The Digital Gap Initiative
Unit 233
137 Victoria Street
Ashfield NSW 2131
Phone: (02) 9799 5388
Email: gisele@digitalgap.org

# Submission to the Australian Human Rights Commission

14 April 2020

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

**Subject:**
Submission to the Australian Human Rights Commission, 'Human Rights and Technology Discussion Paper', December 2019

## About the Digital Gap Initiative

1. The Digital Gap Initiative (henceforth referred to as **DGI** or **we**) is a not-for-profit (**NFP**) charity registered with the Australian Charities and Not-for-profit Commission (**ACNC**).
2. We are an advocate for all groups in society to enjoy and embrace technology equally. Specifically, we recognise that technology is an enabling tool for people with disabilities; it allows these groups to contribute and interact with society independently and autonomously.
3. When compared to the treatment faced by those with disabilities in the past, a history which includes overt discrimination, it cannot be stated how much our community values its sense of dignity and self-worth. For the most, technology allows that to happen.

4. DGI is an advocate for change in Australia's legislative framework and public policy towards technology accessibility. We have been an active member in the accessibility community. In the last two years, DGI has actively participated in various public forums that provide a voice for minority groups. DGI attended the Australian Human Rights Commission's (**AHRC**) roundtable event, following a submission prepared in response to the AHRC's 'Human Rights and Technology Issues Paper' (2018).

5. More recently DGI has attended roundtable events as part of the Australian Payments Network's (**APN**) efforts to improve the accessibility of touch-screen EFTPOS machines. Our input has also helped shape the Australian Banking Association's (**ABN**) '*Accessibility Principles for Banking Services*' (2018).

6. The input provided by DGI is shaped directly by the lived experiences of those who face difficulties in accessing technology, particularly those with visual disabilities. Our voice is on behalf of a network of end users who face challenges in accessing everyday technology and our aim is to share this voice with policy makers, regulators and the private sector in a productive manner.

7. 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.

8. DGI would once again like to thank Edward Santow and the AHRC for providing an inclusive forum for consultation. DGI commends the AHRC for publishing the 'Human Rights and Technology Discussion Paper' (December 2019) (henceforth the **AHRC Discussion Paper**). The AHRC Discussion Paper is detailed and covers a broad range of perspectives. More promisingly, there are actionable proposals which alleviate many of DGI's initial concerns.

9. It is pleasing that accessibility has been recognised as an integral issue that technology brings. The AHRC Discussion Paper in our view substantially covers the human rights issues associated with a lack of accessibility and provides a broad range of practical, actionable solutions. DGI is also pleased that its own submission was referenced numerous times by the AHRC.

10. DGI is keen to continue this positive momentum and is looking forward to having healthy discussions with the AHRC and the various stakeholders that are impacted by the AHRC Discussion Paper. DGI hopes that the proposals raised by the AHRC can be fine-tuned and actioned, and calls upon all levels of government, as well as the private sector, to bring about meaningful change.

# Contents

# 1. Chapter 1: Introduction

11. It is safe to say that technology has become a staple of modern society. Members of society in Australia are required, in some shape or form, to engage and interact with technology daily. As recognised by the AHRC Discussion Paper, for people with disabilities, technology is an enabling tool that 'can unlock opportunities for the realisation of human rights'[1] like never before.

12. The recent global pandemic caused by COVID-19, which has rocked Australia both economically and socially, has only exacerbated the importance of technology. Now more than ever, all members of society require clear, direct and accessible information and guidance.

13. With access to the physical environment restricted, millions of Australians are relying on their everyday technology devices (including televisions, computers and smartphones) to access important government announcements and media updates on a situation that is changing by the hour.

14. Access, therefore, is an imperative and not a "nice to have". Further, just as COVID-19 can impact all humans around the globe regardless of age, gender, race or ability, access to information should also be universal. Special care must therefore be taken to ensure people more vulnerable in our community, such as the elderly and those with disabilities (such as intellectual or visual) can readily access the required information. In our view, this is akin to a 'human right'.

15. This paper will be divided into two broad sections. First, we will supplement the analysis provided in the AHRC Discussion Paper to reaffirm that access to technology is a human right. Establishing accessibility as a human right opens up a myriad of ways in which accessibility can be introduced, regulated and enforced. DGI would like to stress that a robust regulation, grievance and enforcement system is pivotal in the early stages of accessibility reform. In the long term, DGI hopes that a combination of social awareness and education will ensure that accessibility is at the forefront of the design process.

16. In this regard, it is important to identify the key characteristics of "human rights", such as what they are, how they are defined, whether they are interpreted differently for different groups in society, how they are governed and how they are enforced.

17. These questions are, of course, difficult to answer and will incorporate thinking from, amongst other areas, the legal, philosophical and scientific fields. In this regard the AHRC should be commended for incorporating so many perspectives in its Discussion Paper.

[1] Australian Human Rights Commission, *Human Rights and Technology Discussion Paper,* December 2019, pg. 155 (the **AHRC Discussion Paper**)

18. The second section will cover practical aspects of accessibility, shaped by the lived experiences of our community. We will specifically consider the proposals and questions presented by the AHRC Discussion Paper.

# 2. Chapter 2: Technology – the human rights consideration

## 2.1. The international human rights framework

### 2.1.1. Interpretation of international law

19. Humans are a diverse species. Various international conventions and domestic recognise that, for example, discrimination cannot be based on characteristics such as 'race, colour, sex, language, religion or social origin'.[2] Each facet is important for an individual and is an inherent part of their identity.

20. In a similar vein, the concept of 'disability' is a wide one. In the context of the international framework, it is important to recognise that a disability is not just an attribute of a person but:

> *'an evolving concept and… results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others*'[3]

Noting this definition, such impairments '… are not only diverse, but vary in intensity and impact, and often change over time'.[4] Such diversity also applies '… within groups that might at first seen homogenous'.[5]

21. With this backdrop, it becomes clear that international human rights law must be interpreted in the broadest possible way, to accommodate the needs of *all* humans. After all, the principle behind international human rights law is that 'all human beings born free and equal in dignity and rights'.[6]

22. Such a reading is supported by the *Vienna Convention,* which specifies that treaties are to be interpreted in '… good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[7] Supplementary materials may be considered in the event a reading under the principles above 'leads to a result which is manifestly absurd or unreasonable'.[8] In essence, a

[2] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 [accessed 13 January 2020] **(ICCPR**), Article 4.
[3] UN General Assembly. (2007). Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106. Retrieved from https://www.un.org/development/desa/disabilities/convention-on-the-rights-ofpersons-with-disabilities/convention-on-the-rights-of-persons-with-disabilities-2.html
[4] Shari Trewin, 'AI Fairness for People with Disabilities: Point of View', 2018, IBM Accessibility Research, page 3
[5] Trewin, above n4, page 3.
[6] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), accessed 19 January 2020, note 21
[7] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331 [accessed 19 January 2020], Article 31.
[8] Ibid.

combination of the textual and purposive methods of interpretation, as used in the Australian comm law system, is required when reading international conventions.

2.1.2. Analysis of the international framework

23. DGI agrees with the analysis set out in Chapters 1 and 2 of the AHRC Discussion Paper. Foremost, human rights should be *universal, indivisible, interdependent and interrelated*.[9] Based on the above, it can therefore be concluded that people with disability, regardless of the type of disability, are born equal in dignity and rights. Cambridge defines dignity as:

*the quality of a person that makes him or her deserving of respect, sometimes shown in behaviour or appearance.*[10]

24. Under the *Convention on the Rights of Persons with Disabilities* (**CRPD**), people with disabilities are explicitly given the right to, amongst either things:

i. 'inherent dignity, individual autonomy, freedom of choice and independence' (art. 3a, CRPD);
ii. 'full and effective participation and inclusion in society' (art 3 c, CRPD);
iii. 'accessibility' (art 3 f, CRPD); and
iv. 'access all aspects of society on an equal basis with others including the physical environment, transportation, information and communications, and other facilities and services provided to the public.' (art 9, CRPD).

25. The CRPD should be read in conjunction with the rights already provided under the International Convention on the Civil and Political Rights, as identified by the AHRC Discussion Paper.[11] A detailed analysis was provided in the AHRC Discussion Paper with respect to the implications of the above rights granted to persons with disabilities. When viewed as a whole, DGI is of the view that persons with disabilities are granted the right to interact with all aspects of society, which will inevitably include interaction with technology, unhindered. Such interaction must be accessible and must maintain dignity of the individual.

26. DGI would like to stress that in its view 'all aspects of society' include all actors forming part of our society. In Australia, we would ordinarily define 'society' as including governments, regulatory bodies, private companies and people as key stakeholders. As

[9] AHRC Discussion Paper, page 154.
[10] Cambridge Dictionary online, 19 January 2020, accessed at https://dictionary.cambridge.org/dictionary/english/dignity.
[11] AHRC Discussion Paper, page 150.

such the obligation rests with *each stakeholder* to ensure people with disabilities achieve the rights defined above.

27. DGI agrees with the Commissioner's conclusion that the 'CRPD sets out durable principles that continue to apply as technology develops swiftly and often unpredictably'. In our view the reason is that any interpretation of the above CRPD articles which might limit the rights of those with disabilities to current technologies or society as it currently stands would produce an unreasonable outcome, which is impermissible under international law interpretation.

28. The conclusion, therefore, is that the international framework sufficiently covers the rights of persons with disabilities to action their everyday lives with dignity. The framework is inclusive and considerate of the needs of persons with disabilities. The framework should be used as a foundation for states that have ratified the respective conventions (including Australia).

29. As a suggestion, it would be promising if the United Nations, in a similar vein to the 'International Year of Plant Health' (2020) or a dedicated year for indigenous peoples around the world (2019), introduced a year celebrating and acknowledging human rights and technology. For us, this would be a positive sign that the United Nations sees the issue of technology, in the context of human rights, as a pivotal future issue.

### 2.1.3. The Human Rights Framework in law making

30. Having established that accessibility is compatible with the current human rights law framework, a logical next step would be to use a Human Rights Framework when developing laws, regulations and policies regarding current and emerging technologies. DGI promotes transparency in government (and in an ideal world, the private sector as well) decision-making, as well as accountability of state and non-state actors. DGI agrees that 'community trust in new and emerging technologies has been decreasing'[12] and believes that a human rights framework is the solution to building community trust.

31. Most importantly, the AHRC Discussion Paper notes that the impact of technology '… is not uniformly experienced across the community, or even within communities', yet human rights principles require that all humans be treated equally. The conclusion is that a Human Rights Framework needs to go *above* ordinary human rights principles to protect those with disabilities – the CRPD is an example of specific rules incorporated for our community.

32. Using the above international principles as a foundation for policy-making, combined with an 'inclusive design' approach where numerous affected stakeholders are consulted

[12] AHRC Discussion Paper, page 31.

throughout the policy development lifecycle (as done by the AHRC), will ensure that policies developed in the future are compliant with international human rights principles.

33. Importantly, incorporating this framework will aid in the 'purposive interpretation' of international and domestic law (in common law countries, such as Australia). This will allow parliament and judicial authorities to consider human rights principles, such as dignity and autonomy of individuals, when interpreting legislation and creating regulations. The benefits of this will be felt in potential judicial cases. The courts may be given an opportunity to develop landmark precedence in relation to human rights law, in areas such as consumer law.

34. The AHRC Discussion Paper introduces Proposal 2 in respect of an independent body to inquire into ethical frameworks for new and emerging technologies. We generally agree with this Proposal, although an issue with ethical frameworks is that they are subjective; that is, they are not representative of a societal consensus, regardless of the independence of the proposed body.

35. To this regard, we would caveat our support to the extent the ethical framework supersedes the human rights framework. In our view, human rights law is universal (agreed by most countries around the world through ratification of international conventions). Further the law '… at its very foundation is conceived and derived from values' which '… find their expression not only in the formal law, but also in societal expectations, behaviour and actions'.[13]

36. The consequence is that human rights laws and principles, which are universal and reflective of societal views, should be the primary source of decision-making.

## 2.2. Australia's obligations under the Human Rights Framework

### 2.2.1. Implementation of the Human Rights Framework

37. Noting the place of human rights, and accessibility as a human right, this section will consider Australia's human rights obligations. In our experience, while Australia is more progressive than most countries and on par with the OECD group of countries, Australia's actions to date have still been somewhat inconsistent.

38. Generally, Australia's obligations under the CRPD and the *International Covenant on Civil and Political Rights* (**ICCPR**) (and other relevant international human rights treaties) is to ensure compliance with the treaty by taking reasonable measures. A

[13] Chief Justice Allsop, 'Values in Law: How they Influence and Shape Rules and the Application of Law', accessed at https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20161020

"breach" of human rights treaties is assessed on a case-by-case basis and can occur through either a positive act or inaction by the state.

39. An example of Australia's inconsistency is the failure to implement, to this date, EN 501 301 549 standards across all levels of government. To this extent we strongly welcome Proposal 20 requiring appropriate procurement of technology products across all levels of governments and notes that this would be an affirmative action in compliance with articles 3 (f) and 9 of the CRPD.

40. In an ideal world we would also like these standards to be implemented to the private sector, or at the very least for large corporate companies. The recent COVID-19 has forced many people to work remotely. Unfortunately intranet and other office applications have not been accessible for many people with disabilities which has caused great difficulty in 'working from home'.

41. DGI would like to point out that the AHRC Discussion Paper itself was not completely accessible for our community – the 'PDF' document was not compatible with our screen reader programs, and the 'Word' document did not have aligning headings, which made accessing the paper more difficult.

42. On a side note (but nonetheless important), the impact of social measures, implemented due to COVID-19, on people with disabilities has been disproportionate. DGI notes that these are challenging and unprecedented times, and governments do not have a blueprint to fall on when addressing these issues. Yet a 'Human Rights Framework' has not been considered at a public or private level when implementing certain measures.

43. As an example, our community has found difficulty in accessing mainstream information. Videos released by the government showing how to wash hands and use face masks correctly have not been accessible for people with visual disabilities. It has been up to independent agencies to provide audio descriptions and other types of format options.

44. Similarly, the National Disability Insurance Scheme (**NDIS**) has been lax in providing detailed information for our community. One of our members is experiencing difficulties in contacting the NDIS where their plan is due to expire soon. Further, while the NDIS has stated that participants will be contacted to organise priority home grocery deliveries, this was never done. On top of this, her application to Woolworths was rejected as the application form was incomplete, due to not being completely compatible with her computer screen reader.

45. In a segment aired by Channel 10's 'The Project' (dated 26 March 2020), Mary Sayers (CEO, Children & Young People with Disability) highlighted that

*"… families are scared, no information is coming out that is tailored to their needs.*

*Families are having their core supports under the NDIS cancelled."*

46. Government reach-out to the vulnerable has been poor. Further, a combination of government and media reporting has resulted in confusion as to the exact situation and the exact instructions. New South Wales' 'reasonable excuse' measures for leaving the home is difficult to understand for most of the population, let alone a group with limited or restricted access to digital technologies.

47. Another example is the implementation of dedicated grocery shopping hours by Woolworths and Coles (between 7am and 8am) for the elderly as a result of "panic buying". While a noble gesture, Greens Member for Parliament Jordon Steele-John highlighted that:

*"… these time slots do not work for disabled people. Early mornings, 7am, 8am, require disabled people to get up at 5.30am, 4am, to be able to get dressed, get sorted… it is almost impossible to get a support worker."*

48. This was experienced first-hand by one of our community members. She was forced to turn up at 7am with a friend to a supermarket, where social distancing was not practised at all. This policy has since changed, but the alternative is trusting a social worker with a credit card and PIN to shop on behalf of our community. This highlights the lack of dignity our community has to deal with during this crisis.

49. Jordon concluded by suggesting that a national hotline be established specifically for people with disabilities during this crisis, which would allow targeted and direct information and guidance, and ensure essential services and goods remain in place. For DGI this is an example of target measures that would be in line with Australia's human rights obligations.

50. A recent survey highlighted by The Project found that 81% of families with children with disabilities could not get essential resources, while 23% had support workers cancel on them. Astoundingly, 82% of those surveyed were not getting the information needed to keep their children safe.

51. Noting that vulnerable communities require targeted action from the government, it appears that Australia has acted inconsistently with the Human Rights Framework highlighted above. The mixed messaging on schools, for example, has presented families with a dilemma as to whether to send their children to school. More needs to be done to ensure people with disabilities, whether it be a physical disability, intellectual, visual or hearing difficulties, get access to information and essential goods and services during these challenging times.

2.2.2. Methods of enforcement

52. For DGI and for our community, laws and human rights obligations are not enough. In the early stages of accessibility reform, enforcement and regulation is key. This point will be stressed numerous times throughout this submission. Enforcement, remedies and grievance mechanisms must be simple to use, must themselves be accessible and must be treated as input for change. Leveraging off the ombudsman infrastructure and Australian Consumer Law are two such examples which should be considered by the AHRC. Where possible, new or streamlined complaint mechanisms should be established.

53. In Australia a combination of law, co-regulation and self-regulation is used to govern a particular area. Legislation is particularly lacking in Australia when it comes to new and emerging technologies, particularly artificial intelligence (**AI**); this is compounded by Australia's lack of a charter of human rights (although we note human rights are generally well protected in Australia mechanisms such as separation of powers and judicial interpretation). The area is a good example of regulatory lag, as identified by the AHRC Discussion Paper.

54. DGI agrees that a combination of the three should be used, however promotes the use of legislation first as it is legally enforceable. Our community has faced the problem that voluntary standards and guidelines, such as the Australian Payments Network's (**APN**) 'Guidelines for Accessibility in PIN entry on touchscreen terminals'[14] are not enforceable and not implemented consistently.

55. A lack of enforceability in our view does little to change current entrenched behaviours and goes against the principle of 'accountability' discussed within a human rights framework context. We have experienced first-hand the positives of self-regulation. The APN facilitated a world-first consultation on the accessibility of touchscreen payment terminals (such as EFTPOS machines) and consulted with a range of stakeholders, including DGI.

56. The guidelines, however, are on an opt-in basis and are not enforceable. No complaint or grievance mechanism is incorporated into the guidelines either, meaning aggrieved customers have nowhere to report to. This would also go against the principles defined in the *UN Guiding Principles on Business and Human Rights*.

57. In addition, existing grievance mechanisms, such as those under the Australian Consumer Law, are cumbersome and put too onerous a burden on aggrieved individuals. The AHRC Discussion Paper proposes to introduce various new bodies to cover aspects of human rights and technology. DGI recommends investing resources into a central body which can oversee a streamlined complaints or grievance process.

[14] Australian Payments Network, 'Guidelines for Accessibility in PIN entry on touchscreen terminals', December 2019.

58. A secondary issue is that self-regulation does not result in *consistency*. While general human rights principles guides states and private bodies to act, consistency in the products and services created is rarely achieved. From first-hand experience, those with disabilities would appreciate consistency in the user experience of products designed. Unfortunately, given the interests of the bodies creating these products (i.e. the private sector), other considerations such as brand reputation, desire to be seen as innovative and profit maximisation for shareholder results in private entities acting *independently* rather than co-operatively.

59. This can be seen in various emerging products. We have experienced firsthand inconsistencies in the user experience of facial recognition devices and public touchscreen kiosks. Specifically, we note the positive work that our banks are doing in order to procure and produce accessible PIN entry devices. Despite this, as each bank is producing in-house, the open communication required to create a consistent device is lacking.

60. To this extent DGI supports Proposals 3 to 8. Each proposal introduces *legislation* which is practical and can be legally enforced. As an example, people from our community have had to say their bank card PIN numbers out loud in stores where the EFTPOST machine has been inaccessible for those with visual disabilities (for payments above A$100). This has been a degrading and embarrassing process for our community. We believe such a situation could satisfy the criteria set out by the AHRC Discussion Paper in relation to a breach of privacy,

61. Similarly, we are pleased that Proposal 3 has the support of the Australian Competition and Consumer Commission (**ACCC**). AI-informed decision making is likely to significantly impact our community. As identified at numerous stages by the AHRC Discussion Paper, areas such as insurance, housing applications, job applications and broader aspects of everyday life will be governed by AI to the disadvantage of our community. This would be an unwarranted and unwanted example of implicit discrimination in our systems.

62. We therefore support Proposal 5 and 7, which will ensure our community is, at the very least, notified when decisions rely on AI. This, combined with a streamlined aggrievance or complaint process and backing from the ACCC would increase awareness in our community around AI-informed decision making.

### 2.2.3. A case study: Scandinavia

63. At the outset it should be acknowledged that we are proud to live in Australia – as a nation we care and respect for each other and in some accessibility areas we are world-leaders. It is for this reason we want Australia to continue the positive work and truly be

seen as a pioneer and champion of accessibility and human rights in the context of new and emerging technologies.

64. Lessons can be taken from the Scandinavian region, often seen as an ideal welfare state and generally considered together given the similarities in demographics, markets and policies. Their process started in the 1980s and 1990s as a result of a movement to deinstitutionalise people with intellectual disabilities, to be replaced with the idea that everyone was a 'citizen of the welfare state' and an increased 'focus on acceptable living conditions'.[15] That is, change occurred due to an inherent desire to treat all people equally. Notably, reform in this area was sparked by legislative policy at both a state and federal level.

65. In Scandinavia a shift occurred from a welfare state to a policy of social regulation, aiming to 'promote the aims of equal opportunities and societal participation'.[16] In Norway, for example, anti-discrimination and inaccessibility legislation was introduced in 2008 with inaccessibility treated as a form of discrimination. Norway specifically included 'various articles regulated the duty to ensure universal design and provide individual accommodations in working life, education and social services.'[17]

66. In Sweden, it was noted that:

*"Architecture students learn about universal design principles, and the following personal story may illuminate the point. In a meeting with the company designing our new webpage, I stressed that accessibility was expected and was told in response, "Of course. Some customers find it unnecessary, but not complying with currents standards is illegal. For us, this is simply taken for granted.""*[18]

67. In Norway, the current legal situation and obligations on service and product providers depends on the level of standards relating to a particular sector. In a case before the Discrimination Tribunal it was determined that the general interpretation of Norway's anti-discrimination legislation is that if correcting inaccessibility is an *undue burden*, it should not be discrimination. The converse must also be true; if it is *not an undue burden* to provide accessibility, then it should be seen as discrimination.

68. The case effectively concluded that:

*"… this means that if a lack of accessibility can be corrected by simple and inexpensive means, noncompliance will be judged as discriminatory and illegal, whereas if the*

[15] Jan Tøssebro, 'Scandinavian disability policy: from deinstitutionalization to non-discrimination and beyond', 2016, *European Journal of Disability Research 10,* pages 111-123.
[16] Jan Tøssebro, above n15, page 8.
[17] Jan Tøssebro, above n15, page 10.
[18] Jan Tøssebro, above n15, page 8.

*burden of making changes is substantial, the duty to provide universal design is not enforced until regulations are in force."*[19]

Tøssebro concludes that '… if standards and regulations are not in place, the legislation is only efficient in cases of simple and inexpensive corrections. Thus, establishing binding regulations and standards is a core issue.'[20]

69. For DGI, this is how the law and standards should interact. The law acts as a foundation for enforcement and to stimulate action and awareness. Standards, if implemented, should raise the standard of care for businesses and government. We agree that simple, inexpensive measures (such as by adding audio / visual / touch related instructions) in public places should be implemented by businesses as a given.

70. We also note that standards do not necessarily have to be created by the Australian government; organisations such as the International Organisation for Standardisation (**ISO**) exist to create uniform standards. Utilising these in our domestic law would help create a consistent user experience for those with disabilities.

71. Various layers are utilised in the Nordic countries to promote accessibility and raise awareness. For example, the Nordic cooperation on assistive technologies encourages cooperation between various stakeholders to research and provide assistive technologies. Costs are distributed amongst stakeholders, although in Norway assistive technologies (in sectors such as education) are provided entirely by the state.[21]

## 2.3. Conclusion

72. Human rights in technology *needs* to be front and centre. While we are passionate about accessibility being a human right and therefore being incorporated in technology, we also believe the full spectrum of human rights as they evolve should be considered. The international framework is there. The thought leadership is also emerging. The AHRC has shown global leadership with the AHRC Discussion Paper and it is hoped most proposals related to human rights are implemented by government.

73. DGI is particularly impressed where legal measures are proposed. We understand that AI is an emerging technology which will have huge impacts on our community. In this regard, the proposals recommended in respect of AI, which are legally enforceable and considerate of a human rights framework, are pleasing and will put Australia on the front foot.

[19] Jan Tøssebro, above n15, page 10.
[20] Jan Tøssebro, above n15, page 8.
[21] Disability Information Resources, 'Provision of Assistive Technologies in the Nordic Countries', accessed 24 January 2020, accessed at https://www.dinf.ne.jp/doc/english/resource/nordic2.html

# 3. Chapter 3: Technology – practical considerations for access to technology

## 3.1. Introduction

74. Having established that equal, unperturbed access to technology is a human right, we will now consider the practicalities of the proposals presented by the AHRC Discussion Paper. As mentioned above, DGI is broadly happy with the scope and breadth of proposals considered. Reform needs to occur in all facets of society, from political framing to education.

75. DGI would first like to outline a key overarching principle that should be considered when implementing any proposals. Where possible, the AHRC and the Australian federal government should leverage off the private sector and DGI notes that plenty of positive accessibility measures already being implemented. This is considered in detail below and is in part our response to Question G.

## 3.2. The Private Sector

76. The AHRC Discussion Paper briefly discusses the '*Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*'[22] (the **UN Business Guiding Principles**). The role of the UN Business Guiding Principles, amongst others, is to define the nexus between state and business actors within a jurisdiction with respect to upholding human rights obligations. Specifically, businesses are encouraged to:

> *… respect human rights, which involves avoiding infringing human rights, and addressing any adverse human rights impacts, including by remediation. Businesses should also seek to 'mitigate adverse human rights impacts directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts'*[23]

77. The responsibility of upholding human rights rests with the state, and this includes governing the actions of businesses. The 'state duty to protect is a standard of conduct'[24] which thus requires an active level of policy and regulation-making to ensure there is no

[22] United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (2011). Endorsed by the Human Rights Council on 16 June 2011 in Resolution 17/4 (**UN Guiding Business Principles**).
[23] UN Guiding Business Principles, above n22.
[24] UN Guiding Business Principles, above n22.

human rights abuse by private actors. In this regard, a strong stance towards 'modern slavery' by both business and state suggests that cooperation is both possible and beneficial to all parties.

78. DGI is of the view that, where possible, the private sector should be allowed and encouraged to innovate and create products that are accessible by all or create products that bridge the accessibility gap. Accessibility in our view is an untapped commercial market which should be highlighted to businesses. Almost one in five Australians has some form of a disability,[25] which represents a substantial target market for business.

79. A simple example which rewards private businesses for creating accessible products should be implemented in Australia's National Disability Insurance Scheme (**NDIS**). From our experience, Apple iOS and Google Android (two smartphone operating systems) already have in-built accessibility features (screen readers, visibility enhancement, hearing enhancements) which are highly customisable and readily available to consumers. DGI users appreciate that such mainstream devices address accessibility and hopes that the power and influence of the two brands can increase awareness of the issue in the industry broadly.

80. Notwithstanding, Apple products are not available under the NDIS for the very reason that they are 'mainstream' products. In our view this goes against Australia's obligations and specifically goes against the UN Business Guiding Principles. Such products should be rewarded by the NDIS scheme for their accessibility features. Another way the NDIS could be utilised is for companies that include accessibility features in their products to list what proportion of their total costs relate to accessibility research and implementation. This amount could be claimed under the NDIS.

81. The NDIS should similarly sponsor basic technologies, including computers and desktops. With a market of over 450,000, the NDIS is a feasible economic market to consider broadening. Basic technologies now more than ever are required for our community to stay connected with the rapidly changing world.

82. It is appropriate to point out that the AHRC and the Australian government do not necessarily need to reinvent the wheel. Accessible products, and accessibility guidelines, exist in the world. These include Web Content Accessibility Guidelines, universal design courses and accessible smart devices (refer to above). The Australian government should leverage off these existing frameworks and engage, regulate and work with the private sector. This would include establishing oversight functions.

83. Similarly, businesses have obligations under the UN Business Guiding Principles to avoid infringing on the human rights of others. Specifically businesses must:

[25] Australian Network on Disability, accessed 2 February 2020, https://www.and.org.au/pages/disability-statistics.html

*… seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.*[26]

84. In our view this covers all technology products created by companies, with accessibility to the full functioning of these products the 'human rights impacts' referred above.

85. With appropriate awareness of the issue of accessibility and some form of regulation and control, accessibility will become a more mainstream issue for private businesses when designing and creating Digital Technology products. The Australian government can leverage off existing resources in terms of guidelines and should remain at the forefront of global legislation and adoption of universal accessibility standards. The more pressing issue is regulation and enforcement.

86. To this extent we support Proposal 21. An audit into current accessibility compliance is necessary to determine Australia's upholding of both the UN Business Guiding Principles and human rights law discussed above. Should the results of the audit indicate major non-compliance with accessibility standards, this would indicate Australia's actions contradict its human rights obligations and, in our view, should incite significant government action. This should be in the form of legislative proposals and economic investment. Economic incentives such as research grants and taxation would bring accessibility to the forefront of the design process and may even stimulate the local economy.

87. We also agree with the Law Council of Australia's view that the Australian government should develop guidance for businesses regarding effective human rights due diligence in accordance with the UN Business Guiding Principles. This is an appropriate balance between effective state monitoring and allowing private actors to act independently and innovate.

## 3.3. Consideration of the AHRC Discussion Paper proposals

88. In this section we will specifically address the AHRC Discussion Paper's proposals in relation to accessibility. Overall, we are pleased with the broad range of proposals, specifically those relating to education. The proposals should be implemented consistently across all levels of government and should be overseen by an independent body with appropriate stakeholder inputs.

[26] UN Guiding Business Principles, above n22.

3.3.1. Proposal 20

89. With respect to Proposal 20(a), as mentioned above, DGI is glad that this been introduced, as this will commit all levels of Australian government to procuring technology that is compliant with Web Content Accessibility Guidelines (**WCAG 2.1**) as well as EN 301 549. DGI recommends that this should be boosted with additional enforceability and remedial measures. Specifically, we would recommend Australia fall in line with "Section 508 compliance" as per section 508 of the Rehabilitation Act in the USA. Broadly this requires all federal agencies to make their technology products accessible and affects all federal agencies as well as vendors, contractors and partners. The scope thus extends to areas such as the finance industry, healthcare and many legal organisations. This would also incentivise suppliers to stock accessible technology and thus be competitive in government procurement tenders.

90. This is supplemented with a robust complaint mechanism, where government employees can sue their agency for failing to provide accessible technology and be protected from negative repercussions (such as counter-claims and career progression issues). Governments can also request accessibility compliance documentation from their agencies or vendor counterparties. In our view this forces companies and agencies to consider the issue, with real consequences for failure to comply.

91. "Section 508" even has its own website (https://www.section508.gov/) which provides businesses with useful links and testing for accessibility compliance. We recommend the AHRC consider the section 508 framework as a benchmark. However, we recommend Australia maintain its documentation requirements under the current EN 301 549. Section 508 introduces a 'Voluntary Product Accessibility Template' (**VPAT**) which explains how technology is compliant with "section 508 standards". However, from our experience the VPAT only provides vague descriptions, whereas documentation under EN 301 549 is more stringent.

92. In our experience, accessibility is currently seen as a burden. On the topic of procurement, one of our members has found that very few software currently fit the current standards (i.e. WCAG 2.1 and EN 301 549). No usability research tools were accessible with screen readers, resulting in researchers having to use 'Zoom'. Similarly, only one social media aggregator tool was compatible. For businesses accessibility is 'not commercially viable' and their products do the job 'as is'. It is therefore important that the government lead by example and implement the above standards at all levels.

93. With respect to Proposal 20(b), in our view all policies from all levels of government should be in written to be accessible for the widest possible as possible. Governments have a general duty to explain their actions to the community and are held accountable

through levers such as our judiciary and the democratic system. This should be done concisely rather than through legal terminology and jargon.

94. Communities that are more vulnerable to poorly communicated or inaccessible information include people with hearing, visual and intellectual disabilities, as well as for people who have English as their second language.

95. The recent COVID-19 pandemic and the government's inconsistent and confusing messaging is a prime example of information which may be "inaccessible" despite being readily available. Policies should be in place for all communication (not just for government employees) to be in accessible formats.

### 3.3.2. Proposal 21

96. An audit into current accessibility compliance in the public and private sector is supported by DGI. With technology ever-evolving, standards such as WCAG 2.1 may become redundant soon. It is vital for the Australian government to stay on top of the latest accessibility guidelines. As mentioned above, using economic incentives will shift some of this responsibility to the private sector. The Australian government could potentially raise awareness around the research and development tax incentives for accessibility research.

97. DGI would also like to see a similar audit into the accessibility of AI-related information technologies.

### 3.3.3. Proposal 22

98. DGI broadly supports the concept of Proposal 22 and this is a good example of an area where accessibility can become mainstream. DGI also appreciates the use of legislative change, by amending the *Broadcasting Services Act 1992* (Cth). DGI would like to make a couple of observations. First, 14 hours of audio-described broadcast content a week is equivalent to 8.3% of content a week. The AHRC Discussion Paper does not specify whether this would be restricted to Australian-produced content and, if there is an annual increase in this rate, what rate that would be.

99. DGI recommends that a minimum of 10% of Australian-produced broadcasting content should be audio-described, with a recommended 20% level. This would be in line with the British broadcasting system. The Australian government should also target all broadcasting content to be fully audio-described by 2038, which results in a 5% increase in audio-described content per year. This number in our view should also exclude already accessible international content, as the onus should be on Australian content producers.

100. Further, in our view, internationally produced content with audio-description should be shared as part of the licensing arrangement without additional charges. Accessibility should be treated as a universal issue and accessible content should be promoted in the early stages to raise awareness. Streaming services are already incorporating accessibility features into their systems, including Netflix which has introduced audio-described content. Our free-to-air services should follow suit.

3.3.4. Proposal 23

101. DGI agrees with this proposal. Standards are in effect soft law which codifies what companies do and, if appropriate grievance mechanisms are in place, provides a reference for the public as to how businesses should behave. DGI would like to make three suggestions in relation to this proposal.

102. First, we agree that specific technical standards should be adopted by Standards Australia to cover both the provision of accessible information, as well as training and instructional materials to accompany consumer goods and services. Of course, the creation and implementation of these standards should be done cooperatively with those in the disability community. While WCAG 2.1 is a good start, this does not cover hardware and physical technology-enables goods.

103. To this extent we suggest leveraging off guidance recognised and developed by the International Standards Organisation (**ISO**). ISO/EIC Guide 71:2014, for example, provides guidance to standard developers on accessibility requirements. Similarly, ISO 9241-171:2008 provides guidance on the ergonomics of software accessibility. We note software and hardware accessibility stretches to more than just computers and smartphones; products such as consumer and whitegoods (televisions, dishwashers), public service systems and educational services all require accessible technology.

104. Any standards develop must provide the disabled community with a relatively consistent approach. Standards should also be enforceable, with appropriate complaint mechanisms and oversight by the relevant industry's watchdog.

105. Secondly, DGI recommends that the government take initiative in respect of accessible training and instruction materials for consumer goods and services. As an example, the federal government could set up a government-owned corporation which assists businesses in creating accessible training and instructional materials, where the goods providers do not have the facilities or resources to do so themselves. This could be anything from outsourcing instruction manuals in "easy English" or creating accessible websites and videos for more complex goods and services.

106. In our view this would demonstrate significant governmental leadership on the issue. Further, provided standards are in place and accessibility is a mandatory or enforceable

requirement, businesses will certainly approach this government corporation to outsource their accessibility functions. This will assist businesses to be compliant and will increase accessibility consistency.

107. Finally, in our view the Australian Competition and Consumer Commission (**ACCC**) should play an active role in overseeing standards compliance and enforcement. While the Australian Consumer Law is in place, it is far too onerous on individuals (especially those with disabilities) to raise a complaint and request change. Perhaps Proposal 23 could include a separate branch within the ACCC, or at least and expedited and simple complaint procedure, which can be accessed in the event of an accessibility dispute.

108. A related proposal could be the introduction of a rating system of common whitegoods and smart devices. Similar to the 'energy efficiency ratings' for common household appliances, or the 'health star rating system' for packaged food, which gives a rating out of five stars, a similar system could be introduced to show an accessibility rating for products. Such a system could be in reference to any implemented standards and should be required to be front-of-packaging labelling. This could also be overseen by the ACCC.

### 3.3.5. Question G

109. In our view the private sector will act where there is either an economic benefit or a legislative requirement, or where actions are part of a company's corporate social responsibility. As mentioned above we believe a combination of law, policies and awareness around the economic benefits of accessible products should be utilised by the government. Law and standards which are simple to understand, easy to regulate, enforce and dispute should be the initial governance mechanism for accessibility, something which isn't yet a mainstream focus.

110. This should be supplemented by the benefits discussed under Proposal 21. Over time, DGI hopes that like Australia's approach to accessibility for the built environment, technology accessibility becomes a mainstream consideration. Eventually, using legal means to force compliance will not be required, as businesses will consider accessibility front and centre in their design processes.

111. The Australian government should support the private sector in achieving these goals. As discussed in Section 3.2 above, we believe the private sector has a vital role in shaping accessibility.

### 3.3.6. Proposals 25 – 28; Question H

112. DGI is supportive of 'human rights by design' and would support all proposals which introduce this as a mainstream concept in education, manufacturing and research.

'Human rights by design' is:

*"a process that includes incorporating human rights norms into the concept, research, design, testing and manufacturing phases of technological innovation with the intended outcome of human rights compliance in production and use of the Digital Technology."*[27]

113. Universal design is already enshrined in the legislation of some Nordic countries. For examples in Norway, articles in their disability discrimination law 'regulate the duty to ensure universal design and provide individual accommodations in working life'.[28] In both Norway and Sweden, therefore, inaccessibility is seen as disability discrimination.

114. Universal design plays a key role in this. Codes have been included to support the legislation ensuring a duty to provide universally designed ICT products. These laws and codes are enforceable at a civil level, allowing people to make complains to an ombudsman. Norway has gone further, introducing a 'Norway universally designed by 2025' initiative.

115. The research shows that the 'the regulations also appear to have impacted awareness and the general image of users and usability'.[29] Jan Tøssebro specifically recognises that:

*"Architecture students learn about universal design principles, and the following personal story may illuminate the point. In a meeting with the company designing our new webpage, I stressed that accessibility was expected and was told in response, "Of course. Some customers find it unnecessary, but not complying with currents standards is illegal. For us, this is simply taken for granted."*[30]

116. This for us is the ideal state. We support Proposal 25 and agree that action needs to be taken at a governmental level. Of course, universal design for our community would include design and manufacture input from people with disabilities. Such processes would also align with accessible, inclusive and co-design principles.

117. Utilising the Council of Australian Governments' (**COAG**) Disability Reform Council is a positive way to encourage consistent action. We would assume these would be coordinated through Australia's Digital Transformation Agency at the federal level. However, our question turns to whether there are similar agencies at the state level and how states and local governments are to be held accountable for their compliance with

[27] Jan Tøssebro, above n15, page 12.
[28] Jan Tøssebro, above n15, page 11.
[29] Jan Tøssebro, above n15, page 13.
[30] Jan Tøssebro, above n15, page 9.

'human rights by design' principles, particularly given the concept hasn't been yet enshrined in any law or code.

118. DGI suggests utilising the human rights framework and recommends that each cabinet minister at a federal and state be responsible for ensuring 'human rights by design' is incorporated into their own portfolios. A failure to address 'human rights by design' principles should be enforceable under either the *Disability Discrimination Act 1992* (Cth) (**DDA**) or through an independent oversight body (including any relevant ombudsmen). As mentioned above, such grievance mechanisms should be easy to access and are required to hold the government account.

119. In this regard we also are highly supportive of Proposal 26. For us education is a pillar with which we can bring about systematic and long-lasting change in the accessibility sphere. Often, a lack of awareness around the issue is the main reason accessibility is not considered by businesses. Science, technology and engineering degrees at the very least should incorporate a course on accessibility, as accessibility can only be achieved through good and inclusive coding. Further, any accessibility courses should include input from people within the disability community, as would be required under a universal design approach.

120. With respect to Question H, we would suggest most university degrees should include some form of education around the accessibility issue, with input from people with disabilities. For example, communications and media degrees should include education around 'Easy English' community; this too is a form of accessibility. Marketing, business and other degrees should also be taught basic accessibility, such as creating accessible PDF documents and captioning multimedia content. This would go a long way to bringing about meaningful social change.

121. DGI is also in full support of Proposals 27 and 28. Professional accreditation would aid in upskilling our current workforce and solidify the mandatory nature of accessibility in mainstream professions. A federal government organisation to oversee the education piece would be ideal and DGI fully agrees with this.

### 3.3.7. Proposal 29; Question I

122. Finally, DGI would like to comment on the role that the DDA should play amid the AHRC's proposals. In our view the DDA should be the focal point for standards and enforceability of accessibility. At the end of the day, disability discrimination is against the law and this should be emphasised and leveraged where possible.

123. We agree with Proposal 29 in relation to a new Digital Communication Technology standard under section 31 of the DDA. This would provide our community with the specifics by which people with disabilities cannot be discriminated against. Going

forward, standards created under other areas of the law (such as the Telecommunications Consumer Protection Code and the *Broadcast Act*) should be harmonised with the DDA to provide a consistent way going forward.

124. As we have consistently pointed out, these laws and standards require an efficient grievance mechanism. Providing protection to the complainant must be adopted in the proposed initiative. As the law is one lever for changing society, the disability community must have confidence in the law to be able to complain without the threat of being financially impacted by reclaiming of legal costs or counter sued.

125. Other technologies for which standards should cover include:

i. Mobile applications;
ii. Desktop applications;
iii. Internet of Things technology, including smart homes;
iv. Digital kiosks, including on flights and at tourist locations;
v. Digital ticketing machines;
vi. ATMs and similar technology used to facilitate financial transactions;
vii. GPS and mapping technology.

126. As you can imagine, technology is broad-reaching and impacting our lives at a macro and micro level. Legislation and standards introduced must be well thought out, cohesive and inclusive of the maximum number of technologies.

# 4. Chapter 4: Conclusion

127. DGI is pleased with the AHRC Discussion Paper. It approaches the issue of human rights and technology from a myriad of perspectives which is imperative to an inclusive solution. The AHRC also sought input from many stakeholders.

128. We are more importantly pleased with the proposals introduced by the AHRC Discussion Paper. The proposals are *practical* and *actionable,* which is much needed in the space. The proposals target short, median and long-term structural change and are designed to bridge the gap between technology and the law.

129. We have sought to provide our first-hand experience to supplement the AHRC in its proposals. We have aimed to highlight that accessibility to technology is a human right, which is an important mechanism to establish future change and hold governments accountable.

130. From this, our view is that the law should be the primary tool for change in the short-term, while accessibility becomes a more mainstream consideration. This, combined with a robust regulatory framework and economic incentives, should spark the private and public sector into meaningful change.

131. We are looking forward to working with the AHRC in future discussions including a round-table discussion on the AHRC Discussion Paper. We appreciate this is a challenging time for all. Now more than ever, Australia requires accessible technology that works for us.

The Directors
Digital Gap Initiative