



Human Rights and Technology Discussion Paper Australian Human Rights Commission



The University of Melbourne response

April 2020

Executive summary

The University of Melbourne welcomes the opportunity to respond to the Australian Human Rights Commission's *Human Rights and Technology Discussion Paper*. The development of new technologies poses considerable challenges to legal and regulatory frameworks intended to support the rights and interests of Australians. The Human Rights Commission (AHRC) is to be commended for its contributions in this area.

The contents of the Discussion Paper reflect the key point that the development of new technologies and digital applications entails opportunities as well as risks. There are clear dangers of human rights being compromised where, for example, new technology fails to protect individual privacy or where algorithms discriminate against certain groups. It is also true that the new technology can serve to enhance the wellbeing of individuals and communities, for example by enabling social connection for those with a disability or those who reside in remote locations. It is important to manage the legitimate risks that come with new technology, without allowing this to prevent the considerable benefits from being realised. We also note that new technologies can either enable or impede political participation and therefore impact rights of citizenship. While these issues are understandably out of this consultation's scope, this broader context is relevant to the framework for reform proposed in the Discussion Paper.

The impact of new technology on already marginalised groups is appropriately a point of focus in a discussion of the human rights implications of that technology. We welcome the attention the Commission has given to accessibility for people with disability throughout the consultation process; the comments below add to those the University offered on the issue of accessible technology in our earlier contributions to the consultation process. We note that accessibility and inclusion are matters of particular concern not only for people with disability but for other marginalised groups. The human rights framework should be sensitive to the ways in which these groups may be further disadvantaged by poorly designed technology or inadequate laws and regulations. In addition we reinforce the observation that universal design benefits all, not just special groups.

We also note that the issues addressed in this consultation have also been addressed in other public inquiries, most notably the ACCC Digital Platforms Inquiry and Data61's AI Ethics Framework. Given this overlap, the outcomes of the Commission's work would be bolstered by ensuring that they are integrated with the outcomes of those other inquiries, where appropriate, or seek to engage with those agencies where there is divergence.

Submission overview

This submission draws upon the expertise of leading researchers from the University of Melbourne across a range of fields, and was assisted by an internal roundtable held in February to discuss the Commission's Discussion Paper. Many of these researchers also contributed to the University's response to the Issues Paper and White Paper released in earlier stages of this consultation. A list of contributors has been included at the end of this submission.

The following comments are not an exhaustive response to each of the Discussion Paper's proposals or questions. Rather, the submission addresses specific elements of the framework set out in the Discussion Paper, building upon points made in the University's earlier submissions to this consultation process. The comments are limited to Parts B, C and D; where appropriate, we note specific proposals to which these comments are addressed.

Key points:

Part B – Artificial Intelligence

The University of Melbourne:

- recommends that the Commission should avoid attempting to distinguish between AI and non-AI technology for the sake of the human rights framework, given the problems associated with this distinction.
- recommends that the Commission consider amending the proposed definition of “AI-informed decision making”, in view of problems associated with the phrase “legal or significant effect”.
- recommends that the Commission should proceed in proposing “statutory cause of action for serious invasion of privacy”, but should go further in proposing broader reform of the *Privacy Act* along the lines of reforms enacted in the EU.
- supports the proposed reforms that mandate both explainability and reasonableness.
- supports the proposal to establish a taskforce, but notes that the success of this measure will depend upon a range of groups and interests being represented.
- supports the proposal to use ‘regulatory sandboxes’ to test compliances, but suggest that this should involve a number of sandboxes (rather than just one) given the range of applications to be tested.

Part C – National Leadership on AI

- The University of Melbourne suggests that the proposal to establish an AI Safety Commissioner needs to integrate with other elements of the framework set out in the Discussion Paper. In particular, the Commissioner role must be integrated with any independent body established to inquire into ethical frameworks recommended in Part A.

Part D – Accessible Technology

- The University of Melbourne supports the proposal for COAG to lead a national process for promoting ‘human rights by design’, but encourages that this be taken further to include service development and delivery.

For further information, or to discuss the submission, [REDACTED], Pro Vice-Chancellor (Research Infrastructure and Systems), can be contacted at [REDACTED] or on [REDACTED]
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Part B: Artificial Intelligence

Distinction between AI and non-AI technology

Part B of the Discussion Paper is dedicated to Artificial Intelligence and AI-informed decision making, by implication excluding technology that does not involve AI. As per the University's responses to the Issues Paper and White Paper¹, we argue that it is best to avoid attempting to distinguish between AI and non-AI technology within the human rights framework. There are three reasons for this. First, there is no clear or agreed distinction that separates "AI" from other algorithmic technologies. Second, the distinction is not relevant: there is no reason for laws and regulations to apply to an AI algorithm but not to other algorithms tasked with similar types of decisions. Third, limiting human rights-related provisions to AI technology will likely result in organisations seeking to avoid these provisions by arguing that what the relevant technology accomplishes does not count as AI.

Definition of 'AI-informed decision making'

Question A invites feedback on the Discussion Paper's proposed definition of AI-informed decision making as containing the following two elements: (i) "there must be a decision that has legal, or similarly significant, effect for an individual; and (ii) "AI must have materially assisted in the process of making the decision".

Notwithstanding the preceding point about avoiding provisions that are specific to AI-technology, the University of Melbourne proposes that the proposed definition should be re-worded. The phrase "decision that has legal, or similarly significant, effect" could be replaced with "decision that has human rights implications". This would reflect the broad intent of the current definition – to ensure that the basic entitlements of individuals are safeguarded in the face of the risks posed by new technologies – while avoiding potential confusion associated with determining whether a "legal effect" can be ascribed to the application. The recently released *Guidance on the AI auditing framework* from the U.K. Information Commissioner's Office may be helpful in informing thinking around the interaction between individual rights and the development of AI systems.²

Privacy

Proposal 4 suggests introducing "a statutory cause of action for serious invasion of privacy". The University of Melbourne supports this proposal. It is in keeping with recommendations of the Australian Law Reform Commission's *Serious Invasions of Privacy in the Digital Era* (ALRC Report 123, June 2014); Department of Prime Minister and Cabinet's Issues Paper, *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy* (September 2011); and the Australian Competition and Consumer Commission's, *Digital Platforms Inquiry – Final Report* (July 2019). We note also that the Government in its Response to the ACCC Report has undertaken to review the question as part of a broader review of the *Privacy Act*. Further, we note a potential link between the need for more elaborated provisions about consent in the context of privacy, and the need for meaningful explainability in decision making scenarios.

However, Proposal 4 arguably does not go far enough. An additional sentence should be added along the lines of the Australian Government "reforming to the Privacy Act to give better account to the right to privacy". Such reforms should include, at a minimum, a more up-to-date definition of 'personal information' and a right for individuals to bring a claim in court for damages for breach of the Act. The EU has enacted reforms that reflect the need to ensure that increases in data sharing

¹ Submission 50 at <https://tech.humanrights.gov.au/submissions-white-paper> and Submission 79 at <https://tech.humanrights.gov.au/submissions>

² <https://ico.org.uk/media/about-the-ico/consultations/2617219/guidance-on-the-ai-auditing-framework-draft-for-consultation.pdf>, see pp.86-93.

are accompanied by stronger privacy protections. The General Data Protection Regulation (GDPR) – which provides a right to deletion and a more accurate definition of re-identification³ – serves as a useful model for Australia to follow.

Other jurisdictions, including the UK and California, have made progress in developing broad yet flexible, principles-based regulation, coupled with an ability of those whose data has been misused to individually or collectively bring a claim in court for breach of a data privacy/data protection statute and recover damages. These changes would embody a recognition that privacy is a right, rather than a mere privilege, whose enforcement is left to the discretion of the regulator. The ACCC has recommended these and other reforms to the Act in its Digital Platforms inquiry, arguing that such changes are needed for the empowerment of consumers. The Australian Government’s Response indicated that these issues will be addressed in the planned review of the *Privacy Act*. It would help to build the case for the changes if the AHRC’s position aligned with that of the ACCC.

Explainability and the right to review

Proposals 7 and 8 suggest legislative reforms to mandate that AI applications are both explainable and reasonable. The University of Melbourne supports these proposals. As articulated in Proposal 7, individuals that are impacted by algorithmic decisions are entitled to an explanation of those decisions, including both a non-technical explanation that identifies the reasons for the decisions as well as an account of the technical details of the algorithm. Important legislative reform in this area should establish a ‘right to review’. This is an essential accountability mechanism to ensure that the relevant decision making does not involve unfair discrimination.

Taskforce

Proposal 13 suggests that a taskforce be established 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”. The University of Melbourne supports the proposed taskforce. We note, however, that the success of the taskforce will depend upon it being composed of members representing a broad range of knowledge and interest groups. Broad representation should include researchers from a range of fields, industry, technical experts, user groups, and representatives of disadvantaged groups, all the while ensuring that the taskforce is not dominated by any particular interest.

Regulatory sandboxes

Proposal 15 suggests that the “Australian Government should consider establishing a regulatory sandbox to test AI-informed decision-making systems for compliance with human rights.” While supporting this proposal, we argue that it would be better couched in terms of regulatory sandboxes rather than a single sandbox. Given the diversity in technological applications to be tested in this way, and the rapid evolution of technology, a variety of forums appropriate to different types of application would be more effective in ensuring compliance with human rights.

Relatedly, the University encourages the Commission to adopt a broad view of what should be tested in the sandboxes. As well as assessing new technologies, sandboxes could also aid the development of evaluation and review mechanisms. For example, sandboxes could aid in the development and testing of tools aimed at harnessing AI to empower financial wellbeing, as identified by University of Melbourne researchers in a 2019 FinFuture White Paper⁴. A regulatory sandbox for the testing of AI-based decision-making tools to support financial decision-making would enable the testing of these tools in a safe environment to against the requirements of human rights compliance.

³ e.g. <https://gdpr-info.eu/chapter-3/>

⁴ <https://www.unimelb.edu.au/finfuture/whitepaper>

Part C: National Leadership on AI

AI Safety Commissioner

The Discussion Paper proposes that the Australian Government “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.” (Proposal 19).

While there is some merit in the proposal, consideration should be given to how the proposed Safety Commissioner relates to other elements of the framework outlined in the Discussion Paper. Proposals 1 and 2 suggest the development of a National Strategy and the establishment of an independent body to inquire into ethical frameworks for new and emerging technologies. It is important that these elements are properly integrated. Specifically, it would be helpful if it were made clear whether the Safety Commissioner is envisaged as belonging to the proposed independent body or being separate from it.

We also note that the effectiveness of this measure in protecting and promoting human rights will depend upon the remit it is given and on how it interacts with existing bodies. Along these lines, the University suggests that three key features should guide the establishment of the Safety Commissioner:

1. Its remit should not be limited to AI (as per our earlier comments)
2. It should be designed to work in a co-ordinated manner across existing bodies with oversight responsibilities relating to the development and use of technology and data (e.g. the Privacy Commissioner)
3. Its responsibilities should include monitoring international developments in the regulation of new technology to facilitate Australia’s alignment with international developments.

Part D: Accessible Technology

Part D of the Discussion Paper focuses on issues of disability and accessible technology.

It is essential that all people can enjoy the benefits of new technological advancements. The University of Melbourne welcomes the Commission's discussion of accessibility and human rights, particularly the suggested measures to enhance and prioritise disability accessibility in the field of digital technology.

Proposal 25 suggests that the Council of Australian Governments (COAG) lead a process for "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 suggests COAG "include policy action to improve access to digital and other technologies for people with disability as a priority in the next National Disability Strategy".

The University of Melbourne supports this proposal. However, we recommend that this proposal be taken further to include a focus on human rights by design from the start of the service development and delivery, ensuring that all technologies are friendly to disabled users. It is essential that a new National Disability Strategy be implemented this year alongside a new National Disability Agreement (as recommended by the Productivity Commission's *Review of the National Disability Agreement*⁵) and that both the Agreement and Strategy place an emphasis on technology as a key enabler of full citizenship and inclusion for people with disabilities.

The Productivity Commission's Review offers a guide as to what a new National Disability Agreement may look like, identifying seven key person-centred objectives for the new Agreement: Learning and skills; Health and well-being; Inclusive and accessible communities ; Family and carer wellbeing; Rights protection, justice and legislation; Personal and community support; Economic security.

Appropriate technological support will facilitate each of these objectives; it is crucial that people with disability are not excluded through any digital divide. The organisation commissioned under Proposal 28 may provide an important mechanism to assist in the delivery of digital inclusion.

Question G raises the issue of private sector measures to eliminate barriers to accessibility, specifically relating to the affordability of digital technologies for people with disability. We direct the AHRC to a program of research led by the Melbourne Social Equity Institute and developed in collaboration with industry, people with cognitive disabilities, and representative organisations of people with disabilities and mental health consumers. The 'Better support for consumers with cognitive disabilities' project⁶, funded via the Australian Communications Consumer Action Network (ACCAN) Grants Program, involved the development of practical resources to increase support and access to online telecommunications products for consumers with cognitive disabilities. That resource included a set of recommendations to guide service providers to improve and clarify their web content and a toolkit of Easy English templates to support providers to develop accessible information.

⁵ <https://www.pc.gov.au/inquiries/completed/disability-agreement#report>

⁶ <https://socialequity.unimelb.edu.au/projects/support-for-consumer-transactions/>

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*Note that while the researchers listed provided expert comment that informed the content of this submission, the submission ultimately represents the views of the University and not necessarily the views of each of these contributors.