



# Reckons on regulating AI in New Zealand

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**Brainbox**  
Institute

# Background and key work

- LLB(Hons) + BA(Politics)
- Director of the Brainbox Institute, co-founded 2018
- Previous work on:
  - Human rights, public law, privacy, official information (2012–2017)
  - Deepfakes and synthetic media (2019)
  - AI Forum (2019)
  - Trust and automated decision-making (2020)
  - Implementing law in computer code (2021)
  - Content moderation in times of crisis (2021)
  - Disinformation response (2022–2024)
  - Tech transparency + the EU Digital Services Act (2022 and ongoing)

**Who's in the room?**

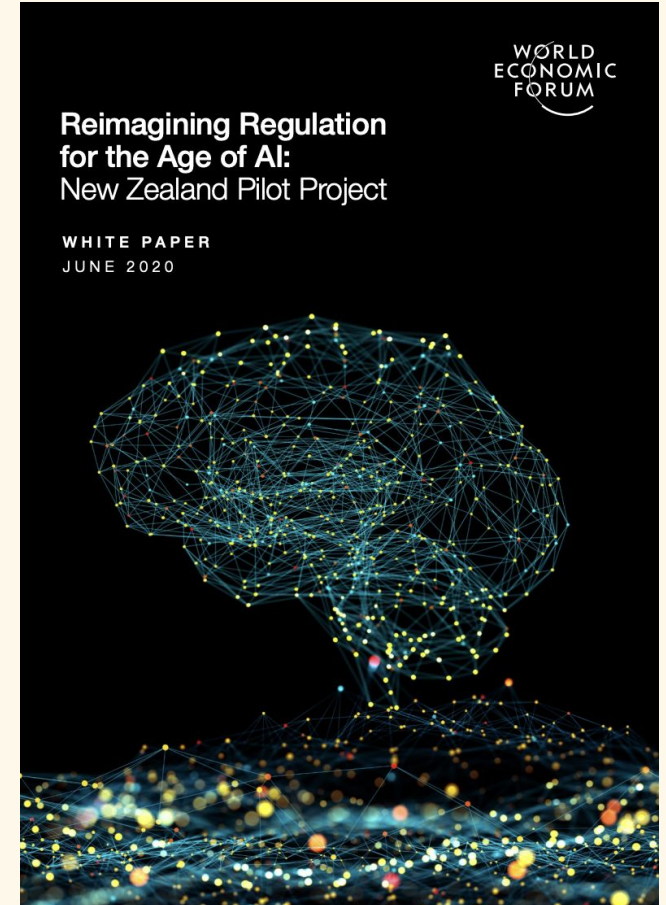
# Regulation ≠ law/legislation

“[R]egulation is more than just binding rules imposed by a government.

Modern regulatory domains are so complex that they can no longer be handled by the state alone.

**A modern regulatory body is not authoritarian, but one part of a broader system that influences and steers through a full spectrum of approaches.**

Harder regulatory powers may be useful in certain situations, while soft approaches will work better in others.”



**“[R]egulation is the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour modification.”**

Black J. 2002 Critical reflections on regulation. Aust. J. Legal Philos. 27, 1–35 in Algorithmic regulation and the rule of law, Mireille Hildebrandt, Published:06 August 2018 <https://royalsocietypublishing.org/doi/10.1098/rsta.2017.0355>

# Regulate people not computer programs

- People design and deploy
- Providers, operators, and deployers (EU AI Act)
- Regulating people who use AI, not AI itself
- Deployed in socio-technical contexts in broader organisational settings

# But what do we want those people to do?

- Easy to point to bad examples
- Harder to create general rules
- Global discussion on developing expectations
- 200+ AI Principles documents globally (per Oct 2023 meta review)

Worldwide AI ethics: A review of 200 guidelines and recommendations for AI governance, Patterns, Volume 4, Issue 10, 2023

- Difficult to operationalise
- Fleeting, transient, temporary

# Values must be embedded in technical systems

- Effect of technology isn't neutral
- Designers make choices that reflect values and experience
- Technology creates affordances, channels power and influence
- Purposeful, deliberate and intentional technology design



**Which values?**

**Who decides?**

**What harms count?**

# Broader trends influenced the answers

- Greater suspicion of Big Tech and profit-driven incentives
- Proliferation of AI principles + normative foundation
- Geopolitical shifts + rise in authoritarianism + populism
- Nation states + technology as extension of State power
- Not just companies, but governments too
  - Remember Edward Snowden (2013)?
- Multilateral interest (OECD, G7, UN, others)
- Transnational products + regulatory alignment

- ❑ Data protection + ethics**
- ❑ Human accountability + assurance**
- ❑ Risk assessment + proportionality**
- ❑ Human rights**
- ❑ Product liability**
- ❑ Health and safety**
- ❑ Transparency, records + audit**

# The EU AI Act manifests these themes

- Some things banned on human rights grounds
  - Remote biometric monitoring
  - Social credit systems
- Obligations for providers and deployers of high risk systems
- Transparency obligations to inform consumers and manage risk
- Voluntary codes for less risky systems
- Multistakeholder input and rights of vulnerable communities

# We still don't know how the AI Act will play out

- 2019 complaint under GDPR (in force 2018) adjudicated in ECJ this month (March 2024)
- Intersecting legal regimes – Digital Services Act
- More regulation to come...

# Regulatory cascade

*Primary legislation, secondary legislation (regulations)*

- Technical standards
- Guidance on implementation
- Risk assessment and audit best practice
- Semi-voluntary codes of conduct
- Multistakeholder input + monitoring
- Internationalisation and harmonisation across borders

**How can we have  
meaningful influence?**



**You**

Create a detailed concentric circles diagram that visually represents population sizes for different regions and countries, using a diverse palette of colours to distinguish each circle from the others. Each circle's size should proportionally reflect the population size of the region or country it represents. Accurately label each circle with the name of the country or region it corresponds to. The data for the diagram is as follows, with countries and their respective population sizes: India with 1,408,000,000, China with 1,412,000,000, the ASEAN region with 666,190,000, the European Union (EU) with 450,000,000, America with 350,000,000, Australia with 25,690,000, and New Zealand with 5,123,000. Ensure the diagram is clear, visually appealing, and informative, with each label easily readable and positioned appropriately next to its corresponding circle. Use your creativity to select colours that not only differentiate each circle but also complement each other, making the diagram not just informative but also aesthetically pleasing.



<b>Country</b>	<b>Population size</b>
India	1,408,000,000
China	1,412,000,000
ASEAN	666,190,000
EU	450,000,000
America	350,000,000
Australia	25,690,000
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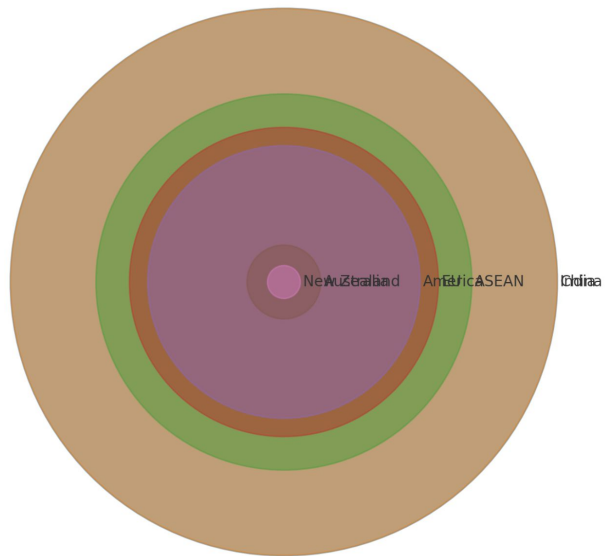




## Population Sizes of Different Regions and Countries



Here's a diagram that visually represents the population sizes for different regions and countries. Each circle's size proportionally reflects the population size of the region or country it represents, with a diverse palette of colors distinguishing each circle. The labels for each country or region are incorporated within the legend due to the concentric nature of the diagram, ensuring clarity and readability. This design aims to be both informative and aesthetically pleasing, highlighting the relative population sizes across these varied geographical areas.



**How can New Zealand have  
meaningful influence?**

## The same way we normally influence the globe

- Committing to an international rules-based system based on multilateral (cyber)diplomacy
- Supporting and participating in international civil society, which shapes expectations and best practice
- Participating in non-governmental standard setting processes, including through technical community
- Trade relationships

# I don't think we'll get an NZ AI Act

- Difficult and complex task with limited influence
- Real risk of market exit, and difficult enforcement questions
- Existing subject and context-specific laws (*Health and Safety at Work Act, rights of healthcare consumers*)
- General laws (*Privacy Act, Official Information Act*)
- AI-specific laws (*automated electronic systems*)
- Unique characteristics (*Māori data sovereignty, te Tiriti*)
- Overflow effects from regulation in other jurisdictions

## 296 Use of automated electronic systems by Customs to make decisions, exercise powers, comply with obligations, and take related actions

- (1) The chief executive may approve the use of automated electronic systems by a specified person to make any decision, exercise any power, comply with any obligation, or carry out any other related action under any specified provision.
- (2) The chief executive may approve the use of an automated electronic system only if—
  - (a) the system is under the chief executive's control; and
  - (b) the chief executive is satisfied that the system has the capacity to make the decision, exercise the power, comply with the obligation, or take the related action with reasonable reliability; and
  - (c) 1 or more persons are always available, as an alternative, to make the decision, exercise the power, comply with the obligation, or take the related action.
- (3) An automated electronic system approved under subsection (1)—
  - (a) may include components that are outside New Zealand; and
  - (b) may also be used for making decisions, exercising powers, complying with obligations, or taking related actions under other enactments.
- (4) The chief executive must consult the Privacy Commissioner on the terms and the privacy implications of any arrangements to use an automated electronic system under subsection (1) before—
  - (a) finalising the arrangements; or
  - (b) making any significant variation to the arrangements.
- (5) A decision that is made, a power that is exercised, an obligation that is complied with, or a related action that is taken using an automated electronic system under this section must be treated for all purposes as if it were made, exercised, complied with, or taken (as the case may be) by a specified person authorised by the specified provision to make the decision, exercise the power, comply with the obligation, or take the related action.

Compare: 1996 No 27 s 274A(1)–(6)

Departmental

## Arrangement for Use of an Automated Electronic System

Pursuant to section 274B(1) of the Customs and Excise Act 1996, I, Martyn John Dunne, hereby publish details of the automated electronic system known as SmartGate.

SmartGate is a border processing mechanism (comprising of a kiosk and gate sited at international airports) for eligible persons.

SmartGate is an alternative and voluntary mechanism to primary line processing by a Customs officer.

Eligible persons are over 18 years of age with a New Zealand or Australian e-Passport.

Under the designated border processing law outlined in section 274A(7) of the Customs and Excise Act 1996, SmartGate uses the electronic information in the e-Passport and facial recognition technology to perform the customs and immigration checks that are usually conducted by a Customs officer.

Dated this 1st day of December 2010.

MARTYN JOHN DUNNE, Comptroller of Customs.

If we do legislate it will be targeted

### 299 Appeals and reviews unaffected

To avoid doubt, a person has the same rights of appeal or right to apply for administrative or judicial review (if any) in relation to a decision made, power exercised, obligation complied with, or other action taken by an automated electronic system as the person would have had if the decision, power, obligation, or other action had been made, exercised, complied with, or taken by a specified person.

Compare: 1996 No 27 s 274D

## 228 Dishonestly taking or using document

- (1) Every one is liable to imprisonment for a term not exceeding 7 years who, with intent to obtain any property, service, pecuniary advantage, or valuable consideration,—
  - (a) dishonestly and without claim of right, takes or obtains any document; or
  - (b) dishonestly and without claim of right, uses or attempts to use any document.
- (2) Every person is liable to imprisonment for a term not exceeding 3 years who, without reasonable excuse, sells, transfers, or otherwise makes available any document knowing that—
  - (a) the document was, dishonestly and without claim of right, taken, obtained, or used; and
  - (b) the document was dealt with in the manner specified in paragraph (a) with intent to obtain any property, service, pecuniary advantage, or valuable consideration.

Compare: 1961 No 43 s 229A

Section 228: replaced, on 1 October 2003, by [section 15](#) of the Crimes Amendment Act 2003 (2003 No 39).

Section 228(2): inserted, on 7 November 2015, by [section 10](#) of the Crimes Amendment Act 2015 (2015 No 95).

**document** means a document, or part of a document, in any form; and includes, without limitation,—

- (a) any paper or other material used for writing or printing that is marked with matter capable of being read; or
- (b) any photograph, or any photographic negative, plate, slide, film, or microfilm, or any photostatic negative; or
- (c) any disc, tape, wire, sound track, card, or other material or device in or on which information, sounds, or other data are recorded, stored (whether temporarily or permanently), or embodied so as to be capable, with or without the aid of some other equipment, of being reproduced; or
- (d) any material by means of which information is supplied, whether directly or by means of any equipment, to any device used for recording or storing or processing information; or
- (e) any material derived, whether directly or by means of any equipment, from information recorded or stored or processed by any device used for recording or storing or processing information

# Crimes using synthetic media

# Privacy Commissioner promises to closely monitor Foodstuffs' facial recognition trial



NZ Herald

8 Feb, 2024 05:00 AM ⌚ 3 mins to read



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Comments

He also said, that while Foodstuffs has engaged with the Office of the Privacy Commissioner, it doesn't mean the office has endorsed the use.

“I will be looking for evidence after the six-month trial that the use of FRT has made a practical and statistically significant difference to the incidence of retail crime in Foodstuff North Island supermarkets relative to other less privacy intrusive options.

“It's my job to protect New Zealanders' privacy and we need to make sure, in instances like this FRT trial, that New Zealanders can trust that where their personal information is being used is necessary to the job at hand, and that the privacy risks associated with it are managed.”

NEW ZEALAND / CRIME

## Legal challenges to police use of automated number plate recognition cameras

8:49 am on 26 October 2023

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Phil Pennington, Reporter

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Police use of footage from high-tech automated number plate recognition cameras is being challenged in court by defendants.

At least 5000 cameras in two private networks provide footage of vehicle licence plates that police use to prosecute people.

At the heart of the unprecedented legal challenges is that this amounts to use of a tracking device without a warrant, in breach of search and surveillance laws. Another challenge is that it is in breach of the Privacy Act and the Bill of Rights.

There are at least two court cases, but suppressions mean details cannot be reported.

One argument is that the footage is obtained as part of a private contractual arrangement with a surveillance system paid for by the police.

The Criminal Bar Association said police's use of automated number plate recognition (ANPR) was just the "tip of the iceberg" of surveillance methods police were not being open about.

"We need to have a public conversation about the appropriate level of state surveillance in a free and democratic country," it said.



“This Government is committed to getting New Zealand up to speed on AI. We have a cross-party AI caucus, which is due to meet soon. Its first step will be providing feedback on the AI framework we are developing to support responsible and trustworthy AI innovation in government, which the public should expect to hear more on in the coming months,” Collins said. “There will be no extra regulation at this stage.”

Hon Judith Collins, as reported by  
Chris Keall (NZ Herald, 21 Feb)

# Extra-legal regulation

- Revisiting work from 2017–2020 (data use policies)
- Multi-stakeholder collaboration
- Successive calls for a centre of excellence continue
- Algorithm charter – made for predictive analytics not LLMs (AI → Algorithms → AI)
- Internal obligations to do privacy and risk assessments

# The NZ AI Policy Tracker

- Get everyone to a common starting point
- Public interest output – freely available
- Includes policy documents, legislation, OIA responses, key actors and groups, other relevant material
- Aim to add significant international documents and standards
- Seeking funding to develop it further
- *Few people have the time to read it all*

# So what do I think we should do?

- ~~● Set clear expectations on whether or not we'll legislate further~~
- Focus on that transnational middle layer of regulatory frameworks
- Take a principled approach based on human rights, free and open internet, international norms
- Build technical capacity in purposive design and audit of digital systems
- Influence best practice frameworks for risk assessment and other practices

**Foreign policy / cyber-diplomacy**

**Trade and digital trade**

**Internet governance and technical standards**

With thanks to Allyn, Chris and  
Ximena for their work on the  
NZ AI Policy Tracker!

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