

## Submission on the Safer Online Services and Media Platforms public consultation

July 2023

1. Te Mana Whakaatu—Classification Office welcomes the opportunity to provide feedback on the Department of Internal Affairs' *Safer Online Services and Media Platforms* discussion document.

### Summary of our submission

2. Te Mana Whakaatu has been protecting the New Zealand public from harm for 30 years using our powers in the Films, Videos, and Publications Classification Act 1993. We recognise that the growth of the internet and social media demands a new framework "to enhance protection for New Zealanders by reducing their exposure to harmful content, regardless of delivery method".
3. The considerations that we have identified and explored in this submission reflect that wealth of experience in classifying content, researching harms, educating the public, and providing resources to empower New Zealanders to make informed choices to protect themselves and their tamariki and rangatahi.
4. The Safer Online Services and Media Platforms proposals present a significant opportunity for Aotearoa to address these challenges. We broadly support this kaupapa and are committed to ensuring that a new content regulatory system will be fit for purpose in the digital age.
5. In particular, we support:
  - 1) A code-based system
  - 2) Greater emphasis on education, research, and engagement
  - 3) A clear and accessible complaints process - either 'one front door' or 'no wrong door'
  - 4) Retention of some legally enforceable age restriction
  - 5) Stronger enforcement powers
  - 6) Inclusion of specific harms in the new Act
  - 7) Clear distinction and 'distance' between the regulator and the censorship function

## Who we are

6. Te Mana Whakaatu – Classification Office (Te Mana Whakaatu) is an independent Crown entity and content regulator. Our roles and functions are set out in the [Films, Videos, and Publications Classification Act 1993](#) (the Classification Act). Broadly, we:
  - classify physical content (such as films released in cinemas or on DVD) and material submitted by Crown agencies and the courts. The Chief Censor has statutory powers to restrict and ban some harmful content
  - provide information, education, and resources to empower New Zealanders to make informed choices about what they, and their rangatahi and tamariki, watch
  - support streaming services to rate their content for New Zealand viewers
  - produce research and practical resources to help New Zealanders understand the classification system
  - provide a complaints and inquiries service to the public
  - maintain expertise in countering violent extremism to support the wider government response.
7. The way New Zealanders access and consume content has changed radically since we were established in the 1990s. The challenges that harmful online material present for a traditional classification-based regulatory approach are numerous and significant.
8. The growth of the internet and social media has led to an explosion of content, much of which is user-generated. Engagement-maximising algorithms amplify harmful content, and bad actors can exploit these advancements to increase the reach and spread of harmful material, leading to real-world harm. Violent extremists, for instance, use these tools to promote their ideologies and recruit new members. Moreover, young people are often exposed to traumatising content without adequate resources to cope with the emotional impact.
9. People seek, and are served content in a variety of ways, and it is important that the regulatory system recognises and caters for this. People may actively choose to watch commercial content, but they want to know what is in it beforehand. Sometimes people intentionally search out harmful or illegal content online. In other cases, a person may watch one online video and then find themselves served harmful content relating to eating disorders. And then there are players who intentionally seek to cause harm, for instance by including a violent suicide video in the middle of a cartoon tamariki would watch.

10. Internet, social media and their impacts could not have been contemplated when the current Act was created in an 'analogue age', and we agree with the objective of a new framework as described in the discussion document: "to enhance protection for New Zealanders by reducing their exposure to harmful content, regardless of delivery method".
11. Recent changes to the Classification Act have supported us in continuing to regulate content effectively in the 2020s. However, the challenges presented by our online lives and exposure to harmful content are such that new tools and approaches are needed to empower New Zealanders to consume their content safely, and to protect rangatahi and tamariki from harm.
12. Globally, there have been efforts to tackle illegal content, but much more remains to be done. Lawful content that can be harmful for younger viewers (such as extreme violence, self-harm, pornography, and mis- and dis-information) is readily accessible and is being accessed by tamariki and rangatahi.
13. The Safer Online Services and Media Platforms proposals present a significant opportunity for Aotearoa to address these challenges. We broadly support this kaupapa and are committed to ensuring that a new content regulatory system will be fit for purpose in the digital age.

*Take care of our children, take care of what they hear, take care of what they feel, for how the children grow, so will be the shape of Aotearoa. – Dame Whina Cooper*

## What we know about content harm

14. It is common for New Zealanders of all ages to see harmful content on screen and online. It can be difficult to avoid, and can impact negatively on wellbeing. When we survey the public, most people say they are worried about the effects of harmful content, whether in movies, shows, games, and social media, or in other online spaces.
15. Our research shows that New Zealanders find it difficult to protect tamariki and rangatahi online, and that most people support regulating harmful online content. 53% of respondents to our [2022 survey](#) had seen online content that promotes or encourages harmful attitudes or behaviours (such as discrimination, terrorism, or suicide). 33% had seen content that directly promotes or encourages violence towards others, and 20% had seen online content that encourages some form of self-harming behaviour.
16. Evidence from New Zealand and overseas, and our own experience classifying content, tells us that certain types of content can cause serious harm to individuals and injure the public good.

17. This is a growing area of study with more research coming in. The US Surgeon General's recent [report](#) *Social Media and Youth Mental Health* outlines the indications that social media presents real risks to the mental health and wellbeing of rangatahi and tamariki.

*Harm from content manifests in different ways*

18. Viewers can be disturbed or shocked by distressing material, suffering mental anguish and adverse psychological experiences. Viewers can be triggered to relive their own past trauma so rely on content warnings to make decisions about what to watch – when those warnings are available. Our recent [public survey](#) showed that most people think age ratings (79%) and content warnings (74%) are important when choosing a movie, show, or video game for rangatahi and tamariki.
19. Viewers may experience attitudinal harm from consuming content that depicts degrading, dehumanising, and demeaning conduct – including sexual conduct. Some content can create or reinforce negative attitudes toward women and trans people, and perpetuate negative sexual stereotypes, or normalise extreme and unsafe sexual practices.
20. Viewers may be encouraged by content to cause serious physical harm to themselves or others. They may also be encouraged to treat or regard themselves or others as degraded, dehumanised, or demeaned. Viewers may develop, normalise, or have harmful and antisocial attitudes reinforced, become desensitised to the effects of real-life violence or diminish their capacity for empathy and compassion.
21. Viewers may be encouraged to imitate content that glorifies risky, unsafe, or illegal behaviours – such as drug use and disordered eating. Adolescent girls in particular are at risk from content that perpetuates body dissatisfaction, disordered eating behaviours, social comparison, and low self-esteem.

*Tamariki and rangatahi are especially vulnerable to harm*

22. Research into brain development from the [Collaborative Trust](#) shows that tamariki and rangatahi are disproportionately susceptible to harm because of their general levels of emotional and intellectual development and maturity. They have not yet developed the cognitive capacity to critically evaluate certain information. Exposure to age-inappropriate content can impair their mental, emotional, and social development.
23. [Tamariki can't always distinguish between what is real and what is not](#). At 6-8-years-old, only 10% fully understand the difference. This increases to 36% by the time children reach their teenage years.
24. The 2020 [Children's Media Use: Research Report](#) by the Broadcasting Standards Authority/NZ On Air found that:

- 87% of tamariki have seen content on programmes and shows that has upset them. 72% of them have seen something online that has bothered them.
- Tamariki found sex and nudity, violence/torture, and animal harm most upsetting. Parents have reported negative impacts on children's behaviour: 20% had nightmares or difficulty sleeping, and 19% copied aggressive behaviours.

25. Netsafe's [Ngā taiohi matihiko o Aotearoa – New Zealand Kids Online](#) report found that:

- Almost 50% of rangatahi have been exposed to potentially harmful online content. 28% of rangatahi that were exposed to this sort of content said they were fairly or very upset by the experience. This emotional response was significantly higher for girls (38%) than boys (18%).
- 25% of 9 to 17 year-olds said that they had been bothered or upset by something that happened online in the last year. 46% of them said they were fairly or very upset by that online experience. This response was more common among girls and 12 to 17 year-olds.
- Nearly 20% of 13 to 19-year-olds experienced an unwanted digital communication (such as accidentally seeing inappropriate content online) that had a negative impact on their daily activities. 80% of those who reported experiencing an unwanted digital communication said they had an emotional response to it.
- 20% of teenagers had accessed self-harm material and some (17%) "how-to-suicide guides". 15% had looked for information on "ways to be very thin".

#### *Pornography influences young people's views and sexual behaviours*

26. Our 2018 research into [Youth and Porn](#) found that 25% of young New Zealanders first saw porn by the age of 12, and 71% of them were not seeking it out when they first saw it. 75% had viewed porn as an online learning tool and 20% have tried something they have seen. 69% have viewed violence or aggression in porn and 72% have seen non-consensual sex.

#### **What our Youth Advisory Panel says:**

27. Since 2018, Te Mana Whakaatu has engaged a Youth Advisory Panel (YAP) as part of our wider youth engagement strategy. The YAP is a diverse group of rangatahi aged 15 to 19, who provide input into our classification, research, and information work.

28. We were delighted to facilitate the YAP's engagement with the Safer Online Services and Media Platforms proposals. They said:
- **Young people want to control what they see on social media**  
Our youth advisory panel said that it was important for young people to make their own decisions about what they should or should not experience online and, in many cases, they are already trying to influence what they see. For example, they take care with what they actively 'like' on social media to shape algorithmic outcomes. They said that current complaints processes were inconsistent, and complaints needed to be dealt with faster.
  - **Young people want more information about social media practices**  
The Panel felt that more transparency is needed on platforms, and information needs to be presented well and clearly, for example, to identify if a post has used a filter or has been photoshopped.
  - **Young people feel that platforms have a responsibility to keep them safe**  
The Panel felt that platforms need to take more preventative measures to keep users safe. "13-year-olds and 18-year-olds shouldn't be shown the same content".
  - **Education, especially of older people, will be key**  
Our YAP members said that online content can impact young people, and issues such as disordered eating can become a part of their offline reality. Education, especially of older people, on the ways that platforms work and are used will be important to support young people: "Parents still don't know how it all works".
29. These concerns raised by Te Mana Whakaatu YAP are consistent with [2023 research](#) with young people conducted by Te Hiringa Mahara – the New Zealand Mental Health and Wellbeing Commission. Their research found that "social media increases young peoples' interaction with content that is not intentionally harmful but can cause distress because of the volume of information and the difficulty of shutting it off". The young people interviewed for that research were "clear in identifying the responsibility of platforms in regulating what is published. They want to see more efforts to regulate material, protect young people from harmful messages and provide support for developing the skills and tools to understand what they see and hear online."

## Safer Online Services and Media Platforms proposals

30. Here are our specific points about the proposals, and we welcome further engagement with Te Tari Taiwhenua as more detailed policy analysis is undertaken. We will support the process to ensure that any new legislation, codes, and functions are developed from a strong evidence base – be that our own research,

international experience, or the institutional knowledge held by our expert team, who have been working in this space for a long time.

#### *Independent regulator*

31. It is important that there can be no perception of political interference in the operational regulation of content. It is vital that the public trust and have confidence in the system to keep them safe, uphold their rights, and treat them fairly.
32. Government department Chief Executives can have statutory responsibilities which they must deliver independently from their responsible Minister however, given the close role departments have supporting and advising the government, independence is best assured in the form of an independent entity similar to Te Mana Whakaatu or the Broadcasting Standards Authority.
33. We support the concept of a regulator responsible for approving, implementing, and monitoring codes of practice, which is at arm's length from the government.

#### *Codes of practice*

34. The entertainment and social media industries provide services to almost all New Zealanders. The internet benefits us all, but also has the potential to cause harm to society and individuals. Like any for-profit industry, the public expect content providers to work to a reasonable standard of service and transparency.
35. Codes of practice are used to regulate many industries and, as a model of regulation, are successfully implemented in Aotearoa markets. We note that some social media providers have already chosen a code ([\*the Aotearoa New Zealand Code of Practice for Online Safety and Harms\*](#)) to hold themselves to account.
36. Codes of practice also have the advantage that they can be adjusted to respond to new events and developments. Content provision is so closely related to technological change that any successful form of regulation must be able to respond to changes in that environment.
37. We support the use of codes as they are core to the proposed regulatory system.

#### *Self-rated content*

38. As a result of changes to the Classification Act in 2020, specified Commercial Video on Demand (CVoD) providers can now apply age ratings and content warnings to new content that they stream.
39. Although this system is relatively new, the implementation has shown that providers are capable of consistently rating their own content against our framework and requirements. We support this self-rating approach being expanded from streaming services to all entertainment content available in Aotearoa.

40. For New Zealanders it is important that the ratings applied by entertainment providers are broadly consistent so they can rely on those ratings to make informed decisions. Currently the Chief Censor must approve, and annually review, the rating systems of each streaming service. A future independent regulator must have the same responsibility and functionality to ensure this consistency.

#### *Education, support, and research*

41. A crucial element of the current system is the requirement in the Classification Act for Te Mana Whakaatuto have an Information Unit. This function:
- provides us with research services that enable us to perform our functions effectively
  - disseminates information to the public about our functions, powers, and the procedures for classifying publications
  - receives and responds to inquiries and complaints.
42. In this way, we empower New Zealanders to make their own choices about what they and their whānau consume.
43. Changes to technology and the way people communicate and consume content has exposed New Zealanders to greater risks of harm. We must understand how the public is experiencing these changes to deliver the best service we can. Over recent years, we have conducted research on young people and pornography, mis- and dis- information, and the key concerns people have about the online world. Each research project has supported communities who work to prevent harm – in Aotearoa and around the world.
44. The independent regulator proposed in the discussion document must have a key role in proactively identifying and understanding content harm and educating the public. We recommend that this function of the independent regulator is included as a core requirement in any new legislation.

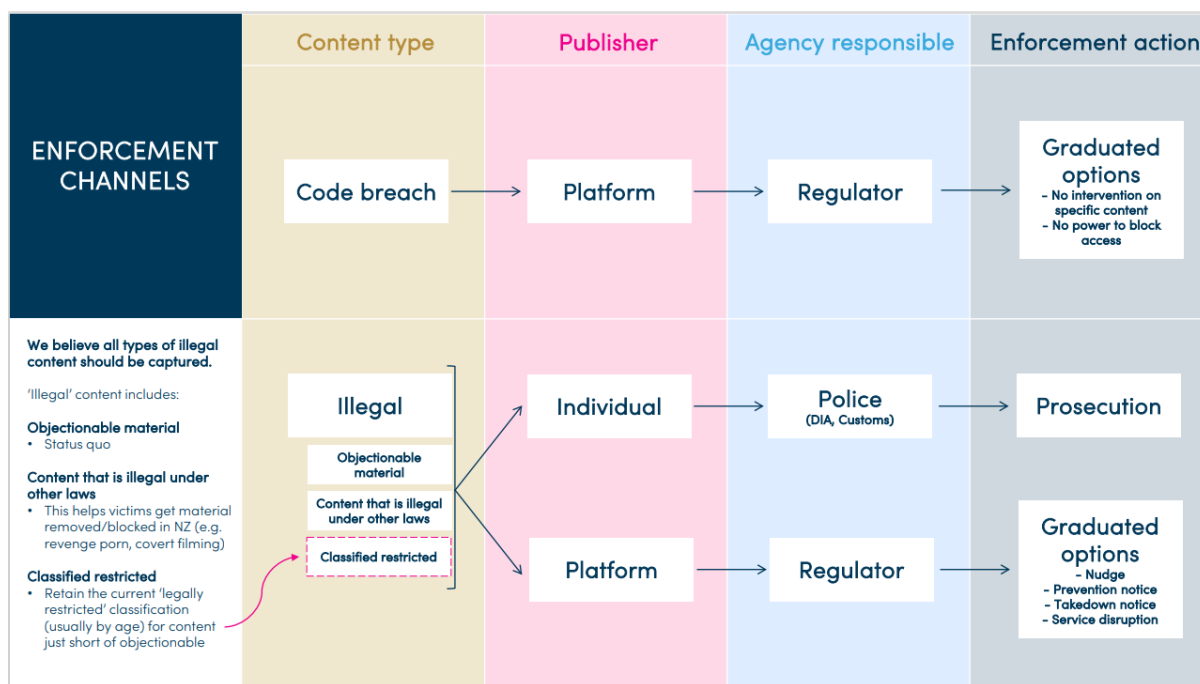
#### *Removal of legally enforceable age restriction*

45. The discussion document makes 2 related proposals:
- a. to replace legal restriction of commercial content with age guidance
  - b. to keep objectionable what is objectionable (illegal) under current law.
46. Currently, the Classification Act authorises us to restrict commercial content by legal age and to classify publications as objectionable. In effect, an R18 age restriction is simply a classification that says the publication is “objectionable except if the availability of the publication is restricted to persons who have attained 18 years”.
47. We support the proposal that commercial films and shows move to a code-based, self-rating framework similar to the existing CVoD regime, where age ratings



applied by the industry do not attract a legal age restriction or 'R rating'. However, enforcement agencies routinely refer pieces of content to us, almost exclusively found online. While not quite meeting the very high test for objectionable, this content poses a high risk of harm if not restricted appropriately. In most cases, the appropriate legal restriction is from children and young people. Examples of this type of content include real-life extreme and graphic violence, killings, and suicides.

48. We support a future censorship function that retains the ability to classify specific (as opposed to classes of) publications as objectionable (with certain exceptions). We recommend that the regulator have the full suite of options available to enforce platform compliance on both objectionable content, and specific pieces of content restricted by the censorship function, as set out in the diagram below. We understand that the options to deal with persistent non-compliance by platforms are proposed to be different, depending on whether the non-compliance relates to a breach of a code or a breach of New Zealand law.



49. We would also support the independent regulator (or other parties) being able to submit content from content providers to the censorship function to determine whether the content is either objectionable or requiring legal restriction. For content providers making legally restricted content available to the public, the independent regulator may, for example, establish a code of practice that requires age verification.
50. This would mean that content such as pornography would not be "restricted" to adults but would be rated 18. We would anticipate that the independent regulator would require in a code that suppliers of such material would provide for protections for tamariki and rangatahi, such as age verification systems.

51. Similarly, while Te Mana Whakaatu currently specialises in content classification according to the criteria in the Classification Act, a future content regulator must have the legislative authority to co-ordinate enforcement action in response to any illegal content online – such as threats to kill. This would mirror the concept of ‘parity of illegality’ in the Digital Services Act (European Union), which ensures that the same rules apply to illegal content online and offline. It defines illegal content as any content that violates the laws of the European Union or any member state.

*Enforcement, investigation, and prosecution of individuals*

52. Some people use online platforms for sharing illegal content, such as Child Sexual Exploitation Material (CSEM) or content promoting terrorism and extreme violence. The discussion document proposes that those people are investigated, apprehended, and prosecuted by law enforcement agencies and not the independent regulator.
53. We support this function remaining with law enforcement. An independent regulator need not have the additional responsibility for investigation and prosecution when law enforcement agencies already have the specialist skills and powers. However, the independent regulator may well have questions for the content provider as to why such content was allowed on its platform, and pursue a breach of a code of practice.

*The censorship function must remain independent of the regulator*

54. There are a number of proposals for the placement of the censorship function, including within the independent regulator.
55. The censorship function must be clearly independent from the regulator. There are two main reasons for this:
  - a. The censorship function is quasi-judicial. The determination that a publication is objectionable can prove a large part of a criminal charge. The defendant facing such a criminal charge, and the prosecution bringing the charge, must have complete faith that such a decision has been made independent of any other influence.

The independent regulator must have the ability to engage with content providers, reach agreements, and provide guidance, support, and information. Defendants and prosecutors may feel that the level of engagement required by the regulator is inconsistent with being independent of influence.
  - b. In many countries, the courts determine whether a publication is illegal. An element of suspicion may exist where a government agency holds the function of ‘censorship’. The regulator being New Zealand’s censor will not

assist in its international engagement – including engagement with the content platforms it will seek to regulate.

56. Te Mana Whakaatu supports the censorship function being separate from the regulator; that may be as a standalone Crown Entity, or it could be as a tribunal or authority like those administered by the Ministry of Justice. Importantly, the censorship function must continue to be administered outside of the judicial system to avoid leaving determinations of objectionability to the courts. Classification of content, particularly objectionable content, requires specialist skill and expertise, consistency, and predictability, and must be done in an expedient manner – particularly when there is a risk of illegal content going ‘viral’. There must also continue to be an appropriate appellant body for classification decisions.

*An accessible complaints function is critical*

57. Consumers of online content, and particularly rangatahi and tamariki must be at the centre of a future system. Accessibility of information, support, and complaints mechanisms are fundamental to a successful regime.
58. Complaints from the public about content may be an early indicator of a systemic issue, and the regulator must be attuned to what is concerning the public. It may be unnecessary to impose a uniform complaint process on all types of platform, but the independent regulator must ensure that each group of providers has a clear and accessible complaints process. Consumers must either have ‘one front door’ or ‘no wrong door’ to get a considered response to their complaints. New Zealanders must know where to go – whether they have experienced content harm or communication harm, such as harassment, online. This means that the regulator, or at least the regulatory system, must seamlessly interface with the [Harmful Digital Communications Act 2015](#).

*What the Act must include*

59. Some things need to be included in an Act rather than in guidelines or codes. We consider it important to:
  - a. **Identify specific harms**

The Act must include the specific harms that the regulator wants to protect New Zealanders from rather than being set out in specific codes of practice, guidelines, or government regulations. This approach works well in the existing Classification Act and is being followed overseas. E.g. in the Irish [Online Safety and Media Regulation Act 2022](#), specific harms of bullying and humiliation, and content that promotes or encourages self-harm, suicide or an eating disorder, are all defined. By putting the specific harms into the Act, Parliament would:

- i. give the independent regulator a purpose, and authority to act, to prevent those specific harms
- ii. make Aotearoa New Zealand's position on what is harmful clear, in particular to overseas providers who wish to deliver services to New Zealanders.

Legislation can set minimum expectations for the industry and the regulator, and prescribe types of harm that all codes need to address. Codes of practice can set expectations for *how* those harms must be mitigated, eg, sufficient measures to restrict access to adult content such as pornography.

#### **b. Establish the regulator's powers**

If the regulator fulfils the role envisaged in the discussion paper, its powers will need to be clearly set out in the Act. It is frustrating that some illegal content remains available to the New Zealand public even after all available regulatory responses have been applied. We endorse the takedown powers proposed in the document, but submit that those powers appear to be the same as the current powers of Te Tari Taiwhenua. We are aware of cases where takedown orders have not been successful in protecting New Zealanders from harmful, and illegal, content, because the hosts of that content are overseas.

In particular, we advise that further work is needed to explore:

- i. A power to compel a provider to block New Zealand access to illegal content where a takedown notice has not been successful.
- ii. Service disruption orders: If a provider has ignored a takedown notice, the authority to get a court order to require third parties (for example, ISP providers) to block New Zealand access to illegal content.
- iii. A power to obtain information from providers that may be necessary for the regulator to fulfil its functions.
- iv. The regulator having authority to levy fines for ongoing non-compliance with codes. We note that overseas, fines have to be significant to have any impact given the annual revenue of some of the content providers.

#### **c. Protections for victims of abuse**

We routinely classify as objectionable CSEM submitted by Police and other law enforcement agencies. This allows the courts to hold some offenders to account, but it does not remove that CSEM from the internet. The voluntary [Digital Child Exploitation Filtering System](#) administered by Te Tari Taiwhenua is an important and impactful tool to prevent access to this

illegal material in New Zealand but, again, it does not remove it from the internet.

In June 2023, at an Expert Group Meeting hosted by the United Nations Office on Drugs and Crime, [Aotearoa joined 71 countries](#) calling to support urgent efforts to proactively remove and combat online child sexual exploitation and abuse material.

Our concern is that the current proposal will not advance the capacity of Aotearoa to respond to this call to action. The Act must specifically authorise the independent regulator to require content providers to proactively identify and remove CSEM content from their services, and give the regulator sufficient power to ensure that occurs.

We work with the Canadian Centre for Child Protection (C3P) on its [Project Arachnid](#) programme to identify and remove CSAM from the Internet. C3P has indicated they would be happy to provide information for, and workshops with, the team working on this reform. We would be happy to facilitate this important kaupapa.

**d. Reflect Te Tiriti in the new regime**

The discussion document does not describe how specific Māori rights or interests will be affected by the proposals or how best to protect them. We expect Te Tari Taiwhenua will work with Māori to design policy that protects their interests and to understand what mitigating content harm might look like in te ao Māori. We are keen to support this process.

It is important that any future independent regulator steward the content system in Aotearoa for the benefit and protection of the rights of Māori. It must uphold the Crown's Te Tiriti responsibilities, and apply those expectations to the services it regulates through codes of practice, whether or not those services are based in New Zealand. A clear expression of the role of the regulator in legislation would be the best place to set out both the general expectation to act in accordance with Te Tiriti principles, and to describe how specific responsibilities will be managed (such as complaints).

In addition, the Office for Māori Crown Relations – Te Arawhiti provides [guidance](#) about non-legislative measures for Te Tiriti-based policy design that we think will be essential to the design of the new system, e.g. investing in programmes that are developed in partnership with Māori and for Māori, and sharing delivery functions and responsibilities with Māori partners.

*Aotearoa New Zealand's regulation must be able to respond to overseas reform*

60. Regulation of content providers is a global issue. Regulators in Aotearoa will be dealing with multi-national content providers who in turn will be dealing with regulators from many countries.
61. Many countries have reformed, or currently are reforming, their regulation of online content. These include codes of practice for content in Australia (notably for social media), the Online Safety Bill progressing through the United Kingdom Parliament, and recent legislation passed in Ireland and the European Union.
62. The independent regulator must be sufficiently authorised to engage, on behalf of Aotearoa, with overseas jurisdictions and be able to propose further reform if overseas experience warrants it.

### Ongoing support to Te Tari Taiwhenua

63. We appreciate the opportunity to make these submissions and the offer of an ongoing dialogue during the policy process. In addition to this document we:
  - a. have prepared, a more detailed response to the 26 questions posed in the discussion document to assist Te Tari Taiwhenua policy team that is working on the proposals
  - b. have prepared a number of deep-dive documents, which may support work on future policy advice are happy to facilitate meetings or workshops on any specific issues, including with C3P, our YAP, and other stakeholders, (including our expert team).