



Australian
Human Rights
Commission

Human Rights and Technology Discussion Paper

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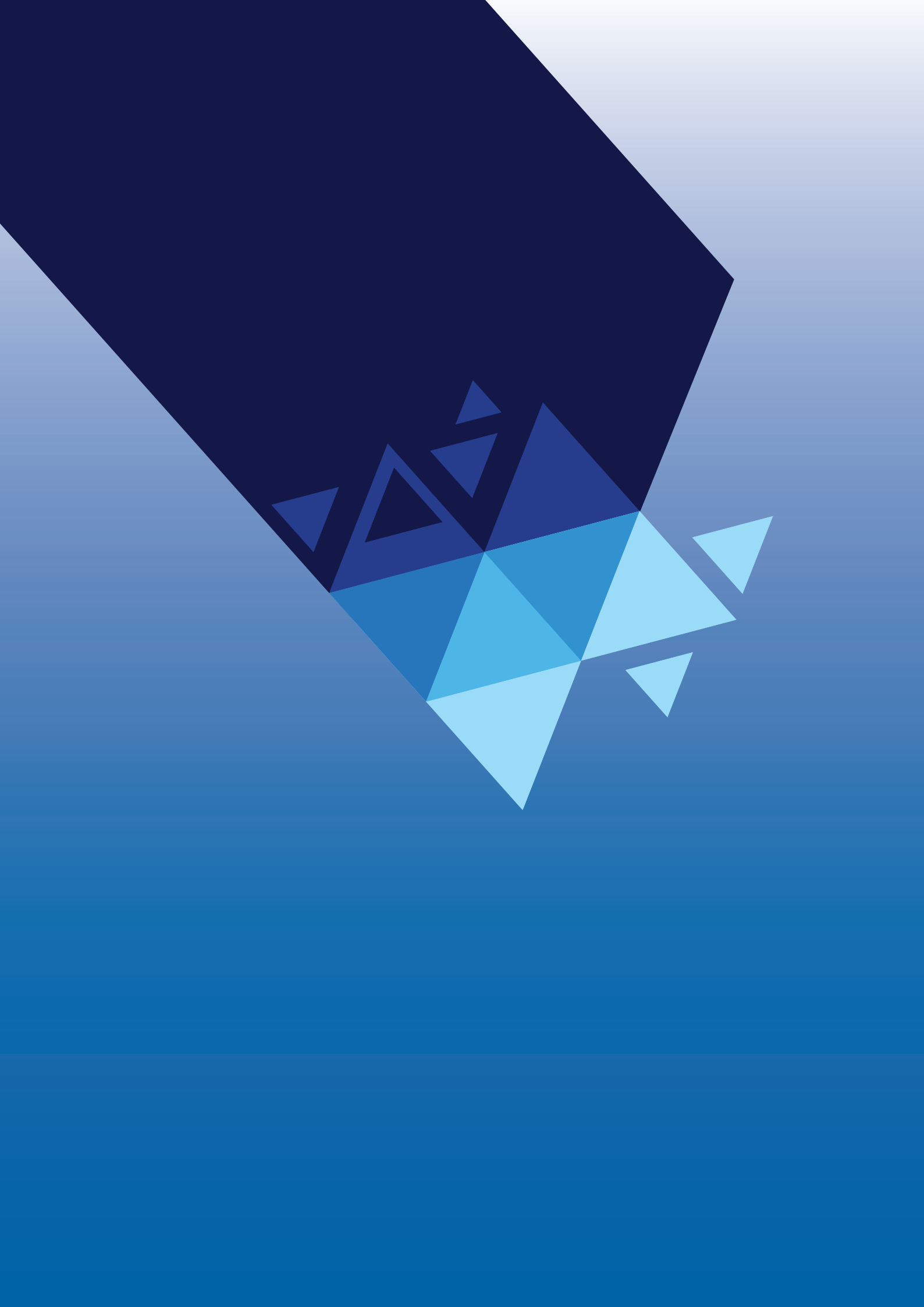
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Executive Summary

Background

This document summarises the Australian Human Rights Commission's (Commission's) Discussion Paper, published in relation to its Human Rights and Technology Project (Project).

The Project considers how Australia should respond to the human rights challenges and opportunities posed by the rise of new and emerging technologies. The Project was launched at an international conference held in Sydney in July 2018, when the Commission released an Issues Paper to frame its work.

Following extensive public consultation, the Discussion Paper sets out the Commission's preliminary views. The Commission will conduct further consultation on the Discussion Paper's proposals and questions. This will be vital in shaping the Commission's roadmap for reform in its Final Report, due in 2020.

This Executive summary provides a chapter by chapter overview of the Discussion Paper, including the proposals and questions for consultation. The full version of the Discussion Paper can be found on the Commission's website, at <https://tech.humanrights.gov.au>.

PART A: INTRODUCTION AND FRAMEWORK

Chapter 1: Introduction

Chapter 1 of the Discussion Paper contains an introduction and background information about the Project.

Chapter 2: Human rights framework

International human rights law applies throughout the world and is aimed at protecting individual dignity and promoting the flourishing of communities. It requires Australia to protect and promote human rights.

New technologies engage human rights in new and profound ways. Governments, companies and others should comply with human rights law in the design, development and use of technology.

Chapter 2 emphasises the importance of understanding how our rights are affected by the development and use of new technologies, and of adopting a 'human rights approach'. This will be critical in making our community fairer and more inclusive, and in countering threats of harm.

A human rights approach is supported by stakeholders and is increasingly reflected in the actions and statements of the United Nations, international bodies, comparable liberal democracies and multinational corporations.

Chapter 3: Regulation

The Australian regulatory framework includes legislation, co-regulation and self-regulation. Effective national regulation should uphold and protect human rights and instil public trust about how new technologies are used in Australia.

Three key principles should apply:

1. **Regulation should protect human rights.** All regulation should be guided by Australia's obligations under international law to protect human rights.
2. **The law should be clear and enforceable.** Australian law should set clear, enforceable rules regarding the design, development and use of new technologies. Our law should promote human rights and liberal democratic values. Australia's law-makers should fill any gaps necessary to achieve these regulatory aims.
3. **Co-regulation and self-regulation should support human rights compliant, ethical decision making.** The law is not required to address every social implication of new technologies. Good co- and self-regulation—through professional codes, design guidelines and impact assessments—can promote sound, human rights compliant development and use of new technologies.

Australia needs a national strategy for the protection of human rights in the development and use of new technologies.

PROPOSAL 1:

The Australian Government should develop a *National Strategy on New and Emerging Technologies*. This National Strategy should:

- (a) set the national aim of promoting responsible innovation and protecting human rights
- (b) prioritise and resource national leadership on artificial intelligence (AI)
- (c) promote effective regulation—this includes law, co-regulation and self-regulation
- (d) resource education and training for government, industry and civil society.

Chapter 4: Ethical frameworks

Governments, the private sector and civil society have recently developed many 'ethical frameworks' to give guidance on the development and use of new technologies. These frameworks include new ethical policies, principles and codes, which apply especially to the use of AI and automated decision making.

The complex challenges presented by new technologies require a multi-faceted regulatory approach. This starts with applying current laws more effectively, and identifying gaps in the law that require reform. Where the law is appropriately silent or does not provide a clear rule to apply, other measures, such as ethical frameworks, can guide 'good' decision making. Ethical frameworks can be important, but they cannot be a substitute for the law.

The proposed *National Strategy on New and Emerging Technologies* should promote the role of ethical frameworks to complement enforceable human rights and other laws.

PROPOSAL 2 :

The Australian Government should commission an appropriate independent body to inquire into ethical frameworks for new and emerging technologies to:

- (a) assess the efficacy of existing ethical frameworks in protecting and promoting human rights
- (b) identify opportunities to improve the operation of ethical frameworks, such as through consolidation or harmonisation of similar frameworks, and by giving special legal status to ethical frameworks that meet certain criteria.

AI is being used by government and the private sector to make inferences, predictions, recommendations or decisions about individuals and population groups. Examples include the use of AI in the delivery of social services and welfare programs, the criminal justice system and targeted advertising on social media platforms.

The Commission proposes three principles to guide how the Australian Government and private sector engage in AI-informed decision making:

1. **International human rights should be observed.** The Australian Government should comply with human rights in its own use of AI, and it should ensure human rights protections are enforced for all entities that use AI.
2. **Minimise harm.** There needs to be appropriate and effective testing of AI-informed decision-making systems, before they are used in ways that could harm individuals, and ongoing monitoring of those systems when they are in operation.
3. **Accountability.** Individuals affected by AI-informed decisions should be able to understand the basis of the decision and be able to challenge decisions that they believe to be wrong or unlawful.

PART B: ARTIFICIAL INTELLIGENCE

Chapter 5: AI-informed decision making

AI is increasingly used to make a broad range of decisions, with significant implications for our human rights. AI-informed decision making refers to the making of a decision that has a legal, or similarly significant, effect for an individual, where AI materially assisted in the decision-making process. Decision making can affect a person's human rights because of something about the *decision* itself, or because of the *decision-making process*.

QUESTION A :

The Commission's proposed definition of 'AI-informed decision making' has the following two elements: there must be a decision that has a legal, or similarly significant, effect for an individual; and AI must have materially assisted in the process of making the decision.

Is the Commission's definition of 'AI-informed decision making' appropriate for the purposes of regulation to protect human rights and other key goals?

Chapter 6: Accountable AI-informed decision making

AI-informed decision making must be accountable. The need for accountability derives from international and domestic human rights law, as well as principles such as the principle of legality and the rule of law.

Those people who are negatively affected by an AI-informed decision may also face further adverse consequences if there is a failure of accountability. To date, the known harms associated with AI-informed decision making are being disproportionately experienced by those who are already vulnerable or disadvantaged. Special attention should be given to the use of AI-informed decision making in areas where the human rights risk is particularly high, such as in social security and facial recognition in policing.

Accountability for AI-informed decision making will be improved by more rigorously applying existing laws, as well as some targeted reform. For AI-informed decision making to be accountable, it must be:

- *lawful*, complying with existing laws and having legal authority where necessary
- *transparent*, encompassing the notion that affected individuals are notified of AI being a material factor in a decision engaging their human rights, as well as transparency regarding government use of AI
- *explainable*, requiring a meaningful explanation for an AI-informed decision
- *used responsibly* and with clear parameters for liability
- subject to appropriate *human oversight and intervention*.

PROPOSAL 3 :

The Australian Government should engage the Australian Law Reform Commission to conduct an inquiry into the accountability of AI-informed decision making. The proposed inquiry should consider reform or other change needed to:

- (a) protect the principle of legality and the rule of law
- (b) promote human rights such as equality or non-discrimination.

PROPOSAL 4 :

The Australian Government should introduce a statutory cause of action for serious invasion of privacy.

PROPOSAL 5 :

The Australian Government should introduce legislation to require that an individual is informed where AI is materially used in a decision that has a legal, or similarly significant, effect on the individual's rights.

P R O P O S A L 6 :

Where the Australian Government proposes to deploy an AI-informed decision-making system, it should:

- (a) undertake a cost-benefit analysis of the use of AI, with specific reference to the protection of human rights and ensuring accountability
- (b) engage in public consultation, focusing on those most likely to be affected
- (c) only proceed with deploying this system, if it is expressly provided for by law and there are adequate human rights protections in place.

P R O P O S A L 7 :

The Australian Government should introduce legislation regarding the explainability of AI-informed decision making. This legislation should make clear that, if an individual would have been entitled to an explanation of the decision were it not made using AI, the individual should be able to demand:

- (a) a non-technical explanation of the AI-informed decision, which would be comprehensible by a lay person, and
- (b) a technical explanation of the AI-informed decision that can be assessed and validated by a person with relevant technical expertise.

In each case, the explanation should contain the reasons for the decision, such that it would enable an individual, or a person with relevant technical expertise, to understand the basis of the decision and any grounds on which it should be challenged.

P R O P O S A L 8 :

Where an AI-informed decision-making system does not produce reasonable explanations for its decisions, that system should not be deployed in any context where decisions could infringe the human rights of individuals.

P R O P O S A L 9 :

Centres of expertise, including the newly established Australian Research Council Centre of Excellence for Automated Decision-Making and Society, should prioritise research on how to design AI-informed decision-making systems to provide a reasonable explanation to individuals.

Q U E S T I O N B :

Where a person is responsible for an AI-informed decision and the person does not provide a reasonable explanation for that decision, should Australian law impose a rebuttable presumption that the decision was not lawfully made?

P R O P O S A L 10 :

The Australian Government should introduce legislation that creates a rebuttable presumption that the legal person who deploys an AI-informed decision-making system is liable for the use of the system.

Q U E S T I O N C :

Does Australian law need to be reformed to make it easier to assess the lawfulness of an AI-informed decision-making system, by providing better access to technical information used in AI-informed decision-making systems such as algorithms?

P R O P O S A L 11 :

The Australian Government should introduce a legal moratorium on the use of facial recognition technology in decision making that has a legal, or similarly significant, effect for individuals, until an appropriate legal framework has been put in place. This legal framework should include robust protections for human rights and should be developed in consultation with expert bodies including the Australian Human Rights Commission and the Office of the Australian Information Commissioner.

Q U E S T I O N D :

How should Australian law require or encourage the intervention by human decision makers in the process of AI-informed decision making?

Chapter 7: Co- and self-regulatory measures for AI-informed decision making

Co- and self-regulatory measures include codes of practice, guidelines, directives, industry or sector rules and protocols. They can help protect human rights in AI-informed decision making. The flexibility and adaptability of these forms of regulation may be difficult to achieve solely by legislation.

There are opportunities for these measures to protect human rights at various stages of the AI life cycle—from research and design through to deployment and monitoring.

- Design strategies, standards and impact assessments address the earlier stages of the AI lifecycle. Good examples of these industry tools or approaches need to be scaled up across sectors, nations and globally.
- Regulatory sandboxes allow for new products or services to be tested in live market conditions but with reduced regulatory or licensing requirements, some exemption from legal liability, and with access to expert advice and feedback.
- Education and training on human rights compliant technology is needed for professionals who design, develop and use AI in decisions that significantly affect human rights. Such education is also needed for the public and particularly affected groups.

Government accountability for the use of AI-informed decision making would be improved through the application of three principles:

1. Government decision making that uses AI should be transparent, especially where it affects human rights. Transparency could be advanced through better auditing processes that show how the Australian Government is procuring and using AI.
2. There should be ongoing human oversight and evaluation of this form of government decision making.

3. Government procurement rules and practices should be used to strengthen human rights safeguards for government AI-informed decision-making systems.

PROPOSAL 12:

Any standards applicable in Australia relating to AI-informed decision making should incorporate guidance on human rights compliance.

PROPOSAL 13:

The Australian Government should establish a taskforce to develop the concept of 'human rights by design' in the context of AI-informed decision making and examine how best to implement this in Australia. A voluntary, or legally enforceable, certification scheme should be considered. The taskforce should facilitate the coordination of public and private initiatives in this area and consult widely, including with those whose human rights are likely to be significantly affected by AI-informed decision making.

P R O P O S A L 1 4 :

The Australian Government should develop a human rights impact assessment tool for AI-informed decision making, and associated guidance for its use, in consultation with regulatory, industry and civil society bodies. Any 'toolkit for ethical AI' endorsed by the Australian Government, and any legislative framework or guidance, should expressly include a human rights impact assessment.

P R O P O S A L 1 5 :

The Australian Government should consider establishing a regulatory sandbox to test AI-informed decision-making systems for compliance with human rights.

P R O P O S A L 1 6 :

The proposed *National Strategy on New and Emerging Technologies* (see Proposal 1) should incorporate education on AI and human rights. This should include education and training tailored to the particular skills and knowledge needs of different parts of the community, such as the general public and those requiring more specialised knowledge, including decision makers relying on AI datapoints and professionals designing and developing AI-informed decision-making systems.

P R O P O S A L 1 7 :

The Australian Government should conduct a comprehensive review, overseen by a new or existing body, in order to:

- (a) identify the use of AI in decision making by the Australian Government
- (b) undertake a cost-benefit analysis of the use of AI, with specific reference to the protection of human rights and ensuring accountability
- (c) outline the process by which the Australian Government decides to adopt a decision-making system that uses AI, including any human rights impact assessments
- (d) identify whether and how those impacted by a decision are informed of the use of AI in that decision-making process, including by engaging in public consultation that focuses on those most likely to be affected
- (e) examine any monitoring and evaluation frameworks for the use of AI in decision-making.

P R O P O S A L 1 8 :

The Australian Government rules on procurement should require that, where government procures an AI-informed decision-making system, this system should include adequate human rights protections.

Q U E S T I O N E :

In relation to the proposed human rights impact assessment tool in Proposal 14:

- (a) When and how should it be deployed?
- (b) Should completion of a human rights impact assessment be mandatory, or incentivised in other ways?
- (c) What should the consequences be if the assessment indicates a high risk of human rights impact?
- (d) How should a human rights impact assessment be applied to AI-informed decision-making systems developed overseas?

Q U E S T I O N F :

What should be the key features of a regulatory sandbox to test AI-informed decision-making systems for compliance with human rights? In particular:

- (a) what should be the scope of operation of the regulatory sandbox, including criteria for eligibility to participate and the types of system that would be covered?
- (b) what areas of regulation should it cover eg, human rights or other areas as well?
- (c) what controls or criteria should be in place prior to a product being admitted to the regulatory sandbox?
- (d) what protections or incentives should support participation?
- (e) what body or bodies should run the regulatory sandbox?
- (f) how could the regulatory sandbox draw on the expertise of relevant regulatory and oversight bodies, civil society and industry?
- (g) how should it balance competing imperatives eg, transparency and protection of trade secrets?
- (h) how should the regulatory sandbox be evaluated?

PART C: NATIONAL LEADERSHIP ON AI

Chapter 8: National leadership on AI

The Discussion Paper proposes the creation of a new AI Safety Commissioner to give Australia expert leadership on AI. This independent statutory office would focus on preventing individual and community harm, and promoting and protecting human rights in the development and use of AI. It would have a central role in policy development and national strategy relating to AI, and help build the capacity of existing regulators, government and industry bodies to respond to the rise of AI.

The AI Safety Commissioner would not be a regulator of AI, but *support* the existing regulatory structure, and build the capacity of regulators and others involved in protecting the rights of people who may be affected by the use of AI.

Three critical factors point to a need for leadership in Australia on AI, which the AI Safety Commissioner could address:

- **Expertise.** Regulators, oversight bodies and those responsible for developing law and policy need support in understanding how AI applies to their work.
- **Trust.** The benefits of AI are possible only if the community can trust that the risks associated with AI are identified and addressed. By improving the operation of existing governance and regulatory mechanisms, the proposed AI Safety Commissioner could play a critical role in building an enduring foundation of community trust.
- **Economic opportunity.** The local innovation economy will be strengthened and the global competitiveness of Australia's technology industry will be enhanced, if Australia comes to be known for developing and using AI-powered goods and services that protect users' human rights.

PROPOSAL 19:

The Australian Government should establish an AI Safety Commissioner as an independent statutory office to take a national leadership role in the development and use of AI in Australia. The proposed AI Safety Commissioner should focus on preventing individual and community harm, and protecting and promoting human rights. The proposed AI Safety Commissioner should:

- (a) build the capacity of existing regulators and others regarding the development and use of AI
- (b) monitor the use of AI, and be a source of policy expertise in this area
- (c) be independent in its structure, operations and legislative mandate
- (d) be adequately resourced, wholly or primarily by the Australian Government
- (e) draw on diverse expertise and perspectives
- (f) determine issues of immediate concern that should form priorities and shape its own work.

PART D: ACCESSIBLE TECHNOLOGY

Chapter 9: The right to access technology

People with disability have a right to access new and emerging technologies. Access to these technologies can enable people with disability to enjoy equal participation and inclusion in political, social, economic and cultural aspects of life in the community.

Inaccessible technology can exclude people with disability from community participation and limit independence. Many people with disability encounter barriers in accessing 'Digital Technologies', which is defined here as information and communication technologies, connected devices and the Internet of Things, and virtual and augmented realities.

People with disability may encounter barriers accessing technology where they cannot use a particular item of Digital Technology (eg, a smartphone) because it does not accommodate the individual's disability. This is known as functional inaccessibility. It can be addressed in part by encouraging government and other providers of goods, services and facilities to provide accessible forms of technologies.

People with disability may also encounter barriers when they cannot obtain a good or service that uses new technology. This may be because, for example, it is unaffordable or not available for people living in remote areas. Such barriers may be addressed by improving affordability and information about accessible technologies to people with disability.

PROPOSAL 20:

Federal, state, territory and local governments should commit to using Digital Technology that complies with recognised accessibility standards, currently WCAG 2.1 and Australian Standard EN 301 549, and successor standards. To this end, all Australian governments should:

- (a) Adopt an accessible procurement policy, promoting the procurement of goods, services and facilities that use Digital Technology in a way that meets the above accessibility standards. Such a policy would also favour government procurement from entities that implement such accessibility standards in their own activities.
- (b) Develop policies that increase the availability of accessible communication services such as Easy English versions and human customer supports.

PROPOSAL 21:

The Australian Government should conduct an inquiry into compliance by industry with accessibility standards such as WCAG 2.1 and Australian Standard EN 301 549. Incentives for compliance with standards could include changes relating to taxation, grants and procurement, research and design, and the promotion of good practices by industry.

P R O P O S A L 2 2 :

The Australian Government should amend the *Broadcasting Services Act 1992* (Cth) to require national broadcasting services, commercial broadcasting services, and subscription broadcasting services to:

- (a) audio describe content for a minimum of 14 hours per week for each channel, with annual increases
- (b) increase the minimum weekly hours of captioned content on an annual basis.

P R O P O S A L 2 3 :

Standards Australia should develop an Australian Standard or Technical Specification that covers the provision of accessible information, instructional and training materials to accompany consumer goods, in consultation with people with disability and other interested parties.

P R O P O S A L 2 4 :

The National Broadband Network should undertake economic modelling for the provision of a concessional wholesale broadband rate for people with disability who are financially vulnerable.

Q U E S T I O N G :

What other measures could the private sector take to eliminate barriers to accessibility related to the affordability of Digital Technologies for people with disability?

Chapter 10: Design, education and capacity building

‘Human rights by design’ involves consideration of all key human rights engaged across all stages of the production process—from product concept through to final product manufacture and upgrades.

There are significant benefits in applying a ‘human rights by design’ strategy to new technologies—people with disability benefit from being able to access technology, other members of the community experience more inclusive functionality, and the technology industry benefits from a bigger consumer market and a better reputation.

A ‘human rights by design’ strategy in government policies and procedures could promote accessible technology for people with disability. Education, training and capacity-building initiatives for the private sector and engineering, technology and science professionals could further promote such a strategy.

P R O P O S A L 2 5 :

The Council of Australian Governments Disability Reform Council should:

- (a) lead a process for Australia's federal, state and territory governments to commit to adopting and promoting 'human rights by design' in the development and delivery of government services using Digital Technologies, and monitor progress in achieving this aim
- (b) include policy action to improve access to digital and other technologies for people with disability as a priority in the next National Disability Strategy

P R O P O S A L 2 7 :

Professional accreditation bodies for engineering, science and technology should consider introducing mandatory training on 'human rights by design' as part of continuing professional development.

P R O P O S A L 2 8 :

The Australian Government should commission an organisation to lead the national development and delivery of education, training, accreditation, and capacity building for accessible technology for people with disability.

P R O P O S A L 2 6 :

Providers of tertiary and vocational education should include the principles of 'human rights by design' in relevant degree and other courses in science, technology and engineering. With appropriate support, the Australian Council of Learned Academies should undertake consultation on how to achieve this aim most effectively and appropriately within the tertiary and vocational sector.

Q U E S T I O N H :

What other tertiary or vocational courses, if any, should include instruction on 'human rights by design'?

Chapter 11: Legal protections

People with disability encounter multiple barriers in accessing goods, services and facilities. A legally-binding standard or set of standards would better protect the right of people with disability to access Digital Technologies used for communication.

The introduction of a 'Digital Communication Technology Disability Standard' could benefit the technology industry and the broader community through:

- greater availability of accessible Digital Technology for people with disability, potentially reducing the likelihood of unlawful discrimination
- greater certainty for industry regarding its obligations to design and develop accessible Digital Technology, and guidance on how to undertake 'human rights by design' processes, enhancing compliance with human rights laws
- development of new technology products and services which are more usable, which may bring commercial benefits, as well as benefiting the broader community.

PROPOSAL 29 :

The Attorney-General of Australia should develop a Digital Communication Technology Standard under section 31 of the *Disability Discrimination Act 1992 (Cth)*. In developing this new Standard, the Attorney-General should consult widely, especially with people with disability and the technology sector. The proposed Standard should apply to the provision of publicly available goods, services and facilities that are primarily used for communication, including those that employ Digital Technologies such as information communication technology, virtual reality and augmented reality.

QUESTION 1 :

Should the Australian Government develop other types of Standards, for Digital Technologies, under the *Disability Discrimination Act 1992 (Cth)*? If so, what should they cover?

PART E: CONSULTATION

The Commission is conducting a broad, inclusive public consultation and would like to hear your views on the proposals and questions in the Discussion Paper.

Written submissions may be formal or informal. They can address some or all the consultation questions and proposals. The information collected through the consultation process may be drawn upon, quoted or referred to in any Project documentation. You can elect to make your submission public or confidential.

The Discussion Paper's proposals and questions are extracted in this Executive Summary. Please refer to the Discussion Paper for more detail.

Written submissions must be received by **Tuesday 10 March 2020**. The submission form and details on the submission process can be found at <https://tech.humanrights.gov.au>

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