Building on the Content Regulatory Review

Ways to keep building on the work so far

Aotearoa New Zealand needs a content regulatory system that works for our people and communities in the 21st century. We need continuity, with institutions that continue to uphold media standards in the online environment, and we also need evolution, as we build capacity to understand emerging challenges and respond to them in ways that meet the needs of our communities over time. As well as addressing technological changes, this is also a once in a generation opportunity to put in place the foundations for a unique Aotearoa New Zealand approach to content regulation that centres Te Tiriti o Waitangi, which could help support broader and linked areas of work on social cohesion, dangerous speech and combating racism.

We support the overall direction of the content regulatory review and think work so far offers a good foundation to build from. DIA has heard from a range of perspectives during its targeted consultation, and we have appreciated the chance to engage with officials and other interested parties during this process. Out of these conversations, officials have mapped many of the key issues that our system of content regulation must address in coming decades. Documents shared for feedback point to a spectrum of policy responses, from education, to moderation, to censorship. We comment on these areas below. We welcome the effort to 'zoom out' and get an overview of the landscape.

With that overview in hand, we think the next stage of this work should develop options for an overall framework, but should also inform those options by focusing on different issues, areas, and actors which may need different approaches. Some areas pose relatively well-understood policy issues, while others are developing. For example, in the area of journalistic content, we see the potential to maintain continuity with current standards for balance, accuracy, and fairness, with work to adapt and implement these standards across all distribution modes. For other areas, such as moderating user-posted content online, both the standards that should apply and the mechanisms for upholding them are far less certain and likely to require iteration over time informed by community voices. Officials have worked hard to reach people, but we think a different vehicle is needed for deeper

ongoing engagement on key issues to inform both this review and the operation of the system it will put in place.

On this basis, we think an important next step in the area of online content moderation is work to build capacity across this system to address these issues with community, government, and industry. We think the steps to address capacity are (i) develop a credible forum to host and coordinate conversations (we propose a model in this paper to address that) (ii) resource community and experts to engage in this forum and (iii) set a clear expectation that online services will constructively engage with this forum or face consequences for not doing so. We think this forum should be hosted, resourced, and coordinated by government through a new independent body. Setting this up could run in parallel with and help to inform work by DIA officials under the review, while the review itself focuses on regulatory design work. At the conclusion of the review, this resource can form a useful part of the new system.

To advance this approach we suggest the establishment of an independent Aotearoa Media Commissioner, with an initial mandate to host and resource discussions among expert and community voices to frame key concerns, and then a broader dialogue with industry, media and other relevant stakeholders. The purpose of these discussions would be to develop statements of key issues such as online content moderation and Māori participation, and iterate proposals to address them in the content framework. This deeper engagement and collaboration would build a shared understanding of community needs and concerns. This approach could also offer a vehicle for coordinated dialogue on issues like misinformation which go beyond the scope of the content regulatory review itself. We think policy issues in online content moderation are a key area requiring this approach, and so recommend an Online Media Panel with that focus, sitting underneath the new Commissioner.

Within the terms of the review itself, a summary of our views is:

a) The framework needs overall leadership from a strong independent regulator

b) We support work to extend and combine content regulation with work on public education about related issues and the content system itself

c) To engage effectively at the next stage, stakeholders need to see a range of options and understand how these relate to current rules and institutions

d) On issues such as online content moderation, where understanding is still developing, deeper multi stakeholder engagement both during and following the review is vital. We think this can advance in parallel with the review, but it needs a home, coordination, and resourcing similar to the model we propose. A body like the Online Media Panel would be able to offer deeper and community-tested input at the next stages of the review.

To get in touch with us about the review and the perspectives we share here please email us on policy@internetnz.net.nz

Comment on the approach proposed by officials

We base our comments below on the slide deck dated 1 June 2022 shared to us by officials alongside targeted engagement conversations in June 2022.

Objectives

Materials shared for feedback set out objectives of **minimising harms caused by content**, **upholding freedom of expression and freedom of the press**, and **simplifying regulatory requirements** for content creators, providers and regulators.

While these are are all valid objectives, we think there are some gaps, in particular:

- **We think these objectives should include a positive aim**, such as "to support the benefits of a vibrant media environment" or "to uphold the public interest in accessible, reliable, and locally accountable content production" or both. We think a positively stated aim like this would help the public, regulators, and others to understand the aims of this process.

- Objectives of upholding freedom of expression and freedom of the press are important, but we think they are better treated as components of a positive goal rather than stated as independent objects in their own right. Talking in terms of freedom of expression tends to suggest limits on interventions rather than support for an environment where people can fully participate.

- The objective of **minimising harms** is ambitious and also ambiguous depending on the harms taken to be in scope. We think stating a positive goal as above would offer a richer set of interests to consider alongside the goal of harm reduction. We would also suggest more cautious wording such as "reducing harms" or "addressing harms". This would recognise that regulation can only achieve so much, and also that there is a spectrum of options for responding to harms.

- **The last stated objective aims at simplified regulation for content creators, providers, and regulators**. But our content regulatory system has impacts on people and communities across the whole of society, and other interests may weigh against simplifying regulation for the listed groups. This could be changed to something like "a clear and unified framework that upholds public interests in the content system".

We look forward to dialogue on the set of objectives.

Summary of proposed response framework

Officials working on the content system review have mapped the problems they have heard about in consultation so far, and propose an approach to regulatory design based on the standard model of responsive regulation, the Braithwaite pyramid which divides behaviour into a broad base of normal behaviour, a middle layer where regulation applies, and a pointy end which triggers criminal liability.
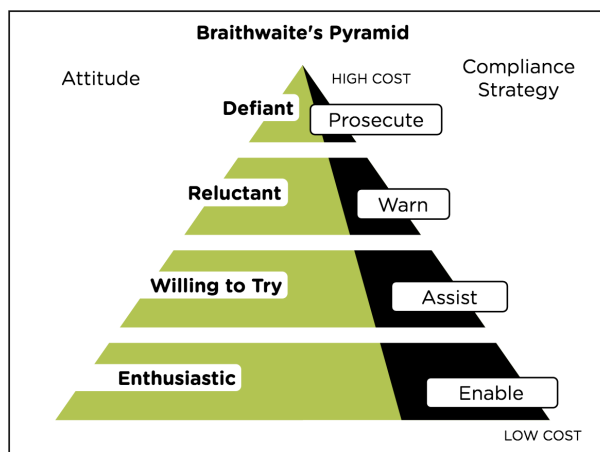
Here officials propose responses under three broad headings:

- **Education** (for the bottom of the pyramid), to support public understanding and informed judgements by consumers that help them to avoid harms;

- **Content moderation policy** (for the regulated middle), requiring media service providers to apply codes aimed at reducing risks of harm;

- **Censorship** (for the pointy end), with criminal and civil liability to deter the creation and sharing of extremely harmful content and its impacts.

They also propose a map of the eventual system, with a shared legislative framework setting baseline standards, and with specific roles and responsibilities falling to government, to a regulator, to media service providers (such as news organisations and online services), and to others such as educators, training bodies and non-government organisations to deliver to the overall framework.

We welcome the offered overview of the objectives, levers, and roles in terms of the pyramid of responsive regulation. We think it will be important to zoom in and understand how different policy levers should apply to different issues, systems, and actors as part of an overall framework. We also think it is vital to consider non-regulatory responses, and how to build in the flexibility to iterate and develop the system over time. Below we offer more detailed comments under each heading.

Education

We welcome consideration of education to build media literacy, critical thinking and resilience, together with an understanding of the harm that content can

cause. We hope that the education approach will also cover education on the content regulatory system itself, so that people are equipped to use the system.

We also welcome the indication that critical thinking and resilience education will be targeted at all ages and communities, not just school children. It is well established in the digital equity space, and is clearly evidenced from experiences such as the COVID vaccine roll out, that education should be provided through networks that are established and well trusted in communities. We strongly recommend that providers with an existing trust relationship be prioritised over specialist knowledge when choosing providers for communities.

We think education on the content system and regulation will be most effective if it is delivered by a body with unified and credible oversight of the content regulatory system, similar to the role of the Commerce Commission, the Electoral Commission, or the Human Rights Commission, with operational expertise alongside the educational role. Without this coupling of roles, it is likely that education will not track emerging issues.

Finally, we welcome the indication that education will encompass authors, creators and publishers as well. The Internet allows some individuals to have extraordinary reach and influence akin to established broadcasters, and the regulatory review needs to consider how to reduce harm from the content distributed by individuals who have this level of power. Education is a good lever to start with, but we think that the review should consider whether responses further up in the pyramid should also be aimed at these individuals. The review would benefit from combining education with operational expertise under one umbrella.

Moderation

Moderation of media service providers though industry Codes

This section focuses on media service providers (MSPs, a term with uncertain scope) and proposes a system where regulation mandates MSPs to achieve minimum standards set out in industry Codes, with the system to be overseen by a regulator. This system replaces a broad range of frameworks, standards, and industry bodies. We agree that it makes sense to unify these frameworks under one umbrella for ease of public understanding, upholding standards, and reporting of complaints. However, we think the activities under this broad heading may be different enough to require varied approaches going beyond the scope of industry specific codes, and understanding those requirements may require looking at features of each area.

For example, we think the public interest in access to quality news and reporting is well served by specific standards for news and journalistic content backed by regulation, such as the balance, accuracy and fairness standard for broadcasters. This is an area where we would prefer a level of continuity, levelling up these well established standards with unified oversight as part of a broader system, rather than an approach which might leave it to a multitude of industry bodies.

By contrast, the area of online services hosting user-posted content is newer and the approach to understanding community needs and developing effective responses (including developing standards and upholding them) is still developing around the world. Obligations on these services are more complicated because of their predictable and unpredictable impacts on how individuals can express themselves and participate for better and worse. We need coordination to develop shared expectations and consistent responses across the system rather than ad hoc moves. For example, a joined-up reporting process could help people to raise concerns and have the applicable standard apply regardless of source or medium. In this area, we think work on standards needs to be iteratively developed starting with a group of expert and community voices in Aotearoa. We propose a model to foster that work at the end of this document.

Other approaches to harmful but legal content

We agree that consistent and platform-agnostic industry codes can form a useful part of responding to the grey area of harmful but legal content. As above, we think it is important that these standards continue to reflect community expectations in each area, for example, applying higher standards for journalistic content.

However, we think options beyond industry codes for content moderation should also be on the table. Other responses to explore could include algorithmic transparency, counter speech programmes, community based interventions, victim support, data gathering, Police and intelligence work against particular harmful behaviours, or approaches based in competition, tax, data protection and privacy laws. Preserving space for these responses is one reason we propose a model that puts the framework under the umbrella of one robust regulatory body.

We recognise that the time and scope of this review are limited, and that these options require ongoing work and evaluation due to changes in the issues and the nature of the risks over time, as well as the efficacy and practicality of various responses. In a space where the answers are complex, evolving, and depend on the interaction of many diverse actors, what is needed is a process for ongoing iteration of responses by a diverse group testing ideas from a variety of perspectives.

We propose that the review put in place a framework (with mandate and funding) that allows a new combined regulator, the Aotearoa Media Commissioner, to play a central convening role to support the identification, iteration and implementation of further and ongoing responses to harmful but legal content. This convening role could involve setting up a forum of community voices, technical experts, academics and civil society, with the ability to call in industry where appropriate. We think early work on this could start now, beginning with work to gather and build capacity among experts and community voices.

This type of coordination will benefit the review and the broader ecosystem. Information needed to develop online content policy issues is spread across different agencies, industry groups, and under-resourced community groups. Coordinating the gathering and sharing of this information among these groups

would enable a shared understanding of problems, and the potential to quickly iterate regulatory and other policy proposals which are pre-tested for being effective, legitimate, and achievable.

Building a framework for ongoing input from diverse actors also opens up the potential to use this convening and discussion space in other ways to benefit the content regulatory system over time. For example, it could be used as an information clearing space where all actors can receive and discuss the same information, e.g., the latest misinformation threat, and coordinate on how to prepare for and minimise the harm. Media can be prepared to not amplify the information and instead publish stories that counter it; platforms can be prepared to prioritise reporting on the specific issue; community groups can prepare counter speech and seed it in their communities, and so on.

Censorship

Because it is highly sensitive and directly informs criminal liability, the work of identifying and responding to objectionable material requires specific expertise, support for staff, and independence from Police and the executive government. We think this work should remain a specialist function within a broader umbrella.

Blocking and filtering

Proposals for web filters were removed from the Films, Videos, and Publications Classification Bill last year in response to strong public feedback against them. We are concerned to see consideration of filters so soon after this, with no discussion of the technical or legitimacy concerns that were persuasive to the Select Committee and Minister in charge of the Bill. As we and others submitted, options like judicial takedown orders are a better option which supports due process.

Regardless of the form they take, coercive powers under the framework need robust oversight which is accountable to communities in Aotearoa. We think the best way to inform appropriate models for this is to continue working with communities and experts at the design stage and to find ways to resource deeper engagement. The model we propose below advances this type of engagement, as well as ongoing engagement to ensure the system is meeting community needs.

Roles and responsibilities

A key concern shared by expert and community voices is that there is no single, visible place to take concerns about harms from behaviour and content online. One of the key things we most want to see from this review is options for more consistent and unified reporting, oversight, and responses in the content system.

The map of roles and responsibilities proposed in the targeted consultation identifies a variety of different actors, including the executive government, industry bodies, media service providers, and organisations offering education. We did not see community representatives, academics and technical experts, whanau, hapu or iwi, or civil society in this map. If New Zealand is to formulate an effective and evolving response to harm from content, we need a multistakeholder approach to

draw on the full range of roles, expertise, and policy perspectives which matter for the Internet.

We agree that all of these different organisations will need to participate in this framework, but we think that participation must be coordinated by an overall regulator to avoid recreating the problems of multiple bodies, agencies, and reporting systems. Below we propose a new Aotearoa Media Commissioner to offer that leadership.

Mātāpono and consultation with Māori

We appreciate the effort by officials to consider Te Ao Māori, but based on the text and presentation of the Mātāpono in the targeted consultation, more participation by Māori will be needed at all stages of this review. We have provided more detailed feedback to officials with support from Te Puni Māori at InternetNZ.

We think our proposal below for an Aotearoa Media Commissioner could help to host and resource the deeper participation by Māori that this work requires, in a way that can run alongside and inform the regulatory review.

Next steps

The work so far offers an overview of the issues to address and a high level sketch for the design of a framework, but we think it also raises many questions.

At the next stage of this work, it will be important to set out a range of options for the design of the framework and the considerations driving these. These options should answer questions such as:

- Who would have overall responsibility and when would that work begin?

- Which existing standards and organisations would be replaced and which would continue? How would industry bodies be overseen?

- Thinking about online influencers as one example, which types of actors will be included in the moderation area? Will any types of content be excluded?

- How will community needs inform the system and its operation over time?

- What other models have been considered and rejected? Why?

We are grateful for the chance to hear from officials and to offer our feedback, and we would welcome the chance to talk more as this work develops.

A sketch of the Aotearoa Media Commissioner

The Aotearoa Media Commissioner would be a single independent body to oversee regulation of media standards and objectionable content in Aotearoa, resource community and expert engagement, convene and coordinate multi stakeholder discussions, and support public education in this area. Our proposed sketch of a model draws on the precedent of the Commerce Commission, Electoral

Commission, and the Human Rights Commission, which has a Chief Commissioner and area-specific Commissioners under one umbrella.

This model offers the benefits of a clear and unified front door for coordination, information, and reporting, while enabling policy work to progress in stages. The first job of the Commissioner would be community engagement to develop and iterate responses on difficult policy areas like online content moderation, while regulatory work advances on areas where options are clearer. We think a unified structure of this type would also be well placed to incorporate perspectives from Māori experts and communities in the design and operation of the framework.

Chief Media Commissioner

The Chief Media Commissioner would have overall responsibility for media standards, harms from objectionable content, and public engagement on these issues. Their mandate would include reviewing the operation of remaining industry bodies. As well as coordinating work across existing issues and policy levers, they would develop responses to emerging issues by resourcing dialogue, research, and information sharing anchored in community perspectives.

News Media Commissioner

The News Media Commissioner would be responsible for upholding standards for content that is presented as news coverage or journalism to audiences in Aotearoa, regardless of the medium by which this content is distributed. This role would replace the Broadcasting Standards Authority, and continue to uphold standards of balance, fairness, and accuracy, and perhaps transparency of funding. Their mandate would include upholding the public interest in quality news media as well as hearing complaints, suiting someone who has mana in journalism.

This role would unify independent oversight of all news media and journalism in Aotearoa, including oversight of industry standards bodies if any remain separate. It could also offer oversight and support to uphold the public interest in coverage of important matters that might otherwise be objectionable by journalists, researchers, and people across communities affected by these issues.

Classification Commissioner

The Classification Commissioner would replace the Office of Film and Literature Classification by classifying and responding to objectionable content, developing the focus and expertise to work with harmful content and to independently advise on both criminal prosecutions and broader systemic responses in this area. This would maintain continuity of expertise and approach in protecting people against harms from the most extreme violent, sexual, and other objectionable content.

Online Media Panel

Online content moderation poses unique challenges for content regulation. The Online Media Panel would bring together expert and community voices (sometimes with others e.g. industry, media) to develop and iterate options for this difficult area, with a view to the eventual appointment of an Online Media Commissioner to

oversee the area. When a Commissioner is appointed, the Panel could continue as a body to gather and coordinate information and perspectives on other difficult and emerging issues.

Other areas

We have proposed focus areas under the Aotearoa Media Commissioner to address areas that require special expertise like classification, which raise key public interest considerations like journalism, and which need iterative community engagement to develop new ideas like online content moderation. Other areas could be added, for example, a group to address Te Ao Māori perspectives and/or a Māori Co-Commissioner.