just, and equitable digital future. A submission to the Digital Strategy for Aotearoa consultation by the Veracity Lab community.

¹⁶ Within our reach. Veracity Lab community.