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## SUBMISSION ON THE REGULATORY REFORM FOR SAFER ONLINE SERVICES AND MEDIA PLATFORMS

### About the Submitter

1. Founded by David Farrar and Jordan Williams in 2013, the *Taxpayers' Union's* mission is Lower Taxes, Less Waste, More Accountability.
2. We enjoy the support of some 200,000 registered members and supporters, making us the most popular campaign group championing fiscal conservatism and transparency. We are funded by our thousands of donors and approximately two percent of our income is from membership dues and donations from private industry.
3. We are a lobby group not a think tank. Our grassroots advocacy model is based on international taxpayer-group counterparts, particularly in the United Kingdom and Canada, and similar to campaign organisations on the left, such as Australia's *Get Up*, New Zealand's *ActionStation*, and *Greenpeace*.
4. The Union is a member of the *World Taxpayers Associations* – a coalition of taxpayer advocacy groups representing millions of taxpayers across more than 60 countries.
5. Nothing in this submission is confidential and we would welcome the opportunity to discuss this submission with you further.

### Executive Summary

6. The *Taxpayers' Union* does not support the proposals.
7. Whilst the proposals to minimise harm to children are laudable, the proposals go too far.
8. Critical terms used in the consultation paper (the Paper) are too poorly defined to be of any use. For example, what is meant by “interferes in democratic processes”? Harmful is

defined<sup>1</sup> as a loss of damage to rights, property or physical, social, emotional and mental wellbeing. The Paper also states that being harmed is distinct from feeling offended<sup>2</sup>, but provides no clarity as to how that distinction is to be determined, especially as being offended can damage social, emotional and mental wellbeing.

9. Similarly, unsafe content is defined as where there is a risk of harm occurring if that content was experienced by a person. The Paper develops an approach to managing this risk, but it does not look convincing.
10. There has been no clear gap analysis identifying where existing legislation and standards fail to address the concerns raised in the Paper. Whilst there is much discussion about perceived gaps, some of this relates to a lack of enforcement and not a failure of an Act or standard to address the potential harm.
11. These proposals would cover the work of the *Taxpayers' Union*. A primary purpose of our work is to keep our 200,000 registered members abreast of matters affecting them, which we do with regular newsletters, campaigns and ad hoc events. It would seem that the *Taxpayers' Union* meets the proposed definition of a "regulated platform<sup>3</sup>".
12. However, our content should not be of interest to any regulator as it is not aimed at children, does not contain any libellous, discriminatory, racist, hate speech or otherwise unsafe or harmful content. Our activities focus on matters of taxation, government waste and government accountability and so contribute greatly to democracy in New Zealand. Developing terms of service, operating policies and then demonstrating their compliance with the relevant codes through regular audits and transparency reports<sup>4</sup> is a complete waste of our members' and supporters' contributions and will achieve precisely nothing.
13. The underlying priority given by the Paper to contested concepts such as "disinformation" is probably the most egregious aspect of these proposals. Although the Paper only uses the term once<sup>5</sup>, it is the supporting academic report<sup>6</sup> that is concerning and clearly leads to one of the Paper's guiding principles<sup>7</sup>:

*Freedom of expression should be constrained only where, and to the extent, necessary to avoid greater harm to society.*

14. This statement should send a shudder down the spines of all freedom-loving people who hold dear the sanctity of free and frank expression. Who decides what constitutes greater harm? The Paper does discuss the importance of freedom of expression and freedom of the press<sup>8</sup>, but the import of the principle above is truly chilling. This principle clearly rides roughshod

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<sup>1</sup> Paragraph 10, page 18

<sup>2</sup> Being offended is not covered by the proposals.

<sup>3</sup> Paragraph 32, page 28

<sup>4</sup> Paragraph 75, page 45

<sup>5</sup> Paragraph 103, page 55

<sup>6</sup> Mapping Media Content Harms – a report prepared for the Department of Internal Affairs; Lips, M. and Eppel, E., Victoria University School of Government, 22 September 2022, pages 29 to 32.

<sup>7</sup> Appendix B, page 83

<sup>8</sup> Paragraphs 19 – 21, pages 19 and 20

over the ideas expressed around freedom of expression, as paragraph 22 of the Paper clearly indicates.

15. The *Taxpayers' Union* concludes that, despite the worthy intentions of improving the online safety of children, the ultimate aim of these proposals is to censor opinion (and fact) that government and/or public institutions find unwelcome. The report by Lips and Eppel clearly illustrates that this is the end goal and this is consistent with legislation introduced, or proposed to be introduced, elsewhere.
16. The *Taxpayers' Union* strongly opposes censorship of uncomfortable views. Indeed, we say it would be such censorship that is the real threat to our democracy and would cause real harm to society.

## The Taxpayers' Union is Unreasonably Captured and Burdened

### The Taxpayers' Union is a Regulated Platform

17. The Paper states that Platforms are a broad group ranging from enormous companies through to a single person with a website hosted at home<sup>9</sup>. Regulated platforms are platforms where their primary purpose is to make content available and are likely to have one of the following:
  - An expected audience of 100,000 or more annually; or
  - 25,000 account holders annually in New Zealand.
18. With 200,000 registered members and supporters, the *Taxpayers' Union* is clearly captured by the proposed regulation.
19. Alternatively, the regulator may designate a platform as a regulated platform if it is unclear whether the threshold has been met, or the risk of harm from that platform is significant.
20. The Paper states that "We think it's simpler for all types of platforms to be included in this regulatory framework"<sup>10</sup> and then proceeds to justify this view in the next two paragraphs. The *Taxpayers' Union* disagrees with this view and especially the absence of exemption rules. In any regulated environment, there are generally rules to exempt parties from the regulations when it is clear that said parties should not be subject to the regulations<sup>11</sup>.
21. The absence of clear rules for granting exemptions is a major failing of the proposals and is likely to lead to legal challenges should these proposals proceed into law without them.
22. The *Taxpayers' Union* can see no benefit to the well-being of New Zealanders with having our organisation subject to the proposed regulation. We advocate for lower taxes, more government accountability and less government waste – what is harmful about that? Certainly, governments may not like what we say and expose, but what we do assists the

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<sup>9</sup> Paragraph 31, page 28

<sup>10</sup>Page 29

<sup>11</sup> See Chapter 16, Delegating powers to grant exemptions, Legislation Guidelines, September 2021 by the Legislation Design and Advisory Committee.

democratic process by holding governments to account. Having to comply with unnecessary heavy-handed regulation is an onerous financial burden for such a member-funded organisation as ours.

### Burdensome Compliance

23. The Paper sets out how the regulator would monitor a regulated platform's compliance programme<sup>12</sup>:
- Require regular transparency reports on how they are managing people's rights and protections.
  - Review complaints relating to Regulated Platforms' implementation of codes.
  - Share information with domestic and international agencies to support enforcement efforts.
  - Require Regulated Platforms to submit periodic audits, conducted by a qualified independent third-party, to check systems-level measures and processes to meet compliance obligations.
  - Require an audit outside of the periodic audits if it has reasonable cause to believe there are substantive failings in the compliance programme.
  - Require Regulated Platforms to provide relevant information to assess their level of compliance with the code.
  - Provide feedback on Regulated Platforms' compliance programmes.
24. The level of detail and intrusion required here is unwarranted. The audit expense alone is likely to be seriously burdensome for all but the largest platforms with extensive financial resources. Has the Department of Internal Affairs made any assessment of the likely scope and cost of an audit?
25. The complaint review requirement and extra audit based on "reasonable cause" are a recipe for vexatious claims to be made in order to impose financial costs on Regulated Platforms whose views and content providers the "complainant" and/or alleged of "reasonable cause" disagrees with. The regulator could find themselves mired in complaint reviews as aggrieved parties seek to shut down platforms. Has the Department of Internal Affairs considered this sort of possibility at all?
26. Further, despite the Paper's assertions that the regulator would be "independent" of government, it is very conceivable that with the right leverage a government could also use these provisions (perhaps through proxies) to harass platforms and content providers. We see no protections against politicisation or capture of regulators.

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<sup>12</sup> Paragraph 75, pages 44 and 45

27. In approving codes of practice, the regulator would consider (amongst other things) whether the code provisions reflected Te Tiriti and New Zealand's social and cultural expectations.<sup>13</sup> People have widely differing social and cultural expectations and views about the Treaty of Waitangi. What does this incredibly imprecise statement mean and especially in a regulatory regime where precise rules and definitions are mandatory for the regime to function properly?
28. Worse, Regulated Platforms would be required to align their terms of service and operating policies to the applicable codes and to implement them in practice. Whilst this works where a code is clear and precise in its meaning and expectations, it will be much more difficult to get alignment with vague statements like reflecting Te Tiriti and social and cultural expectations.
29. The *Taxpayers' Union* does not support the thresholds for determining Regulated Platforms as they are far too broad and have no exemption provisions. Neither do we support the compliance regime as it is clearly too burdensome for many smaller platforms. Any code development process must focus on objective matters and not introduce subjective material like Te Tiriti or social and cultural values.

## Harmful and Unsafe Content

30. The Paper attempts to define unsafe or harmful content<sup>14</sup> as:
  - Content is considered harmful where the experience of content causes loss or damage to rights, property, or physical, social, emotional and mental wellbeing. Being harmed is distinct from feeling offended (although content that is harmful will often cause offence).
  - Unsafe content is where there is a risk of harm occurring *if that content* was experienced by a person. Everyone's risk profile is different. Safeguards can be put in place to help reduce risks.
31. These descriptions of such critical elements to the proposed regime are so loose that they are useless in a regulatory environment. Regulation requires precise definitions that are clearly understood and can be easily applied. Looseness like this simply does not work and invites litigation.
32. Anyone who dislikes a view expressed online can claim they suffered social, emotional and/or mental harm and therefore the content is unsafe. To minimise the chance of such harm occurring the Paper proposes an approach that builds in monitoring and accountability requirements<sup>15</sup>. Alarming, these include:
  - Methods to identify harmful content and prevent how it is shared and amplified. This would include ways to remove this content, such as:
    - Through human and Artificial Intelligence (AI) moderation practices

<sup>13</sup> Paragraph 62, page 40

<sup>14</sup> Paragraph 10, Page 18

<sup>15</sup> Paragraphs 49 – 55, Pages 35 - 37

- Downgrading content visibility

33. Here is the nub of concerns – content deemed to be harmful and/or unsafe will have its visibility downgraded to the point of invisibility so it effectively disappears. Society will be deprived of alternative views and social wellbeing will not be enhanced and it could even be damaged by the silencing of important information.
34. Worse still, truth does not appear to trump concerns about ‘harm’. That is an extraordinary failing. A person can be defamed if the speaker/publisher can prove truth in the defamatory statement. That is the correct approach.
35. Without clear and robust definitions of harmful and unsafe content, the regulatory regime will not perform as expected. Litigation will follow.

## International Developments

36. The following paragraphs provide some headline views on the European Union legislation and the Canadian and United Kingdom proposals referred to in the Paper and which have clearly had a significant influence on the direction and scope of the proposals.

### EU Digital Services Act 2022<sup>16</sup>

- E.U.’s Digital Services Act threatens Americans’ free speech – Reason Magazine, 5 June 2023.
- Europe increases state censorship powers with the Digital Services Act – Telecoms.com, 25 April 2023.
- The DSA is nothing more than digital censorship – Brussels Report 20 January 2022.
- The EU’s censorship regime is about to go global – spiked-online.com, 23 March 2023.

### UK’s Draft Online Safety Bill

- The Online Safety Bill is still a censor’s charter – The Spectator, 29 November 2022.
- The UK Online Safety Bill Must Not Violate Our Rights To Free Speech And Private Communication – Electronic Frontier Foundation, 12 May 2023.
- A Censor’s Charter? The case against the Online Safety Bill – Centre for Policy Studies, September 2022.

### Canada’s Proposed Online Harm Legislation

- Failure to Balance Freedom of Expression and Protection from Online Harms – Michael Geist, 28 September 2021 submission to government consultation.

<sup>16</sup> Note that Appendix D of the Paper refers to the Digital Safety Act 2022, but this could not be found, so it is assumed the Paper is referring to the Digital Services Act 2022.

- Trudeau’s Internet censorship law still a big problem – Toronto Sun. 3 October 2022.
  - O (No!) Canada: Fast Moving Proposal Creates Filtering, Blocking and Reporting Rules – and Speech Police to Enforce Them - Electronic Frontier Foundation, 10 August 2021.
37. These views demonstrate that there is international opinion that the online harm legislation and proposals currently in train elsewhere represent significant unwarranted new curbs on freedom of expression and therefore represent new censorship of “harmful” ideas.
38. The Paper states that the proposals in this paper are aligned to the changes being made in other countries to better protect their citizens and their human rights<sup>17</sup>. It would therefore be no surprise to find similar restrictions on free speech in the Paper’s proposals as those identified in these other countries.

## Disinformation and Censorship

39. The Paper discusses “unsafe” content and includes content that “interferes in democratic processes” as falling within the scope of the proposals<sup>18</sup>. What constitutes interference?
40. The report prepared by Miriam Lips and Elizabeth Eppel provides some clues. They report the following, including quotes from other studies:
- Content can cause harm to wider society, for example by individuals or communities losing trust in, or access to, key public institutions such as the legal, health and education systems, freedoms of identity and expression and democratic participation (attributed to the Department of Internal Affairs, probably in an earlier draft of the Paper)<sup>19</sup>.
  - An informed citizenry requires trustworthy systems of data, access, and delivery to maintain a healthy democracy. When the free-information ecosystem is polluted, the levers holding a democratic society together begin to break (Aspen Institute, 2021)<sup>20</sup>.
  - They record a sharp increase of popularity and intensity of Covid-19 specific disinformation and other forms of ‘dangerous speech’ and disinformation, related to far-right ideologies from 2021 (Hannah et al 2021, 2022; Clarke, 2022)<sup>21</sup>.
  - Mis- and disinformation and ‘dangerous speech’ pose significant threats to social cohesion, freedom of expression, inclusion, and safety (attributed to the authors above)<sup>22</sup>.
  - It is in these areas of content risk that recent and rapid expansions of content harms have occurred in New Zealand for adults as well as children. For example, online bullying,

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<sup>17</sup> Page 3

<sup>18</sup> Paragraph 12, Page 18

<sup>19</sup> Lips and Eppel, Page 6

<sup>20</sup> Lips and Eppel, Page 10

<sup>21</sup> Lips and Eppel, Page 29

<sup>22</sup> Lips and Eppel, Page 30

sexual exploitation and misinformation/disinformation threatening the stability of societal institutions<sup>23</sup>.

- This concentrating and escalating effect is particularly problematic when content is wrong, misleading or advocating for a particular view of the world or action<sup>24</sup>.

41. This last statement is particularly staggering in its egregiousness. Lips and Eppel are clearly arguing that you are problematic if you disagree with their world view – you are simply wrong and they are right. It is unbelievable that this has been written by two university academics.

42. When looking at the totality of the bulleted comments above, Lips and Eppel’s message is clear:

If you publicly disagree with key institutions, including government, you are guilty of spreading disinformation, are causing harm to society and are a threat to democracy.

43. Their report has clearly had a very significant influence on the Paper and has directly lead to a key Guiding Principle<sup>25</sup>:

*Freedom of expression should be constrained only where, and to the extent, necessary to avoid greater harm to society.*

44. This simple principle provides carte-blanche for the regulator to ensure that views unwelcome to the government or public institutions are deemed harmful to society and so must be suppressed and effectively removed from public view. This is censorship.

45. Far from being a proposal to just reduce online harm, the Paper aims to set up a regime to censor views that governments and public institutions do not like and to effectively remove them from public discourse. No government, nor public institution, has a monopoly on truth or fact and to remove competing views is censorship.

46. The proposed regime is a censorship regime and this is the real threat to democracy and it will cause real harm to society.

## Concluding Comments

47. The *Taxpayers’ Union* does not support the proposals in the Paper.

48. Whilst the desire to reduce the exposure of children to harmful and unsafe content is laudable, the proposals go too far by:

- Unnecessarily capturing far too many platforms (including the *Taxpayers’ Union*) and not providing rules for exemption from the regulations.

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<sup>23</sup> Lips and Eppel, Page 35

<sup>24</sup> Lips and Eppel, Page 38

<sup>25</sup> Appendix B, Page 83



- Imposing burdensome compliance costs, especially on small platforms such as the *Taxpayers' Union*.
  - Instituting a regime that provides the opportunity for censorship of views unwelcome to government or public institutions.
49. The loose definitions of “harmful” and “unsafe” are not suitable for a regulatory regime where precision and clarity are clearly required. This invites dispute and ultimately litigation.
50. An underlying theme of the Paper, which is very clearly articulated in the supporting report by Lips and Eppel, is that public disagreement with government and/or public institutions amounts to spreading disinformation and this is harmful to society and a threat to democracy.
51. The work of Lips and Eppel has clearly lead to the most chilling guiding principle in the Paper:
- Freedom of expression should be constrained only where, and to the extent, necessary to avoid greater harm to society.*
52. This principle, along with the ideas of Lips and Eppel that are clearly reflected in the Paper, lead to the real threat to democracy and harm to society. This threat is the regime that is proposed in the Paper, because it is a **censorship regime**.



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