# Submission to the Australian Human Rights Commission

9 October, 2018

**To:**
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Human Rights Commissioner
Australian Human Rights Commission
Level 3, 175 Pitt Street, Sydney NSW 2000
Via email: tech@humanrights.gov.au

**Subject:**
Consultation submission to the Australian Human Rights Commission, 'Human Rights and Technology Issues Paper', July 2018

## About the Digital Gap Initiative

1. The Digital Gap Initiative (henceforth referred to as **DGI** or **we**) is a charity registered with the Australian Charities and Not-for-profit Commission (**ACNC**) and a newly incorporated entity.
2. DGI is a passionate advocate for equal access to technology for all groups in society, but particularly for those with disabilities. DGI recognises that the implications of technology on society are broad and far-reaching. Specifically, DGI is an advocate for change in Australia's legislative framework and public policy towards technology accessibility. Since 2014, DGI has been an active participant in various public forums that provide a voice for minority groups in the context of technology usability, such as the Australian Human Rights Commission's (henceforth referred to as **AHRC**) 25th

anniversary of the *Disability Discrimination Act*[1] (henceforth referred to as **DDA**) event held at PwC Barangaroo.

3. DGI supplements its advocacy activities with informal accessibility testing services, connecting end users who face challenges in accessing technology (such as those with visual impairments) with the private sector, which is responsible for creating the products and providing the services that ultimately impact our everyday lives.

4. The work done by DGI is shaped directly by the experiences of those who face difficulties in accessing technology. The views conveyed in this paper and in the public forum by DGI are on behalf of the passionate members of DGI who want, and ultimately need, change in the way accessibility is viewed and addressed.

5. DGI would like to thank Edward Santow and the AHRC for providing this forum for discussion and consultation. DGI acknowledges that while the concept of technology as a human right is broad, the AHRC has provided with a well thought out paper that considers a spectrum of issues and stakeholders. It is vital that the broader implications of technology continue to be discussed openly and consultatively. DGI is excited to see technology being discussed as a human rights concept, both in Australia and globally.

6. DGI is looking forward to having proactive and healthy discussions with the AHRC and all communities impacted by the AHRC's 'Human Rights and Technology Issues Paper' (**AHRC Issues Paper**). DGI hopes that momentum can be generated as a result of this consultation and that discussions between the AHRC and DGI can continue into the future.

[1] *Disability Discrimination Act 1992* (Cth) ('DDA')

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# Introduction

## The omnipresence of technology in society

7. Technology has an interesting place in Australian law. There are numerous examples of legislation being slow to adapt to the rapid advances of technology and as a result Australian law has often taken a reactionary approach.[2] The AHRC Issues, quoting a World Economic Forum paper, recognises that technologies such as the Internet of Things, Artificial Intelligence (**AI**) and Robotics are some areas that merit close attention.[3]

8. Further, the AHRC correctly recognises that Australia's system does not have a formal bill of rights that legally enshrines the basic rights of individuals; instead, human rights are inherent to our society and are protected by the way laws are created, interpreted and implemented. An example which may be used as an analogy is the legal approach towards freedom of speech in Australia. The High Court of Australia is of the view that 'everybody is free to do anything, subject only to the provisions of the law' and accordingly there is an 'assumption of freedom of speech' such that we only turn to the law 'to discover the established exceptions to it'.[4]

9. DGI agrees with the AHRC that the opportunities presented by technology should be seized to 'advance human rights by making Australia fairer and more inclusive'.[5] Indeed, members of DGI have benefitted greatly from technologies such as text-to-speech converters and improved accessibility features in smartphones, technologies which makes everyday life easier to navigate.

10. At the same time, DGI is also seeing first-hand how technology is 'worsening inequality and disadvantage'.[6] While the paper is bold in seeking to address the human rights impact of technologies such as AI and Blockchain, the AHRC needs to understand that what may seem like basic technology, such as household appliances (for example, microwaves), touchscreen devices and even the Internet, are becoming increasingly difficult to access for people with disabilities. If technology is to be considered a human right and a staple to serve human society, technology accessibility should be a priority

[2] For example, there is no explicit right to privacy yet in Australia; see *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor (Victoria Park)* (1937) 58 CLR 479 and *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63. As a result, drone technology has presented various privacy issues.
[3] Australian Human Rights Commission, 'Human Rights and Technology Issues Paper', July 2018, pp 18 (**AHRC Issue Paper**)
[4] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 (Brennan CJ, Dawson, Toohey, Gaudron, Mchugh, Gummow and Kirby JJ) quoting *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109, 283.
[5] AHRC Issue Paper, above n 3, pp 4.
[6] AHRC Issue Paper, above n 3, pp 4.

for all devices and for all communities in society. After all, accessing technology is the gateway to using technology and letting it serve us as humans.

11. We are at a pivotal point in time with respect to technology. We are at the gateway of a path towards complex technology and AI. If accessibility needs are not met now, and are not brought in as a key design feature of technology products, the fear is that future technology innovations will continue this cycle, such that accessibility is altogether forgotten. This slippery slope needs to be avoided entirely, and affirmative action now will ensure that we do not face these issues later.

# Recommendations

12. This paper will first establish the issue of technology accessibility faced by those with disabilities, particularly visual disabilities. This will address questions 1 and 2 of the AHRC Issues Paper. DGI recommends that existing frameworks such as the National Disability Insurance Scheme (**NDIS**) be expanded to include products that already come with accessibility features, rather than going out of the way to create accessible products which may not meet all user needs.

13. This paper will then discuss the shortcoming of Australia's legislative framework, and differences between Australia's laws and the various international conventions discussed by the AHRC. DGI is of the opinion that the current legislative framework, does not adequately address Australia's obligations under international law.

14. In any case, from firsthand experience, the burden imposed on individuals with disabilities to seek legal remedies under Australian law is far too onerous. Placing the onus on minority communities to lodge complaints and fight for change presents an unnecessary challenge. As such, while DGI sees this as a last resort, there may be merit in introducing a punitive approach towards accessibility legislation, such that the burden lies on companies to comply with accessibility requirements and the law acts as a 'sword' for vulnerable communities.

15. As an extension, DGI feels that the current framework does not pose enough of a balance between legislation and soft law and that the current regulatory system is insufficient in protecting the right to access technology for all. This will address questions 3, 7 and 9 and recommends a tougher regulatory standard for Australian and import products. While DGI recognises the work done by Standards Australia (**SA**), its work is too broad to give specific attention to accessibility requirements; this is reflected in the small number of standards which actually refer to product accessibility.

16. As such, DGI recommends that a new central regulatory body be created, which oversees all accessibility product standards and enforces these regulations. Further, this body should seek to represent Australia in international discussions on accessibility,

advocate for Australia's obligations under international conventions be implemented in domestic law and create and update regulations per global standards. Other roles of this body could be to provide accreditation to qualified accessibility designers and oversee higher education curriculums on accessibility design.

17. As a supplement, DGI is of the opinion that the Australian Consumer Law (**ACL**) and the Australian Competition and Consumer Commission (**ACCC**) should be used more proactively in ensuring products are accessible. While the current ACL provides some soft protection from an accessibility standpoint,[7] explicit references need to be made and aggressively pursued by the ACCC.

18. Finally, as mentioned above, DGI understands that imposing burdens on the private sector to comply with strict laws and regulations may not be in the best interest of the private sector and of society in general, particularly given that people with disabilities comprise a minority of Australia's population. There is also a concern that if accessibility requirements are introduced in a strict sense, companies will only add on accessibility features towards the end of the design phase, for the purposes of complying with standards. By adding accessibility at the end of the development cycle, the private sector is adding unnecessary extra costs to the technology and is not reaching the whole market.

19. Yet, recognising that people with disabilities (**PWD**) make up 18.3% of Australia's population,[8] there is a business case to be made for encouraging the private sector to improve the accessibility of technological products. Accessibility is broader than the PWC community which the AHRC's published statistics do not address, as this figure excludes situations such as dyslexia, poor education, those with English as a second language. All of these communities benefit from accessibility improvements. DGI strongly believes that cooperation between minority groups, public policy, the education sector and the private sphere is the best way to alleviate any inequality in technology.

20. This section of the paper will address questions 4 and 10 of the paper. DGI agrees with the AHRC Issue Paper's recommendation that universal design is a key in addressing accessibility issues in the future. Further, incentivising the private sector to invest into accessibility research and create accessible technology products, for example through government subsidies and tax incentives, will ensure that technology remains accessible for all in the community.

21. The education sector is pivotal in promoting this grass-roots approach towards accessibility design. Introducing educational courses into university and TAFE, and

[7] *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth). Specifically, s 54 states that goods must be of 'acceptable quality'.
[8] Australian Bureau of Statistics, 4430.0-Disability, Ageing and Carers, Australia: Summary of Findings (2015). Australian Bureau of Statistics. At http://www.abs.gov.au/ausstats/abs@.nsf/mf/4430.0 (viewed 28 September 2018)

ensuring that proper accreditation is acknowledged for individuals who have the requisite education, will ensure accessibility as a design feature is thought about in the long run.

# The issue of accessibility

## Background

22. As pointed out in the AHRC Issue Paper, accessibility with respect to technology refers to both the 'input and consumption of information, with the goal of removing barriers to technology'.[9] Research suggests this is further divided into two components; the accessibility and usability of digital content and technology and access to digital infrastructure broadly.[10]

23. DGI seeks change for both components, but the recommendations posed by the AHRC are focused primarily on the former. We are striving for meaningful, long-term structural change into the digital infrastructure.

24. From our experience, and supported by the Australian Digital Inclusion Index (henceforth the **ADII**), digital inclusion for those with disabilities is well below the Australian average and surprisingly the gap is wider in capital cities.[11] For DGI, the ADII is a starting point that touches upon the broader implications of technology accessibility.

25. With respect to accessibility and usability of digital content, progress is being made. Text-to-speech converters are improving in quality, and websites and even products such as Apple's iPhone are becoming more compliant with international accessibility standards such as Web Content Accessibility Guidelines 2.1 (**WCAG 2.1**). Progress is being made and should be recognised.

## Personal experiences with accessibility

26. Notwithstanding the above, plenty needs to be done for digital content to be accessible, as well as for a change in accessible digital infrastructure. Ironically, government websites have been shown to be inaccessible even when claiming conformance**.**

27. Further, DGI notes that the ubiquity of touchscreen technology in everyday devices has meant that those with visual disabilities in particular are finding it difficult to perform everyday activities. Household appliances as dishwashers, microwaves and washing

[9] AHRC Issue Paper, pp 36.
[10] J Thomas, J Barraket, C Wilson, C Ewing, T MacDonald, J Tucker, E Rennie, Measuring Australia's Digital Divide: The Australian Digital Inclusion Index 2017, (RMIT University, Melbourne, for Telstra) 6. At https://digitalinclusionindex.org.au/wp-content/uploads/2018/03/Australian-Digital-Inclusion-Index-2017_v2.pdf (viewed 25 September 2018), pp 19.
[11] Above n 10, pp 19.

machines which are using this technology are failing to consider accessibility entirely, or implementing accessibility features without properly considering its best use.

28. DGI notes its own involvement in raising concerns on the accessibility of the latest generations of ATMs and EFTPOS machines issued by Australian banks. The use of a touchscreen to make decision on the ATM, as well as to insert a bank PIN, has been problematic for those with disabilities. Our members have been in the humiliating position of having to vocalise their PIN numbers in order to make a valid payment. Despite this, these payment devices have been advertised by Australian banks to be accessible.[12]

29. For members of DGI, accessibility is an issue that affects more than the use and interaction of digital content. It is recognised that the concept of accessibility 'touches any kind of human interaction with the external environment'.[13] Employment is a growing area of concern for people with disabilities; as society becomes more digitally educated, people with disabilities are at risk of losing jobs due to the perceived burden imposed on private companies. Often, accessibility features in the workplace are included as an afterthought and do not appropriately accommodate those who need these features. While building access for those with physical disabilities has improved greatly, appropriate technology used in employment is seldom available. Examples of technology which are currently difficult to access include finance, asset, project management and human resources applications used in professional organisations.

30. DGI also notes that areas such as security and privacy, which in themselves are important issues, are considered as a priority to the expense of accessibility. These have not been addressed in great detail in this report, reflecting its importance in the AHRC Issues Paper.

31. Finally, when considering the broader impact of technology in society, it is vital to share our experiences in areas such as employment. Despite all the benefits that technology brings for those with disabilities, it is recognised that the unemployment statistics for PWD remains well above the national average and has, more importantly not decreased in the last 20 years.[14] As pointed out by the AHRC Issues Paper, AI-informed decision making presents issues for those with disabilities. Examples include the use of algorithms to target advertising of job opportunities to the detriment of people with

[12] For example, the Commonwealth Bank of Australia's 'Albert' machine provides accessibility instructions which are difficult in practice, or are not given to operators of these machines; see https://www.commbank.com.au/content/dam/commbank/business/pds/Albert_Accessibility_User_Guide.pdf

[13] Senate Community Affairs References Committee, Commonwealth of Australia, Delivery of outcomes under the National Disability Strategy 2010-2020 to build inclusive and accessible communities (2017) 38. At https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/AccessibleCommunities/Report (viewed 20 September 2018)

[14] Susan Ryan, responding to a question from a member of DGI at the Disability Commission of Australia conference in 2016

disabilities; and risk assessments, such as those for insurance purposes, which unfairly discriminate against minority groups.[15]

32. It is evident that, while there are positive experiences with technology for those with disabilities, the negative experiences are more subtle and reflective of a structural issue on Australia's digital ecosystem. The problems raised by the AHRC Issues Paper are commendable, but a step back needs to be taken and more basic technology issues need to be addressed. The next sections will discuss legislative and policy changes which the DGI feels will aid in creating a more accessible digital infrastructure in Australia.

# Legislation and regulation need to work together

## The disconnect between legislation and international conventions

33. Discrimination with respect to disability is an issue recognised in international law to some degree within the human rights sphere. The conventions highlighted in the AHRC Issue Paper include the Universal Declaration of Human Rights (**UDHR**);[16] the International Covenant on Civil and Political Rights (**ICCPR**);[17] and the International Covenant on Economic, Social and Cultural Rights (**ICESCR**).[18]

34. Yet even in these conventions, the concept of discrimination according to 'disability' is not explicitly stated; reference is made to discrimination according to 'birth or other status'.[19] The effect of this is that it creates ambiguity as to the status of those with genuine disabilities in the face of international law and diminishes the specific issues faced by such groups.

35. The abovementioned conventions also focus on the explicit discrimination of these groups. More often than not, as can be seen with the example of cashless payment systems, discrimination is inadvertent and implicit in the broader digital infrastructure.

36. These is also evidence of these conventions referring to the impact of technology, which state that there is an inherent right to 'seek, receive and impart information regardless of frontiers, either orally, in writing or in print'; as well as a right 'to enjoy the benefits of scientific progress'[20] which, when construed broadly, includes the accessibility of technology.

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[15] AHRC Issue Paper, pp 29.
[16] Universal Declaration of Human Rights, GA Res 217A (10 December 1948). At http://www.un.org/en/universaldeclaration-human-rights/. (**UDHR**)
[17] International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976) (**ICCPR**)
[18] International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (**ICESCR**)
[19] ICESCR Art 2; ICCPR Art 2, 26.
[20] ICESCR, Art 15(1).

37. The Convention on the Rights of Persons with Disabilities (**CRPD**), to which Australia is a signatory, is the primary convention addressing the topic of accessibility. The preamble to the convention recognises the 'importance of accessibility to information and communication' for all, while the convention explicitly imposes a general obligation to adopt legislative measures for implementing the rights in the convention.[21]

38. When viewing these conventions in the face of Australian law, DGI is of the opinion that Australia has not done enough to act on its international convention obligations. Australia's legislative framework towards technology accessibility is not a human rights one, as recommended by the AHRC Issue Paper.

39. In advocating for structural change in the way Australia's laws are enforced and created, DGI accepts the PANEL approach introduced by the AHRC Issue Paper.[22] Of these five factors, accountability is currently lacking in Australian law. DGI also agrees that the approach to legislation should be principles-based, and should focus on creating a set of rights and rules that ensures long-term protection of the right to technology for those with disabilities.

40. DGI finally believes that the federal government should lead by example in ensuring accessibility. This can be done in one of two ways. First, all technology used and procured by the Australian government should meet international standards, particularly WCAG 2.1. The government needs to do more than making websites accessible, and should openly publish its compliance recordkeeping. We believe the Federal Government's Digital Transformation Agency and the NSW State government are introducing some of these measures already, which should be commended.

41. Second, DGI believes that procurement of IT products from international parties should also comply with international standards. Australia's trade agreements should be revised, particularly with nations from which Australia imports technologies where accessibility may not be considered a priority.

## Gaps in Australia's legislative framework

42. Australia's legislative framework on technology accessibility is led by the DDA, and supplemented by other acts such as the *Telecommunications Act*[23] and the *Broadcasting Services Act*.[24]

43. It is well documented that the DDA poses many gaps for those who seek to use it as a 'sword' to achieve meaningful product and services accessibility. Foremost, the DDA, as

[21] Convention on the Rights of Persons with Disabilities, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008), Art 4 (**CRPD**).
[22] AHRC Issue Paper, pp 17.
[23] *Telecommunications Act 1997* (Cth).
[24] *Broadcasting Services Act 1992* (Cth).

with the international conventions listed above, focuses on explicit discrimination and only requires 'reasonable adjustments to be made to enable a person with a disability to access goods, services or facilities unless this would cause unjustifiable hardship'.[25] Under present law, DGI feels this provides a low bar for companies to comply with accessibility requirements and places the burden on individuals to lodge complaints and seek change.

44. The AHRC itself recognises that 'without the backing of a definite legislative timetable, progress towards standard setting has had to be achieved by slow negotiations'[26] and sometimes under the threat of complaints. Further, while the DDA does a decent job at acknowledging and addressing issues faced by common disabilities, other communities, such as 'people with intellectual or psychiatric disabilities, have not had the same clear benefits'.[27] This needs to be addressed by the AHRC.

45. DGI would also like to see the ACL strengthened. Product accessibility is ultimately a consumer issue and the framework exists for protecting consumer rights. However the ACL does not do a satisfactory job when protecting the rights of those with disability in all facets, let alone accessibility. Rights for those with disability are only specific in the context of the National Disability Insurance Scheme (**NDIS**) and no further protection, aside from general guarantees, are provided.

# Supplementation by soft law

## The need to use soft law in harmony with legislation

46. Australia's framework is a combination of encoded law and soft law, being the implementation of standards and regulations by various bodies. Australia's system seems to be one of self-regulation, with voluntary standards being introduced in various areas such as banking.[28]

47. Australia's present system in theory is the most effective way of regulating the private sector to consider accessibility when providing products and services. On the one hand, a self-regulatory system is relatively efficient, yet this is traded off by 'uncertainty over institutional implementation'.[29] On the other hand, 'regulatory legislation is inevitably

[25] DDA, s 5(2).
[26] AHRC, Dr Sev Ozdowski (Acting Disability Discrimination Commissioner), 'Disability discrimination legislation in Australia from an international human rights perspective: History, achievements and prospects', https://www.humanrights.gov.au/news/speeches/disability-discrimination-legislation-australia-international-human-rights-perspective, accessed on 21 September 2018.
[27] Above n 25.
[28] See for example the voluntary standards introduced by the Australian Bankers Association.
[29] Grajzl P and Murrell L, 'Allocating lawmaking powers: Self-regulation vs government regulation', 2007 *Journal of Comparative Economics* 35, pp 520 http://econ-server.umd.edu/~murrell/articles/AllocatingLawMakingPowers.pdf, accessed 3 October 2018.

incomplete, only roughly specifying the obligations of regulators'[30] as well as of the industry being regulated.

48. Studies highlight that flexibility in law-making are more useful in situations where there is uncertainty in the implementation of voluntary standards.[31] Conversely, the lower the bargaining power of consumers, which is clearly the case for communities with disabilities, the less effective regulations are that favour the industry to be regulated. Thus, a balance needs to be struck between the DDA and soft law in order for the interests of all parties to be accounted for.

## The current framework

49. With this in mind, an analysis of Australia's soft law regime suggests that it does not do enough to mandate significant action from the private sector. Standards Australia (**SA**) is the nation's peak non-government standards organisation which develops and adopts internationally-aligned standards in Australia and represents the nation at the International Organisation for Standardisation (**ISO**).[32] The AHRC paper correctly recognises that the standards implemented by SA are voluntary and are not enforced or regulated. With respect to accessibility, while Standards Australia has over 7,000 standards in place, only a handful relate to, or even mention, accessibility.

50. For DGI this presents a huge structural issue in Australia's framework. While voluntary standards are a positive start, no meaningful action will be taken without some formal mandate and even punitive measures for businesses which fail to comply with legislative requirements. The scope for abuse of these voluntary standards is evident in the Commonwealth Bank of Australia's "Albert" cash payment product, which was highlighted by DGI in 2015. Despite the issues faced by our community in making cashless payments, "Albert" has been advertised as being compliant with Australian standards.

51. DGI acknowledges the role of standards in Australia and the process being undertaken to standardise accessibility requirements on an international scale. In November 2016, DGI endorsed EN 301 549, standards for the accessibility requirements suitable for public procurement of ICT products and services in Europe. DGI acknowledges that mirroring the exact text of EN 301 549 seems practical from the point of view of moving towards a universal standard. Further, we accept that the adoption of this Australian standard is to be used when determining technical specifications for the procurement of accessible ICT products and services. This is an important first step in remedying long-

[30] Above n 28, pp 521.
[31] Above n 28.
[32] AHRC Issue Paper, pp 39.

standing omissions in this policy area and has been endorsed by key stakeholders, which has deemed the standards suitable for the purpose of including accessibility requirements in the procurement process used in the public sector.

52. Numerous international standards already exist, of which Australia is not a party. The ISO Technical Committee 159 / Subcommittee 4, titled 'ergonomics of human-system interaction', provides a list of 66 standards to do with workplace ergonomics, with four of these standards being specific to aid accessibility. We note that Australia is not currently a participant or an observing member, when it should be. We believe this needs to be addressed.

## Experiences of other jurisdictions

53. The United States has a strong system of regulation and legislative protection which, although has gaps in it, is further advanced than Australia. Various legislative measures are in place which provide obligations on products and services, as well as disclosure requirements. The first is the *Telecommunications Act* of 1996,[33] which requires telecommunications products and services to be accessible. However, the definition of 'telecommunications' per this act is narrow and only includes voice products.

54. More recently, in 2010, the US Government introduced the *21st Century Communications and Video Accessibility Act*[34] which sought to expand the legislation's scope. Foremost the Act requires all Voiceover Internet Protocol, real time messaging and video conferencing devices and services to be accessible. Further, company executives are required under this act to annually certify to the Federal Communications Commission (**FCC**) their accessibility recordkeeping efforts. This in itself is more robust than the current Australian law.

55. These legislative measures are supplemented by regulations from US Federal agencies. Specifically, the US FCC and the US Access Board write regulations to define technical requirements that are used to enforce accessibility laws.

56. Section 255 of the *Communications Act* states that 'where readily achievable, telecommunications equipment and customer premises equipment' shall be accessible to and useable by individuals with disabilities. Entities that are subject to these sections must maintain records of the efforts they take to implement these accessibility requirements and submit recordkeeping compliance certifications and contact information with the appropriate regulatory body. If not readily achievable, the legislation then states again that products and services need to be compatible with existing peripheral devices, 'if readily achievable'.

[33] 47 U.S.C. 153; Telegraphy (**Telecommunications Act**)
[34] Public Law 111-260 (**Communications Act**)

57. As stated above, the *Telecommunications Act* presents a narrow approach when dealing with telecommunication devices. On top of this, the definition of 'readily achievable', defined as 'easily accomplishable and able to be carried out without much difficulty or expense' is far too low a standard to encapsulate the vast majority of companies. Equally as problematic is the notion of self-certification, which allows entities to submit their own record-keeping on measures taken to comply with their 'obligations' under legislation.

58. The result is the diminishment of accessibility as an issue in the first place, being considered behind the interests of the private sector. Further, with companies each submitting their own compliance measures, the definition and criteria of 'accessibility' varies company by companies, resulting in a mismatch which makes its way into the market. This is potentially harmful in the long term, as inevitably companies will meet lower standards while claiming accessibility.

59. The *Telecommunications Act* has been supplemented by sections 716-18 of the *Communications Act*, which provides regulatory powers to the FCC for the respective technologies.

60. A reasonably positive experience can be found in the monitoring of education services in the United States. Per legislation, the rights of 'persons with handicaps in programs and activities that receive Federal financial assistance'[35] are protected.[36] Evidence of the failure of a purely self-regulated approach is in the lack of accessible content in a range of industries, products and services in America. It is noted that increasingly, 'postsecondary learning experiences are being delivered on digital platforms using digital contents'.[37] With this in mind, 'students with disabilities are finding that they often cannot fully participate in these creative new learning experiences without external assistance'.[38] These struggles for students exist despite the existence of legislation that 'protects the rights of persons with handicaps in programs and activities that receive Federal financial assistance'.

61. DGI feels that the USA mode, while imperfect, provides a reasonable platform from which to base our own laws. Technology is not enshrined in America's constitution, although this is being raised by court cases; however, legislation and soft law, backed by a dedicated regulatory agency, have shaped America to be a world leader in digital accessibility.

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[35] US Department of Education, Office of Civil Rights, 'The Civil Rights of Students with Hidden Disabilities Under Section 504 of the Rehabilitation Act of 1973, https://www2.ed.gov/about/offices/list/ocr/docs/hq5269.html, accessed 6 October 2018.
[36] 29 U.S.C. 701, section 504 (*Rehabilitation Act 1973*)
[37] Bowes F, 'An overview of content accessibility issues experienced by educational publishers', 2 October 2017, *The Association of Learned & Professional Sociey Publishers*, https://onlinelibrary.wiley.com/doi/epdf/10.1002/leap.1145, accessed 5 October 2018.
[38] Above n 33.

## Stricter soft law is required

62. With consideration of the above analysis in mind, DGI recommends firstly that the DDA make reference to these standards explicitly. Notwithstanding that the DDA should reflect principles, as opposed to a 'bright line' approach, reference to internationally recognised standards serve two purposes. For one, it is in direct compliance with Australia's obligations under its international conventions. Second, hardcoding international regulations, which themselves evolve over time, allow the law to adapt over time and remain proactive as opposed to reactionary.

63. Second, noting that harmony between legislation and regulation is necessary, consideration should be given for standards to be mandated, as opposed to voluntary, and overseen by an independent regulatory body. A self-assessment and voluntary basis is commendable, and should not completely be removed. However, the threat is that this approach is idealistic for companies which only see implementing accessibility as an afterthought, if at all.

64. Mandatory regulations, with penalties for a failure to comply, is acknowledged to be a strict step. Yet from our own experiences with requesting change, it is apparent that more needs to be done. A punitive approach towards penalties is, in DGI's views, a step necessary in making accessibility a key feature of design rather than added on towards the end of the product design cycle. Strict penalties should be imposed for companies that blatantly disregard standards requirements, and companies which comply and go beyond what is required should be encouraged.

65. Even the imposition of financial penalties may not be enough. In the United States, under section 255, the Commissioner has a general authority to enforce the section, including issuing guidelines or a policy statement. A fixed financial penalty on large corporations would in no way act as a deterrent or a punishment for companies that intentionally fail to comply; instead, companies may be willing to cop the financial penalty if it means avoiding obligations. In Canada, penalties for gaps in accessibility are applied on a per-day basis.

66. Of course, DGI recognises that a balance needs to be struck between unreasonable administrative burdens and technology accessibility. This is especially so for ICT procurement, given that Australia is a net capital importer from nations which may not be as advanced as Australia in considering accessibility. The scope of any mandatory regulations is something DGI is happy to discuss further.

67. An example of the success of a combined self-regulation and punitive approach to compliance can be seen in the Australian tax landscape. Taxpayers are required to assess their tax positions on a self-assessment basis; however, should the Australian Taxation Office (**ATO**) discover disregard to taxation rules, severe penalties are

imposed. This is particularly the case for 'significant global entities'. It appears as though these financial penalties act as enough of a deterrent, even for larger companies, such that taxpayers comply with the strictest of taxation laws and rulings. This approach thus ensures that compliance is considered at the forefront and done on a self-assessment basis, which minimises the resources required by any independent oversight body.

68. In conclusion, DGI recommends an open, consultative approach between the independent body and technology service providers. Penalties should exist, and should be severe, but they should be used as a last resort. Compliance with standards should be the focus of legislation and soft law, and something the AHRC should work towards implementing.

## Engaging the private sector

69. While advocating for policy change is important, DGI recognises that it is the nexus between end users and the private sphere that influences the quality of accessibility. Presently, accessibility features are either not considered at all, or are only considered as an afterthought, in order to comply with regulations.

70. It is recognised that those requiring accessible technology are a minority and not the majority of the population. Consequently for many businesses, providing accessible products and services is a disproportionate cost. It is noted that business-to-business products generally do not include accessibility features where not required.

71. In instances where accessibility is provided, our experience has been that accessibility is a design feature added on towards the end of the product lifecycle, as opposed to being considered in early design phases. The consequence is that accessibility is not coherently integrated into products, including websites, and thus provides an inconsistent experience for end users.

72. DGI poses three recommendations with respect to the private sector. The AHRC Issue paper recognises that 18.3% of Australia's population faces a disability. Put another way, DGI is of the opinion that one in five of Australia's population, and largely reflecting global statistics, is a substantial number that presents businesses with a unique opportunity to unlock a section of the market.

73. First, it is imperative that federal and state governments first raise the issue of accessible technology to the private sector. It is more likely than not that the private sector, due to a sluggish complaints process that does not connect end users with appropriate legal remedies, is simply unaware of the prevalence of disabilities in Australia and necessity of accessibility features. Similarly the majority of the public,

being people who do not face accessibility issues, are likely not aware of accessibility being an issue in the first place.

74. Analogies can and should be made with the 'green movement'. It is recognised that 'consumers are mindful of environmental impacts when making purchasing decisions for products and services' and have recently started 'purchasing greener consumer products and are feeling good about it'.[39] Similarly, accessibility should be seen as 'not to do with demographics but attitude'.[40] A failure to provide accessible products should be seen as a failure on behalf of the private sector and should deserve negative publicity and even consumer revolt. This is perhaps a stronger threat than any financial penalty for companies to comply with regulations and create meaningful change in Australia's digital infrastructure.

75. Looking at implementing accessibility as a Corporate Social Responsibility (**CSR**) for businesses is another, more positive approach, that may be considered when looking for more meaningful digital infrastructure change.

76. Second, more needs to be done to incentivise the private sector to include such features. As discussed above, penalties for failing to comply with mandatory regulations is a negative approach towards compliance. DGI is of the view that this should be a last resort. Monetary incentives to encourage medium to large businesses to consider accessibility throughout the research and development stage of a product would stimulate the Australian economy and provide valuable access to technology for minority groups.

77. An example of a monetary incentive would be federal government subsidies for any research and development associated with creating accessibility research. In simple microeconomics, subsidies have the effect of increasing supply and lowering the price of goods. Increasing the supply of accessible products and services, from banking services to smart devices, and lowering its cost, is likely to repay itself in the long term.

78. Another example of monetary incentive for businesses is the use of tax credits, such as utilising research and development tax offsets, to encourage additional investment into accessible technology. DGI is happy to consider in more detail these economic incentives.

79. Third, the AHRC Issue Paper raises the benefits of universal design in treating accessibility earlier on in the product lifecycle. For DGI, education and accreditation of the nation's technology innovators and coders is key to treating universal design seriously. DGI is increasingly concerned that despite the projects undertaken by the Federal Government, there is currently only one tertiary courses for students to access if

[39] Sehgal P and Singh N, 'Impact of eco-friendly products on consumers' 2010 *CBS E-journal,* accessed http://www.cbsmohali.org/img/chapter6.pdf on 1 October 2018, pp 12.
[40] Above n 35.

they are genuinely interested in creating accessible technology. Accessibility as a subject is not a core part of information technology degrees and DGI fails to see a valid reason why this is the case.

80. Finally, education can also alleviate the growing problem of companies, and individuals, claiming they are skilled in accessibility without receiving any formal education. An independent body would be able to manage and give out proper accreditation for accessibility designers. This would have the added effect of creating demand for the accreditation in the private sector and thus attracting demand in the corresponding education courses.

# Conclusion

81. DGI is appreciative of the issues raised by the AHRC Issue Paper, and is grateful that it is given the opportunity to respond. As discussed in both this position paper and the AHRC Issue Paper, technology is a powerful tool that will inevitably shape the lives of everyone on a daily basis.

82. We are at the frontier of intelligent, aware and complex technology which should enrich the lives of all Australians, not just the majority. DGI sees accessibility as the gateway to technology; if we are to consider technology as a universal human right, accessibility should be considered an absolute priority.

83. DGI is looking forward to further discussion with the AHRC and is happy to discuss any of the issues raised and recommendations brought forth in the near future.

The Digital Gap Initiative
9 October 2018