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DAVID AND GOLIATH 2.0

**New Zealand's Regulatory Battle
for the Soul of the Internet**

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1. Introduction

I will be the first to admit that ‘David and Goliath’ is an overused rhetorical trope. However, in this case, I suggest it is appropriate. Beyond the obvious juxtaposition between New Zealand (the underdog) and social media companies (the scary giant), there is a deeper link to the biblical story: as Goliath’s defeat represented the victory of David’s God over the Philistine deities, so too is this regulatory battle a contest of ideologies. Whether accountable, responsible governance prevails over opaque corporate self-regulation depends on New Zealand regulators’ ability to overcome three challenges: a lack of coordination and consensus, uncertainty about the legitimacy of government interventions, and practical difficulties regulating large, international platforms. I argue that by following sensible strategies, we indeed stand a fighting chance – but first, I must introduce Goliath.

1.1. Introducing Goliath: Social media and societal issues

While social media has created new opportunities for communication, community building and economic growth, it has also given rise to a range of issues regarding the safety and wellbeing of individuals and society. I propose the following broad typology of issues:

- (a) privacy issues (e.g., breaches of privacy, data security and algorithmic targeting);
- (b) national security issues (e.g., effects on social cohesion, disinformation, online radicalisation and violent extremism);
- (c) safety issues (e.g., cyberbullying, child abuse, grooming and exploitation, sexual abuse images, harassment and revenge porn);
- (d) health issues (e.g., mental health effects of excessive social media use and exposure to harmful content).

These issues have gained attention as social media has become a ubiquitous and increasingly dominant feature of modern life. In little over a decade, social media platforms have developed from a few small sites frequented by ~6% of internet users into a pillar of modern society used by more than half of the global population.¹

The result has been a drastic but little-acknowledged lifestyle change for most individuals, particularly youth (aged 12–24). Before the COVID-19 pandemic, New Zealand teenagers spent more time online than all but three other OECD countries, averaging 42 hours weekly.² This figure more than doubled since 2012, and international trends suggest the current figure is likely to be substantially higher again following two years of pandemic measures.³ It is reasonable to assume that many New Zealand teenagers currently spend around half their waking hours online, many of which on social media. Compared to a decade ago, this is a substantial environmental and behavioural change, which has coincided with skyrocketing rates of youth mental health issues and suicides both in New Zealand and abroad.⁴ Given that youth are most vulnerable to data exploitation;⁵ online radicalisation;⁶ bullying and abuse;⁷ and social media-related health issues such as depression and anxiety, eating disorders, self-harm and suicidal thoughts,⁸ a more assertive regulatory approach may

¹ José van Dijck “Engineering Sociality in a Culture of Connectivity” in *The Culture of Connectivity: A Critical History of Social Media* (Oxford Academic, New York, 2013) 1 at 3–4; and Kyle Taylor and Laura Silver *Smartphone Ownership Is Growing Rapidly Around the World, but Not Always Equally* (Pew Research Center, February 2019) at 11.

² *Digital Literacy in the 21st Century* (OECD, 2021) at 21.

³ Jason M Nagata and others “Screen Time Use Among US Adolescents During the COVID-19 Pandemic” (2021) 176 JAMA Pediatr 94 at 94.

⁴ *Health and Independence Report 2020: The Director-General of Health’s annual report on the state of public health* (Ministry of Health, HP 7954, November 2021) at 44; A Wilson and M Nicolson *Mental Health in Aotearoa: Results from the 2018 Mental Health Monitor and the 2018/19 New Zealand Health Survey* (Te Hīringa Hauora/Health Promotion Agency, October 2020) at 2; and Office of the Surgeon General *Protecting Youth Mental Health: The U.S. Surgeon General’s Advisory* (US Department of Health and Human Services, 2021) at 8.

⁵ BJ Casey, Rebecca M Jones and Todd A Hare “The Adolescent Brain” (2008) 1124 Ann N Y Acad Sci 111 at 112–113, 117 and 122; and Duncan McCann *I-Spy: The Billion Dollar Business of Surveillance Advertising to Kids* (New Economics Foundation, May 2021) at 2, 6 and 16.

⁶ McCann, above n 5, at 13; and Mikhail Myagkov and others “The Socio-Economic and Demographic Factors of Online Activity among Right-Wing Radicals” (2020) 11 Stud Transit States Soc 19 at 24.

⁷ See UNICEF *COVID-19 and its implications for protecting children online* (April 2020) at 1–2.

⁸ Office of the Surgeon General, above n 4, at 25; see Kira E Riehm and others “Associations Between Time Spent Using Social Media and Internalizing and Externalizing Problems Among US Youth” (2019) 76 JAMA Psychiatry 1266 at 1271–1272; Amanda Lenhart and Kellie Owens *The Unseen Teen: The Challenges of Building Healthy Tech for Young People* (Data & Society, May

be warranted to protect their wellbeing, especially given that social media platforms know their platforms are linked to these issues and are failing to effectively self-regulate them.⁹

While youth are not the only group who benefit from better regulation, they warrant particular attention from government which could catalyse broader reform:

“Designing for adolescents doesn’t just address some unique vulnerabilities they possess because of their developmental life stage and disempowered legal status, but can serve as a vanguard for better tech for everyone.”¹⁰

2. Challenges

Social media thus presents many issues for New Zealand society, particularly our youth. These issues are increasingly well-understood, and some regulatory responses have already been deployed to address them. However, I suggest that New Zealand regulators face three main challenges when attempting to adequately deal with the full spectrum of issues:

- (1) a lack of coordination and consensus within government;
- (2) uncertainty about the perceived legitimacy of state interventions; and
- (3) practical difficulties in effectively regulating large, international platforms.

2021) at 8–11; and see generally Matthew J Easterbrook and others “Consumer culture ideals, extrinsic motivations, and well-being in children” (2014) 44 Eur J Soc Psychol 349.

⁹ See Lenhart and Owens, above n 8, at 16–30; Facebook, Inc “Teen Mental Health Deep Dive” (internal presentation to Instagram employees, October 2019) at 21, 25 and 48; Facebook, Inc “Hard Life Moments - Mental Health Deep Dive” (internal presentation to Instagram employees, November 2019) at 14, 16 and 18–19; McCann, above n 5, at 5 and 9; see Letter from Maura Healey and others (National Association of Attorneys General) to Mark Zuckerberg (CEO of Facebook, Inc) regarding Facebook’s Plans to Develop Instagram for Children Under the Age of 13 (10 May 2021); and see also Office of Attorney General Maura Healey “AG Healey Co-leads Bipartisan, Nationwide Investigation Into TikTok” (press release, 3 February 2022).

¹⁰ Lenhart and Owens, above n 8, at 9.

I will outline each of these challenges before proposing some solutions.

2.1. Lack of coordination and consensus

At present, various entities regulate different aspects of social media, but the approach is piecemeal and leaves significant gaps.

For instance, privacy and data protection are governed under the Privacy Act 2020 and administered for the most part by the Privacy Commissioner.¹¹ Online safety, on the other hand, is broadly the responsibility of Netsafe under the Harmful Digital Communications Act 2015 (HDCA), while public health is overseen by the Ministry of Health and its subsidiaries under the Health Act 1956.¹² It is unclear, then, who should be responsible for regulating social media algorithms which use adolescent users' data to promote content featuring eating disorders, self-harm behaviours and suicide.¹³ This is simultaneously an issue of data protection, online safety and public health, and yet there exists no framework for cooperation on holistic regulatory solutions.

Similarly, new approaches to addressing child safety, disinformation and national security issues developed by agencies such as the Department of Internal Affairs (DIA),¹⁴ the Department of the Prime Minister and Cabinet (DPMC) and the Ministry of Foreign Affairs and Trade (MFAT)¹⁵ do not follow any transparent, coordinated strategy to regulate platforms in a way which addresses the complex interrelationships between, inter alia:

(a) privacy, data protection and child exploitation;¹⁶

¹¹ Privacy Act 2020 ss 3, 17 and 18; and see generally Office of the Privacy Commissioner "Facebook must comply with NZ Privacy Act" (press release, 28 March 2018).

¹² Health Act 1956, ss 3A–3F.

¹³ See 5Rights Foundation *Pathways: How digital design puts children at risk* (July 2021) at 66–86.

¹⁴ Five Country Ministerial *Voluntary Principles to Counter Online Child Sexual Exploitation and Abuse* (Department of Internal Affairs, March 2020).

¹⁵ Paul Ash *Briefing: Christchurch Call Unit* (Department of the Prime Minister and Cabinet, Briefing Number DPMC-2021/22-240, August 2021).

¹⁶ See generally 5Rights Foundation, above n 13; and McCann, above n 5.

(b) mental health, online radicalisation and violent extremism;¹⁷ and

(c) platform design, harmful content and user wellbeing.¹⁸

This is a challenge for three reasons. Firstly, different regulators risk developing overlapping or inconsistent responses to issues, sending mixed signals regarding New Zealand's expectations of platforms. For example, Customs, the Police and DIA;¹⁹ DPMC;²⁰ and Netsafe²¹ all oversee (or are developing) separate regulatory systems for online content, containing differing commitments regarding substantially similar system design and operational practice matters, along with different accountability measures. This makes it difficult to discern any cohesive national regulatory approach.²²

Secondly, developing regulatory systems in silos creates a risk that certain perspectives or approaches will not be considered, leaving gaps in the regulatory landscape. For example, despite shocking youth mental health statistics, growing evidence that social media use has a range of detrimental health effects, and calls to action from the World Health Organization,²³ the OECD²⁴ and even our own

¹⁷ See Myagkov and others, above n 6; and see generally Simon Copeland and Sarah Marsden *The Relationship Between Mental Health Problems and Terrorism* (Centre for Research and Evidence on Security Threats, November 2020).

¹⁸ See generally 5Rights Foundation, above n 13; Age Appropriate Design Code 2020 (UK); and House Subcommittee on Consumer Protection and Commerce (US) *Holding Big Tech Accountable: Legislation to Protect Online Users* (memorandum, 25 February 2022) at 1–2.

¹⁹ Five Country Ministerial, above n 14; and Cabinet Paper “Initiating a Broad Review of the New Zealand Media Content Regulatory System” (2 July 2021, CAB-21-MIN-0179).

²⁰ Ash, above n 15.

²¹ Martin Cocker “Online Safety Code of Practice” (9 April 2021) Netsafe <www.netsafe.org.nz/onlinesafetycodeofpractice/>; and see also Netsafe *Aotearoa New Zealand Code of Practice for Online Safety and Harms* (25 July 2022).

²² See Chris Keall “New safety code from Netsafe and social media firms 'an attempt to avoid real change'” (25 July 2022) NZ Herald <www.nzherald.co.nz/business/new-safety-code-from-netsafe-and-social-media-firms-an-attempt-to-avoid-real-change/GZHUCUO7Z3KVVU2RHJAYXU6EIKA>.

²³ World Health Organization *World mental health report: Transforming mental health for all* (16 June 2022) at 124 and 179–180.

²⁴ OECD *Children and Young People's Mental Health in the Digital Age: Shaping the Future* (2018) at 12–13.

government inquiry,²⁵ social media is not treated as a major public health issue in New Zealand. The government's current Child and Youth Wellbeing Strategy mentions social media only once across 82 pages, stating opaquely that "young people need support to navigate the new challenges of real and online relationships and online bullying."²⁶ The presumption seems to remain that health agencies have no role to play in internet regulation.

Thirdly, lack of coordination and consensus creates a vacuum of leadership, responsibility and expertise. At present, there is no agency or person who can authoritatively represent New Zealand's regulatory approach to social media. Consequently, there has been no coordinated effort to understand the issues, let alone develop a holistic response; at present, New Zealand is the second-worst country in the OECD when it comes to monitoring the wellbeing impacts of digital transformation, measuring fewer than half of the OECD indicators.²⁷

2.2. *Legitimacy of state interventions*

A further challenge posed to regulators is uncertainty around the perceived legitimacy of state interventions in this area. To borrow Brownsword and Goodwin's typology, questions remain about the legitimacy of (a) procedures employed by regulators in developing policy; (b) purposes set by regulators; and (c) the means employed by regulators to achieve those purposes.²⁸ I address each in turn.

2.2.1. *Procedural legitimacy*

There is a general expectation in modern democratic societies that new regulatory approaches will be developed transparently and with adequate public consultation and

²⁵ Ron Paterson and others *He Ara Oranga: Report of the Government Inquiry into Mental Health and Addiction* (November 2018) at 9, 49 and 66.

²⁶ *Child and Youth Wellbeing Strategy 2019* (Department of the Prime Minister and Cabinet, 29 August 2019) at 52.

²⁷ OECD *How's Life in the Digital Age? Opportunities and Risks of the Digital Transformation for People's Well-being* (OECD Publishing, 26 February 2019) at 121–123.

²⁸ Roger Brownsword and Morag Goodwin "Four key regulatory challenges" in *Law and the Technologies of the Twenty-First Century* (Cambridge University Press, Cambridge, 2012) at 48–61.

participation.²⁹ Despite social media having progressed far from the embryonic stages into a dominant force in modern life, such a dialogue has not taken place in New Zealand. Apart from a national outcry following Facebook's slow response to the livestream of the Christchurch mosque shootings, there has been little public discussion about social media regulation – and even in that case, consultation has been limited to representatives of governments, industry and an expert advisory group.³⁰ Discussion in the public health context has been particularly absent, despite successive domestic reports noting harmful effects, including a finding that “20% [of 13-17 year olds] saw content about self-harm, 17% about ways of committing suicide and 15% about ways to be very thin.”³¹ The discussion document for a new government digital strategy neglected the issue of social media regulation, though a submission from Physicians and Scientists for Global Responsibility urged the government to more strongly regulate foreign entities, rather than relying on voluntary commitments.³²

There is evidence that New Zealanders broadly support more government regulation of social media platforms: 89% of New Zealanders support having an agency to regulate online content, while only a minority think the current framework is fit for purpose.³³ However, issues with social media go beyond just harmful content, and there will be differing views on the appropriate role of the state in regulating, say, attention-holding features such as ‘infinite scroll’, as opposed to the display of child abuse images or terrorist content. In the absence of broader, holistic engagement with the public and key stakeholders, regulators may battle with the perception that

²⁹ Brownsword and Goodwin, above n 28, at 48–49.

³⁰ Christchurch Call *Community Consultation Final Report* (14 April 2021) at 4.

³¹ Edgar Pacheco and Neil Melhuish *New Zealand children's experiences of online risks and their perceptions of harm: Evidence from Ngā taiohi matihiko o Aotearoa – New Zealand Kids Online* (Netsafe, February 2020) at 1 and 12; see also Arthur Grimes and Dominic White *Digital inclusion and wellbeing in New Zealand* (Motu Economic and Public Policy Research, October 2019) at 31 and 38–39; and Paterson and others, above n 25, at 9, 49 and 66.

³² *Te koke ki tētahi Rautaki Matihiko mō Aotearoa/Towards a Digital Strategy for Aotearoa* (Office of the Minister of the Digital Economy and Communications, Discussion Document, 6 October 2021); and Physicians and Scientists for Global Responsibility *Submission: Te koke ki tētahi Rautaki Matihiko mō Aotearoa/Towards a Digital Strategy for Aotearoa* (10 November 2021) at [1.4].

³³ Henry Talbot, Nusiebah Alali and Te Mana Whakaatu – Classification Office *What we're watching: New Zealanders' views about what we see on screen and online* (Te Mana Whakaatu – Classification Office, June 2022) at 33-37.

consultation and debate has been bypassed in relation to certain issues in favour of ‘regulation by stealth’.

2.2.2. *Legitimacy of purposes*

There are further questions of legitimacy around setting regulatory purposes. At the most basic level, purposes must be set by appropriate bodies acting within their agreed competencies.³⁴ At present, it is not clear whether competent agencies exist to directly regulate social media platforms in certain areas, such as public health. The Health Act permits the making of regulations for “the improvement, promotion, and protection of public health”, but the incredibly broad nature of this provision casts doubt on the legitimacy of its application in such an important and multifaceted area.³⁵ Notably, Netsafe has recently come under fire for ostensibly exceeding its statutory functions by establishing a code of conduct to regulate online harms.³⁶ The current patchwork of legislation provides little help; many statutes are out of date while others lack the teeth to proactively regulate platforms,³⁷ and in some areas (such as algorithm design) there is little to no relevant legislation at all.

Beyond questions of jurisdiction, there are also potential legal and ethical issues with the adoption of certain regulatory purposes. For example, regulating harmful or offensive content will entail limits on the right to freedom of expression enshrined in the Bill of Rights Act (NZBORA), requiring justification.³⁸ Regulation of platforms to discourage excessive social media use and control the use of data-fed algorithms, as has been proposed in the US,³⁹ may give rise to novel concerns about rights to freedom of association and peaceful assembly in digital spaces, as well as

³⁴ See Brownsword and Goodwin, above n 28, at 51.

³⁵ Health Act 1956, s 117(1)(a).

³⁶ Tohatoha NZ, InternetNZ and the Inclusive Aotearoa Collective Tāhono “Statement on the release of the Aotearoa Code of Practice for Online Safety and Harms” (press release, 25 July 2022); and Mark Daalder “Govt harbours concerns over Netsafe’s online code” (18 August 2022) Newsroom <www.newsroom.co.nz/govt-harbours-concerns-over-netsafes-online-code>.

³⁷ See Films, Videos, and Publications Classification Act 1993; Unsolicited Electronic Messages Act 2007; and Harmful Digital Communications Act 2015.

³⁸ New Zealand Bill of Rights Act 1990, ss 14 and 5.

³⁹ Social Media Addiction Reduction Technology Act, S 2314, 116th Congress (2019).

interference with personal ‘property’.⁴⁰ Attempts to directly regulate platforms will likely face opposition from those who take a libertarian stance on digital harms, following the ethos of the early internet which regarded itself as beholden to any state or institution. However, the ‘Web 2.0’ era of significant corporate control over the internet has seen the tide largely turn in favour of accountable government regulation.⁴¹ The challenge, then, is setting regulatory purposes which are ambitious enough to be effective at harm reduction, whilst staying within accepted legal and ethical boundaries.

2.2.3. *Legitimacy of means*

The final challenge to regulators’ legitimacy follows from the discussion of regulatory purposes. Even if there is consensus on who will regulate, in which areas and for what purposes, there will still be differing views about which means ought to be employed to achieve those ends.⁴² So far, regulators have mostly employed soft-touch measures such as voluntary codes of conduct, guiding principles and awareness programmes.⁴³ This is partly out of necessity; the DIA, for example, acknowledges that it has no statutory power to enforce its Digital Child Exploitation Filtering System.⁴⁴ In some cases, tougher measures have been employed, however these are post hoc and generally targeted at end user behaviour, rather than platforms.⁴⁵ As governments around the world begin to more assertively regulate social media platforms, New

⁴⁰ New Zealand Bill of Rights Act, ss 16–17.

⁴¹ Johanna Weaver and Sarah O’Connor *Tending the Tech-Ecosystem: who should be the tech-regulator(s)?* (ANU Tech Policy Design Centre, May 2022) at 6–7.

⁴² See Brownsword and Goodwin, above n 28, at 60.

⁴³ See Christchurch Call *The Christchurch Call to Action to Eliminate Terrorist and Violent Extremist Content Online* (16 May 2019); Department of Internal Affairs *Digital Child Exploitation Filtering System Code of Practice* (1 June 2022); Netsafe, above n 21; Department of Internal Affairs “Child safety online” <www.dia.govt.nz/Digital-Child-Exploitation-Child-Safety-Online>; and Harmful Digital Communications Act, s 8(1).

⁴⁴ See Department of Internal Affairs *Digital Child Exploitation Filtering System Code of Practice*, above n 43, at 2.

⁴⁵ See Privacy Act, ss 102 and 130; Harmful Digital Communications Act, ss 21–22A; Films, Videos, and Publications Classification Act, s 119C; Unsolicited Electronic Messages Act, s 35; Crimes Act 1961, s 179; and Harassment Act 1997, s 8.

Zealand regulators may have to determine what means they can, and should, employ.⁴⁶

In areas like data privacy, there may be less desire to interfere with platform design, as privacy risk tolerance is ultimately a personal choice, provided there is a fair opportunity to withhold consent. However, other issues such as algorithm design and attention-holding practices may justify a more assertive approach, as they generally function in the background without users' awareness or consent and, being central to platforms' business models, cannot be reliably self-regulated. It is now widely accepted that "addressing digital well-being requires more than shifting user behavior – platform companies should also share responsibility for the health impact of their products."⁴⁷ Thus, a broad spectrum of intensity will be required to ensure that proportionate and legitimate means are being employed to regulate each limb of the social media leviathan.

2.3. *Regulatory effectiveness*

Finally, a significant challenge for regulators in New Zealand is the practical difficulty of effectively enforcing domestic standards against large, international companies. Simply put, platforms are unwilling to yield to government control, and there are complex jurisdictional issues surrounding their corporate operations and data storage arrangements. Facebook demonstrated this in 2018 when it breached the Privacy Act 1993, claimed New Zealand law did not apply to it, and publicly criticised then-Privacy Commissioner John Edwards for reporting its non-compliance, prompting a fiery

⁴⁶ See Senate Committee on Commerce, Science, and Transportation (US) *Executive Session Opening Statement* (27 July 2022); House Subcommittee on Consumer Protection and Commerce, above n 18; Online Safety Bill 2022 (UK) (121-2); Age Appropriate Design Code (UK); European Commission *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Decade for children and youth: the new European strategy for a better internet for kids (BIK+)* (COM(2022) 121, 11 May 2022); Office of Attorney General Maura Healey, above n 9; Office of the Central Cyberspace Affairs Commission (China) *Note on the Regulations on the Protection of Minors on the Internet (Draft for Comments)* (Cyberspace Administration of China, March 14 2022); and Mehmet Bedii Kaya "The Turkish Internet Law: Full Translation of the Law no. 5651" *Bilişim ve Teknoloji Hukuku – IT Law* (5 January 2021) <www.mbkaya.com/turkish-internet-law/>.

⁴⁷ Lenhart and Owens, above n 8, at 8.

response from Edwards.⁴⁸ The Australian government's spat with Facebook further illustrates these challenges.⁴⁹

3. Strategies

I propose three broad strategies, which each overlap to provide a holistic answer to the challenges enumerated above:

1. Establishing a public inquiry;
2. Creating a coordinated regulatory regime; and
3. Enacting new data sovereignty and corporate responsibility laws.

3.1. A public inquiry

A public inquiry to investigate the issues posed by social media, assess the current regulatory framework and advise on a new approach would be a valuable strategic step in overcoming the challenges outlined above. Firstly, offering a holistic, independent view would give government an opportunity to coordinate action and build consensus around the findings of the inquiry. Secondly, an inquiry empowered to hear perspectives from the public, the government, civil society and industry would satisfy the demands of procedural legitimacy and provide a starting point from which to develop regulatory purposes and means which are in step with prevailing views and values. Thirdly, a properly resourced inquiry could lessen New Zealand's data deficit, allowing regulators to proceed with reliable information about the impact of social media on national wellbeing.

3.2. A coordinated regulatory regime

⁴⁸ John Edwards "Facebook: What this is really about" (3 April 2018) Office of the Privacy Commissioner <www.privacy.org.nz/blog/facebook-what-this-is-really-about/>.

⁴⁹ Diana Bossio and others "Australia's News Media Bargaining Code and the global turn towards platform regulation" (2022) 14 Policy Internet 136 at 137.

On the heels of the inquiry, I suggest that a coordinated regulatory regime be created, overseen by an interdepartmental executive board (IEB). The IEB model brings together departmental heads to “address complex issues that have impacts ... that sit across a wide range of portfolio areas.”⁵⁰ It bridges the gap between voluntary inter-agency coordination and new agency formation/mergers, creating an entity responsible to a Minister and capable of employing staff and administering appropriations for the purpose of cross-agency collaboration on a particular issue.⁵¹ A recent Australian report found that not a single surveyed representative of government, industry or civil society favoured establishing one tech super-regulator (e.g., China’s Cyberspace Administration) though interviewees consistently called for stronger political leadership and better regulatory coordination.⁵² I suggest IEB leadership is the best strategy to reconcile these positions in New Zealand.

This model would address the challenge of coordination and consensus, creating a forum for cross-agency collaboration and sharing of expertise. This would ensure, for instance, that platform design regulations reflect public health concerns as well as online safety issues, and that data algorithm rules address both privacy and national security issues. The IEB would also lend transparency and legitimacy to the regulatory system by streamlining a holistic strategy through one body responsible to one Minister and ensuring that all parts of the regulatory framework are compatible, informed by consistent values and purposes, and administered by the appropriate agencies.

3.3. Data sovereignty and corporate responsibility

I suggest that regulators pursue stricter data sovereignty laws, requiring user data to be stored locally. This strategy would improve regulatory effectiveness by closing the loophole which allows the Information Privacy Principles to be circumvented where

⁵⁰ Te Kawa Mataaho Public Service Commission *Machinery of Government Supplementary Guidance Note: Interdepartmental Executive Board* (2018) at 1.

⁵¹ Te Kawa Mataaho Public Service Commission, above n 50, at 3; and State Services Commission *System Design Toolkit* (2018) at 1.

⁵² Weaver and O’Connor, above n 41, at 8.

inconsistent with foreign law – a provision relied upon by Facebook to flout New Zealand law⁵³ – and help to respond to calls for Māori data sovereignty by extending the Treaty principle of active protection to data as a taonga.⁵⁴ I further propose that New Zealand require social media companies with large New Zealand user bases to establish a legal presence in New Zealand to allow more hands-on regulation, from closer consultation through to the effective enforcement of penalties. I quote Associate Judge Abbott in *A v Google NZ Ltd*, where a defamation claim against Google failed on the basis that its New Zealand subsidiary was a separate entity uninvolved in its search engine operations:⁵⁵

... one can have sympathy with the plaintiff's position. The creator of the main website carrying the defamatory material appears to be based in the United States, and has a policy of not removing any material upon request. It would be a difficult and expensive exercise to take proceedings against that party to try to compel removal.

The strategy I have described would help to ameliorate this situation, and there is precedent for such an approach: most major platforms have complied with Turkey's law change in 2021, and the EU is currently testing the waters.⁵⁶

4. Conclusion

The aim of this essay is not to provide a complete roadmap for regulators, nor to presume the views of New Zealanders regarding the state's role in regulating social media. Rather, it is to suggest some high-level strategies to address the biggest challenges regulators face, and in doing so to provoke thought and, perhaps, inspire

⁵³ Privacy Act, s 23; and Edwards, above n 48.

⁵⁴ See *Te Mana Raraunga – Māori Data Sovereignty Network Charter* (5 April 2016); and Stats NZ and Data Iwi Leaders Group of the National Iwi Chairs Forum *Māori Data Governance* (Stats NZ, August 2021).

⁵⁵ *A v Google New Zealand Ltd* [2012] NZHC 2352 at [47].

⁵⁶ Kaya, above n 46; Meta Platforms Inc "An Update on Facebook in Turkey" (press release, 18 January 2021); Twitter Inc "An Update on Twitter in Turkey" (press release, 19 March 2021); LinkedIn Corporation "An Update on LinkedIn in Turkey" (press release, 15 January 2021); TikTok Inc "An Update on TikTok in Turkey" (press release, 9 January 2021); YouTube Inc "An Update on YouTube in Turkey" (press release, 16 December 2020); and Laura Kabelka "Sovereignty requirements remain in cloud certification scheme despite backlash" (17 June 2022) Euractiv <www.euractiv.com/section/cybersecurity/news/sovereignty-requirements-remain-in-cloud-certification-scheme-despite-backlash/>.

hope that Goliath can indeed be subdued. In summary, I suggest that by establishing a public inquiry, creating a new coordinated regulatory regime and enacting new data sovereignty and corporate responsibility laws, New Zealand can overcome the regulatory challenges of lack of consensus, uncertain legitimacy and practical difficulties in regulating large platforms and protect its youngest and most vulnerable from the dark sides of social media.