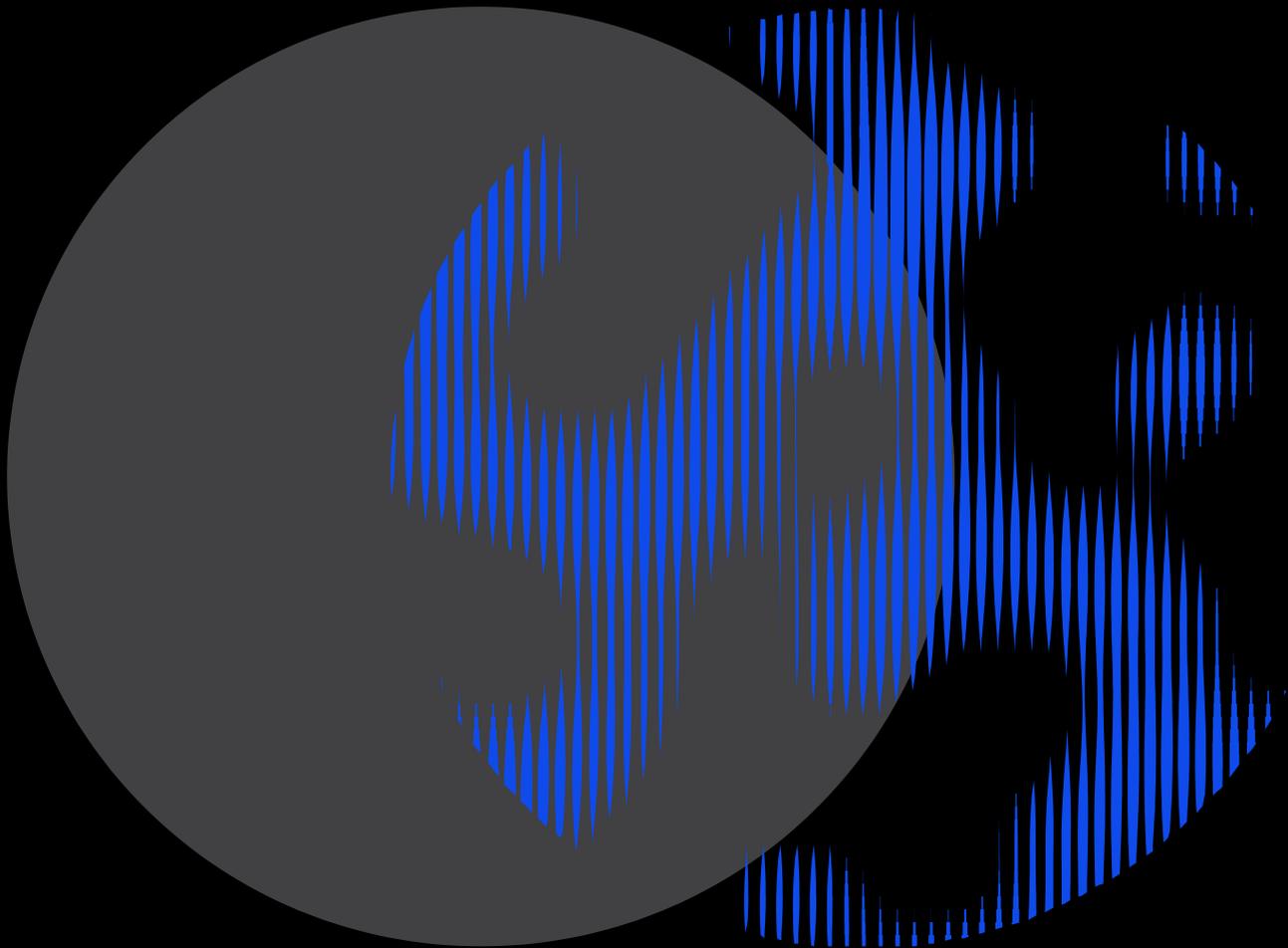




Human Technology Institute



Department of Industry, Science and Resources
Discussion Paper, 'Safe and responsible AI in Australia'

Submission

Human Technology Institute, UTS

August 2023

About the Human Technology Institute

The Human Technology Institute (HTI) is building a future that applies human values to new technology. HTI embodies the strategic vision of the University of Technology Sydney (UTS) to be a leading public university of technology, recognised for its global impact specifically in the responsible development, use and regulation of technology. HTI is an authoritative voice in Australia and internationally on human-centred technology. HTI works with communities and organisations to develop skills, tools and policy that ensure new and emerging technologies are safe, fair and inclusive and do not replicate and entrench existing inequalities.

The work of HTI is informed by a multi-disciplinary approach with expertise in data science, law and governance, policy and human rights.

In this submission, HTI draws on several of its major projects, including:

[Facial Recognition Technology: Towards a model law](#). In a world-leading report published in September 2022, HTI outlined a model law to govern facial recognition technology in Australia.

[AI Corporate Governance Program](#), which is aiming to broaden the understanding of corporate accountability and governance in the development and use of AI

[The Future of AI Regulation in Australia](#), which is considering the major legal and policy issues related to AI and will present a roadmap for reform.

For more information, contact us at hti@uts.edu.au

Acknowledgement of Country

UTS acknowledges the Gadigal people of the Eora Nation, the Boorooberongal people of the Dharug Nation, the Bidiagal people and the Gamaygal people upon whose ancestral lands our university stands. We would also like to pay respect to the Elders both past and present, acknowledging them as the traditional custodians of knowledge for these lands.

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Executive summary

The Department of Industry, Science and Resources (**DISR**) Discussion Paper, *Safe and responsible AI in Australia* (June 2023) (the **Discussion Paper**) proposes a clear policy intent for the Australian Government regarding artificial intelligence (**AI**) and related technologies. That policy intent might be summarised as follows: well-considered regulation and governance measures can build public trust, thereby enabling Australia's 'economy and society to reap the full benefits of these productivity-enhancing technologies'.¹

The Human Technology Institute (**HTI**) commends this policy intent. It sets an appropriate balance between promoting positive innovation for economic and broader gains, while also ensuring that Australians are protected from harm. AI promises significant benefits for Australians. In order to realise those benefits without causing harm, it is important that we develop and deploy AI systems in safe and responsible ways.

As the Discussion Paper makes clear, achieving AI's promise will be possible only if Australians trust the underlying technology, as well as how AI is used by the public and private sector. Community trust is especially important where AI is used in high-stakes decision making.

While there has been an almost exponential rise in the development and use of AI, leading research reflects persistently low levels of community trust in AI. Only a third of Australians trust AI systems, and fewer than half of Australians perceive that the benefits of AI applications outweigh the associated risks. Such research findings reflect a perceived failure, to date, on the part of both industry and government to address a wide range of substantive concerns about AI, including in relation to cybersecurity and data-sharing risks, deskilling and subsequent technological unemployment, and threats to human rights.

Addressing these concerns will require increasing the *trustworthiness* of AI as it is applied by businesses, governments, and others. One critical driver of trustworthiness is the existence of effective, fit-for-purpose regulation. Where clear legal guardrails promote safe and responsible innovation, and the law provides for readily available forms of redress when technology is misused or otherwise results in harm, community confidence around the safety and benefits of technology will tend to improve.

Regulation is sometimes held out as the enemy of innovation – the idea is that regulation unhelpfully puts a brake on the development of new, beneficial products and services. Poorly drafted laws can indeed have a net negative impact on innovation. However, regulation, per se, is not the problem. Where the law is inadequate or uncertain, this can encourage harmful innovation and discourage responsible innovation. Furthermore, centuries of evidence proves that well-conceived legal guardrails can simultaneously protect the community while actively *fostering* innovation by setting clear parameters within which

¹ Department of Industry, Science and Resources, *Safe and responsible AI in Australia* (Discussion Paper, June 2023) 4.

innovators can operate. It is essential that Australia develop and adopt regulation which promotes innovation in this way.

Australian law, like the laws of all comparable jurisdictions, is generally technology-neutral. This means that legal obligations already apply to the development and use of AI in the same way as they do to other technologies. In considering how Australia should regulate AI, the first step is to consider how current laws apply, and identify any barriers to the effective enforcement of existing obligations.

There are also gaps in our existing law as it applies to AI. Rather than identifying and filling these gaps through law reform, both government and industry have, to date, over-relied on self-regulatory measures (such as ethical guidance), which have had limited impact on changing behaviours.² Gaps in the law should be filled, and low-impact, self-regulatory measures should be augmented with more effective measures.

More fundamentally, Australia has the opportunity to take an economy-wide regulatory approach to AI. Such an approach could help ensure that our law is effective, coherent and innovation-enhancing, while also safeguarding against risks of harm.

Over the last decade, as AI has driven the Fourth Industrial Revolution around the world, Australia has been slow to adopt a clear and effective policy and regulatory strategy. The establishment of a clear policy intent – one that balances the needs of the economy and Australians as a whole – is a welcome first step.

There is now an urgent task to realise this policy intent through reform. As summarised in the six recommendations set out below, and elaborated on throughout this submission, HTI urges the Australian Government to adopt a strong strategic framework for how it will regulate in respect of the development and use of AI. This framework should underpin a series of positive reforms that HTI has outlined below.

List of recommendations in this submission

Recommendation 1

The Australian Government should develop a regulatory strategy for AI (**Australia's AI Regulatory Strategy**). It should

- be *practical and effective* – this will involve a combination of hard and soft law, and both self- and co-regulatory measures
- pursue *a clear aim* – namely, to encourage innovation for public benefit, while upholding human rights and other community protections
- promote *national coherence and efficiency* – this means better coordination across Australian Government departments and agencies,

² Australian Human Rights Commission, *Human Rights and Technology* (Report, March 2021) 27, 87.

and a harmonised regulatory approach in the federal, state, and territory jurisdictions

- generally adopt a *technology-neutral approach* – except where this approach would be inadequate to harness an opportunity or address a risk of harm
- adopt a *risk-based approach* – which clearly articulates legal and broader responsibility across the AI life cycle of design, development, and deployment
- establish *consultative mechanisms* to support ongoing engagement with stakeholders including civil society, industry and technical experts.

Recommendation 2

The Australian Government should do a stocktake of reform recommendations arising from recent landmark reports relating to AI, conducted by bodies including the Australian Competition and Consumer Commission, the Australian Human Rights Commission, and the Attorney-General's Department. The Australian Government should prioritise reform proposed in those reports.

Recommendation 3

The Australian Government should undertake a legal gap analysis, focused on areas where AI presents an especially significant risk of harm. The Australian Government should prioritise reform that addresses those risks.

Recommendation 4

The Australian Government should establish an 'AI Commissioner' to provide independent expert advice to government and regulators, and to provide guidance on law and ethics for industry, civil society and academia.

Recommendation 5

The Australian Government should work with independent experts to develop an AI assurance framework that would apply to the private sector in Australia (an **Industry AI Assurance Framework**).

Recommendation 6

Australia should adopt framework legislation for AI (an **Australian AI Act**). The proposed Australian AI Act should advance Recommendations 2-5 above. It should also support the Australian Government in ensuring parity of legal protections for Australians, as compared with citizens of the European Union and other leading jurisdictions. However, the Australian Government should not seek to replicate the text and structure of the EU's draft AI Act in Australian law.

Background

HTI welcomes the opportunity to comment on the Discussion Paper. The increasing uptake of AI by Australian businesses and government presents enormous opportunities for Australian society. From forecasts of significant economic benefit,³ to identifying solutions to society-wide problems such as climate change,⁴ there is enormous potential for AI to meet some of the most challenging and complex issues of our time.

In this submission, HTI draws on its expertise in AI governance and regulation. It makes recommendations to support the safe and responsible use of AI in the private sector, especially through reform to regulation and governance.

Given HTI is currently undertaking a major project on AI regulation, there are some questions and issues raised in the Discussion Paper about which HTI does not yet have a settled view. HTI would welcome the opportunity to update DISR, and other parts of the Australian Government, as it progresses this work and develops further recommendations in this area.

The need for regulatory reform

Australia does not have an effective, coherent regulatory framework that provides appropriate safeguards to ensure the safe and responsible use of AI. Nor has there been, to date, a concerted effort to align Australian law with the various strategic goals Australia has set regarding AI. There is now the opportunity for the Australian Government to achieve both, through the creation of an AI regulatory strategy.

AI is rapidly becoming essential to how Australian businesses create value. HTI research indicates that a large number of Australian organisations rely on AI-driven systems.⁵ AI systems are penetrating to the core of business models, promising significant gains in both efficiency and productivity. HTI research further indicates that few senior executives are fully aware of the extent of this reliance. Many AI services are embedded in third-party software systems, deployed by suppliers further up the supply chain, or used by employees without management knowledge or oversight.⁶

As the development of AI accelerates, Australian businesses are increasingly exposed to a range of new and exacerbated commercial, regulatory, and reputational risks. Individuals and communities can and do suffer irreversible harm when AI systems fail, are misused, or deployed in inappropriate contexts. At a societal level, AI can be used in ways that increase inequality, undermine

³ See, for example, Microsoft and Tech Council of Australia, *Australia's Generative AI opportunity* (Report, July 2023).

⁴ See, for example, Hamid Maher et al, 'AI is essential for solving the climate crisis', *Boston Consulting Group* (Slideshow, 7 July 2022) <<https://www.bcg.com/publications/2022/how-ai-can-help-climate-change>>; Mark Minevich, 'How To Fight Climate Change Using AI', *Forbes* (Article, 8 July 2022) <<https://www.forbes.com/sites/markminevich/2022/07/08/how-to-fight-climate-change-using-ai/?sh=41e48b5c2a83>>.

⁵ Lauren Solomon and Professor Nicholas Davis, Human Technology Institute *The State of AI Governance in Australia* (Report, May 2023).

⁶ Lauren Solomon and Professor Nicholas Davis, Human Technology Institute *The State of AI Governance in Australia* (Report, May 2023).

democracy, contribute to unemployment, threaten Australia's security, and increase social isolation.⁷

To date, approaches to AI governance have tended to be industry-led and voluntary. However, as HTI's research shows, such efforts have been unsystematic, unstrategic, and unequal to the task of protecting Australians as AI use rises.⁸ This is supported by other findings, such as the growing evidence of the ineffectiveness of governance relying on AI ethics principles.⁹

Demand for regulatory reform is gathering momentum around the world. Globally, 71% of people believe that AI regulation is required to ensure its use is safe.¹⁰ Overseas jurisdictions are adopting a range of regulatory measures, and international and regional bodies are seeking to establish global systems of oversight. While Australia's approach should be appropriate and adapted to our liberal democratic system, it is important that Australians have at least equivalent protections from the risks associated with AI as those increasingly enjoyed by citizens in comparable jurisdictions overseas.

Given the adoption of AI is a global shift, there is also significant economic value in providing regulatory certainty for Australian businesses operating in an international market, and international enterprises who may operate in Australia. Multinational companies find significant efficiency in adopting a single set of compliance measures for their operations across multiple jurisdictions, and some will avoid entering markets that require special consideration. Australian businesses wanting to export AI-powered products and services into markets such as the European Union (**EU**) must also comply with some EU laws, and it is likely that any new trade agreements will require parity of protection with key EU laws governing AI.

It should also be noted that a range of Australian institutions and individual experts are already working to support safe and responsible AI in international networks. One example is Australia's leadership in processes such as the development of international technical standards via the International Organisation for Standardisation (**ISO**) and the Institute of Electrical and Electronics Engineers Standards Association (**IEEE**). This is a powerful way for Australia to influence the underlying technical requirements that increasingly constitute de facto international regulation for the development and use of AI. There is a strong incentive, of course, to ensure that such international technical standards are harmonised with Australian law.

Furthermore, Australians are increasingly demanding fit-for-purpose, effective regulation of AI systems. Recent research indicates that only 35% of Australians believe that current safeguards are up to the challenge. Only 34% of Australians are willing to trust AI systems offered by government or business, and fewer than half of Australians believe, overall, that the benefits of AI outweigh the

⁷ Lauren Solomon and Professor Nicholas Davis, Human Technology Institute *The State of AI Governance in Australia* (Report, May 2023).

⁸ Lauren Solomon and Professor Nicholas Davis, Human Technology Institute, *The State of AI Governance in Australia* (Report, May 2023).

⁹ See, for example, Luke Munn, 'The uselessness of AI ethics' (2023) 3(3) *AI and Ethics* 869 <<https://doi.org/10.1007/s43681-022-00209-w>>.

¹⁰ Gillespie, N., Lockey, S., Curtis, C., Pool, J., & Akbari, A. (2023). *Trust in Artificial Intelligence: A Global Study*. The University of Queensland and KPMG Australia. doi:10.14264/00d3c94

risks.¹¹ And while Australians are supportive of multiple forms of regulation, there is a preference of government-imposed regulation rather than self-regulation by industry.¹²

The Australian Government therefore has a critical role to play in creating a regulatory strategy that creates clear, positive guardrails for the development, deployment, and use of AI while supporting the continued expansion of responsible innovation and use.

The role of humans in sociotechnical systems that use AI

AI systems, particularly those that make or contribute to complex and high-stakes decisions, are ‘sociotechnical systems’. In other words, they necessarily involve a combination of technical infrastructure and human involvement.¹³

Human involvement expands well beyond a ‘human in the loop’ who may approve, deny, or alter an output of an AI system. Humans, and the social contexts in which they operate, are integral to the design, development, and deployment of AI systems. This includes determining the problem to be addressed by AI, approving funding for development or procurement, choosing among algorithms or providers, deciding how and where the system fits into company processes, and monitoring system performance. Especially where AI systems produce outputs that are highly consequential for humans, affected individuals should also be viewed as critical parts of the system.

The sociotechnical nature of AI systems means that understanding the functions that humans perform – and the social and organisational contexts in which they operate – is essential both to assessing the risk of an AI system and assigning accountability for any harms that may eventuate.

For example, a company could rely on AI-generated insights into consumer preferences about a specific product category. The data for such an AI system may come from a wide range of public sources and be only one data point that assists the company to create a new product. Considering the different roles that humans play, and the potential impact on affected individuals, this use of AI would likely carry a low risk of harm.

By contrast, a judge may use AI-generated insights related to the risk of re-offending as an input when determining whether to grant bail to an accused offender. In this case, the potential impact on affected individuals who may be remanded in custody based on the AI system outputs, how the judge might be influenced by the system, and the data and design choices made by the developers, should all be considered when determining risk.

The fact that AI systems are sociotechnical means that high consequence applications require system-wide approaches to oversight and monitoring,

¹¹ Gillespie, N., Lockey, S., Curtis, C., Pool, J., & Akbari, A. (2023). *Trust in Artificial Intelligence: A Global Study*. The University of Queensland and KPMG Australia. doi:10.14264/00d3c94

¹² Gillespie, N., Lockey, S., Curtis, C., Pool, J., & Akbari, A. (2023). *Trust in Artificial Intelligence: A Global Study*. The University of Queensland and KPMG Australia. doi:10.14264/00d3c94

¹³ Eric Trist, ‘On socio-technical systems’ in William A. Pasmore (ed), *Sociotechnical Systems: A sourcebook* (University Associates, 1978) 43; Fred Emery, ‘Characteristics of Socio-Technical Systems’ in Eric Trist (ed), *The Social Engagement of Social Science, a Tavistock Anthology, Volume 2* (University of Philadelphia Press, 1993) 157 <<https://doi.org/10.9783/9781512819052-009>>.

which take into account the complex interplay between humans and technical systems.

For example, the Robodebt Royal Commission report makes clear that the problems associated with that system did not stem solely from technical failures (that is, faults inherent in the technical systems used by the Australian Government for debt recovery), nor did they stem solely from the public servants tasked with developing, procuring, implementing, and overseeing those systems. Many of the problems that arose with Robodebt were problems in the interaction between the technical and human systems.

A corollary is that the *successful* use and effective governance of technology must involve a deeper understanding of the sociotechnical nature of complex decision-making systems.

As discussed further below, the target of regulation generally should not be the technology itself. This is particularly true where technology contributes to consequential decisions. Instead, regulation should incentivise and ensure the existence of robust checks and balances on the individuals and organisations responsible for the outputs of these decision-making systems.

Currently, Australian organisations fall short in this area. Research undertaken by HTI with corporate leaders indicates that while AI systems are fast becoming central to how organisations operate, most corporate leaders across Australia report that they lack the awareness, skills, knowledge, and frameworks to guide responsible AI investment, use, and governance.¹⁴

Similarly, the findings of the Robodebt Royal Commission show that governments do not yet have the expertise, systems, and accountability settings needed to govern the safe use of AI in public sector decision-making.¹⁵

HTI's work on AI regulation and governance

HTI is building a future that applies human values to new and emerging technology. HTI's work is informed by a multi-disciplinary approach, and partnerships with a range of experts. HTI's work is also informed by engagement with a range of experts from government, academia, civil society and industry.

HTI is currently undertaking two major programs that connect directly with the Australian Government's priorities on safe and responsible AI, and the specific issues raised in this Discussion Paper. Both multi-year projects involve expert engagement and in-depth consultation:

1. the **Artificial Intelligence Corporate Governance Program (AICGP)**, which commenced in October 2022, is helping Australian organisations capitalise on the opportunities offered by AI systems while addressing the commercial, regulatory, and reputational risks that AI systems pose. The AICGP aims to support corporate leaders to deepen their understanding of the AI landscape, understand current and evolving legal

¹⁴ Lauren Solomon and Professor Nicholas Davis, Human Technology Institute, *The State of AI Governance in Australia* (Report, May 2023).

¹⁵ *Royal Commission into the Robodebt Scheme* (Report, July 2023) vol 1, 469.

obligations, and identify new approaches across the corporate governance ecosystem to better service Australians and corporate leaders' own organisations.

2. the **Future of AI Regulation Project (the Project)**, which commenced in April 2023, will highlight critical gaps in the design, content and enforcement of existing law relevant to the development and use of AI. The Project will identify priority areas for reform and best practice regulatory approaches to manage the risks and realise the benefits of AI, thereby supporting responsible AI innovation and use at scale. The Project is building on the experience of, and will collaborate closely with, stakeholders across sectors. Its first report, based on engagement with the Project's Expert Reference Group, will be published in the final quarter of 2023.

HTI would be pleased to brief DISR in greater detail on this work.

Part 1: An AI regulatory strategy for Australia

Outline of Part 1 of this submission and Recommendation 1

This Part of HTI's submission addresses Questions 2, 8, 10, 11, and 14-16 in the Discussion Paper.

Recommendation 1 in this submission is that the Australian Government should develop a regulatory strategy for AI (**Australia's AI Regulatory Strategy**). This strategy should:

- be *practical and effective* – this will involve a combination of hard and soft law, and both self- and co-regulatory measures
- pursue a *clear aim* – namely, to encourage innovation for public benefit, while upholding human rights and other community protections
- promote *national coherence and efficiency* – this means better coordination across Australian Government departments and agencies, and a harmonised regulatory approach in the federal, state, and territory jurisdictions
- generally adopt a *technology-neutral approach* – except where this approach would be inadequate to harness an opportunity or address a risk of harm
- adopt a *risk-based approach* – which clearly articulates legal and broader responsibility across the AI life cycle of design, development, and deployment
- establish *consultative mechanisms* to support ongoing engagement with stakeholders including civil society, industry and technical experts.

The remainder of this Part of the submission expands on this Recommendation.

Regulation must be practical and effective

In order for AI regulation to be both practical and effective, HTI recommends Australia's AI Regulatory Strategy be informed by the following key principles:

- protect human rights, Australian democracy and the rule of law
- support organisations using AI to understand and comply with Australian law
- facilitate the accountable use of AI in a way that promotes innovation
- clearly identify which entity will be accountable in law for the use of AI, and apportion responsibility across the AI life cycle of design and development, deployment, and post-deployment actions and measurements

- ensure that the use of AI with a legal or similarly significant effect is both transparent and explainable
- provide individuals with accessible redress and complaint mechanisms
- be responsive and open to sector- and context-specific regulatory measures, ‘where the regulators listen to those they are regulating and choose a course of action to correct the deficiency that they are observing’.¹⁶

Such a regulatory approach for AI would incorporate a range of instruments, including:

- voluntary self-regulatory measures, such as internal governance frameworks for AI use
- co-regulatory approaches, such as mandatory international standards
- more prescriptive regulation, such as the imposition of pecuniary sanctions for unlawful use of AI in decision making.

A risk-based approach to AI

HTI supports a risk-based regulatory approach. Such an approach can support responsible AI because it encourages innovation within guardrails whose explicit aim is to keep people safe. Risk-based approaches to regulation can help manage uncertainty across systems as a whole, rather than dealing with individual cases of harm after they have occurred.

A risk-based regulatory approach to AI should be built around four key principles.

First, **regulation should be risk weighted**. This means that, as the risk level increases, the stringency of the legal safeguards should also increase proportionately.

Secondly, **the concept of risk should be grounded in law**. Risk is not an abstract concept, nor should it be open to idiosyncratic interpretation. Risk should be understood by reference to the likely impact of an AI system on individuals’ legally-protected rights – such as human rights, consumer rights, employment rights, and property rights – as well as its broader impact on Australia’s liberal democratic system.

Thirdly, **severity and likelihood should be central in assessing the relevant risk level**. ‘Severity’ of risk refers to the impact, on individuals or more broadly, if the risk comes to pass. So, for example, a risk that someone might be subjected to unwanted advertising for a soft drink is, by its nature, less severe than a risk of someone suffering racial discrimination in applying for a home loan, because the human rights breach in the latter situation will be more harmful than the first. ‘Likelihood’ refers to the relative probability that the risk

¹⁶ See, for example, Mary Ivec and Valerie Braithwaite, *Applications of Responsive Regulatory Theory in Australia and overseas: Update* (Occasional Paper No 23, March 2015) 5 <https://regnet.anu.edu.au/sites/default/files/publications/attachments/2015-05/Occasional%2520Paper%252023_Ivec_Braithwaite_0.pdf>.

will eventuate. Where the risk is both severe and likely, this would increase the overall risk rating, but if a risk is only severe or likely, it should still be treated as serious, albeit less serious than a risk that is both severe and likely.

Fourth, **risks should be recognised, owned, and controlled by the most appropriate stakeholders across the ‘AI value chain’**. One of the hallmarks of AI systems is that multiple different parties contribute to their development and use. A risk-based approach will ensure that those parties with appropriate knowledge and influence over a system will bear corresponding responsibility and accountability for its safe operation.

Such a risk-based regulatory approach can support responsible AI, because it encourages innovation within guardrails whose explicit aim is to keep people safe. Risk-based approaches to regulation can help manage uncertainty across systems as a whole, rather than dealing with individual cases of harm after they have occurred.

As a general principle, differing responsibility, including legal responsibility, can accrue to those who *research* in the area of AI, those who *develop* AI, and those who *deploy* AI.

- **Researchers** in AI are those who engage in academic or similar research, with a view to identifying new ways of developing or using AI.
- **Developers** of AI include those who create new AI-powered applications, usually with a view to selling or otherwise making available these applications as products or services.
- **Deployers** of AI use AI applications, or rely on their outputs, in a way that affects people. This would include the use of AI that has a legal or similarly significant effect for one or more individuals.

While the three broad categories above are useful in considering how legal responsibility can arise in the development and use of AI, this is not a neat or simple taxonomy. For example, if the use of AI across a given supply chain is hidden, or if multiple developers contribute to a given AI model or application over time, the liability of AI deployers can be difficult to apportion.

Moreover, a single individual or a company can sometimes fit more than one of these three categories. By way of illustration, imagine an academic attached to a public university who uses AI to create a new way of using voice patterns to identify individuals. This AI *researcher* might choose to commercialise their fundamental research by creating a product that they sell to others – in which case, the academic is acting also as an AI *developer*. If the academic then decides to test or fully deploy this product in their company or their lab, they would be an AI *deployer*.

Some legal requirements apply to all development and use of AI, regardless of whether one is a researcher, developer or deployer. However, a risk-based regulatory framework would also apply differing, specific requirements, and perhaps different compliance mechanisms, to researchers, developers, and deployers of AI depending on the risk level assigned to the relevant AI application.

An example of how the Australian Government might legislate a risk-based approach to AI is HTI's model law for facial recognition technology (**FRT**), as outlined in HTI's 'Facial Recognition Technology: Towards a model law' report (**Model Law**).¹⁷ The Model Law, summarised in Box 1 below, is an example of a risk-based regulatory model, established in law, to address the risks of harms posed by an AI technology.

Box 1: A Model Law for Facial Recognition Technology

HTI's Model Law proposes the creation of a Facial Recognition Impact Assessment (**FRIA**) process for all activities involving the use of facial verification, facial identification, or facial analysis technology. The FRIA model was developed following extensive consultation with a range of industry leaders, government representatives, academic experts, and civil society organisations, as well as drawing on qualitative research and other recent official public consultation processes.

An FRIA would involve the rigorous consideration of specific matters in developing and deploying FRT applications. HTI's Model Law would prohibit FRT applications that have been assessed as high-risk in the FRIA process. Exceptions to this general prohibition include:

- where the regulator considers that the use of a high-risk FRT application is justified under international human rights law. An example of this could be where a facial analysis tool is used by people who are blind or vision impaired to 'read' the emotions of people around them
- specific law enforcement and national security reasons, subject to additional protections
- genuine academic research following appropriate legal and ethical protections.

A key advantage of the risk-based FRIA approach is that it would allow Australians, including government and business, to enjoy the benefits of lower-risk uses of FRT (such as facial verification for accessing personal accounts online), while protecting citizens from the increasing number of potentially harmful uses of the technology (such as employers rolling out facial identification or analysis for behavioural surveillance in workplaces).

The default: technology-neutral law

HTI recommends that the default regulatory approach to the development and use of AI should be technology-neutral law.

There are some exceptions to this default position. Some technologies, or specific uses of technology, present particular – even sui generis – issues that cannot be addressed fully by technology-neutral law. Nuclear technology is the most obvious such example. Another example, connected to AI, is facial recognition and some other forms of biometric technology. The risk of harm from unregulated facial recognition technology, for example, requires immediate regulatory reform with targeted, technology-specific legislation (see Box 1 above).

In addition, effective co-regulatory approaches generally involve a combination of technology-neutral provisions and technology-specific rules. For example, technical standards – including those that are being developed for AI – tend to involve technology-specific and technology-neutral rules or principles. The same is true of AI assurance frameworks, including the current NSW

¹⁷ Davis, N, Perry L & Santow, E (2022) *Facial Recognition Technology: Towards a model law*, Human Technology Institute, The University of Technology Sydney

Government AI Assurance Framework and HTI's proposed Industry AI Assurance Framework (see Recommendation 5 in Part 2 below).

Applying this approach, the Australian Government should follow four key steps in undertaking reform in this area:

1. identify how existing technology-neutral laws apply, or in some cases should be applied, to the development and use of AI
2. ensure any gaps in the law are generally filled by technology-neutral law
3. where the problem is that the law is not being effectively applied, directly address this with regulators, courts, and others responsible for the application or enforcement of the law
4. where technology-neutral law is inadequate or otherwise inappropriate, the Australian Government should introduce technology-specific law reform.

Part 2: An agenda for regulatory reform

Outline of Part 2 of this submission

This Part of HTI's submission addresses Questions 3-7, 11, 13, 18, and 20 in the Discussion Paper.

To implement the proposed Australia's AI Regulatory Strategy, HTI recommends that a regulatory reform agenda be established. This agenda should be built around Recommendations 2-6 set out in the Executive summary above.

In summary, HTI's proposed reforms relate to:

- adopting the proposals of recent landmark reviews related to AI (see Recommendation 2)
- identifying areas of AI-related harm for priority reform (see Recommendation 3)
- establishing an AI Commissioner to provide independent expert advice (see Recommendation 4)
- developing an AI assurance framework that applies to the private sector (see Recommendation 5)
- adopting framework legislation for AI in Australia – the Australian AI Act (see Recommendation 6).

Recommendation 2: implementing landmark review proposals

Many of the issues raised in the Discussion Paper are not new, even from the perspective of government reform processes. They should be considered in the context of recent government inquiries, regulatory action and test case litigation, and authoritative research and guidance.

Over the past five years, there have been a number of major consultative reviews that have identified risks of harm to people, the economy, and the broader Australian community arising from the use of technology, including AI. These reviews and consultative processes include landmark reports by the Australian Competition and Consumer Commission, the Australian Human Rights Commission, and the Attorney-General's Department. The Australian Government should start by prioritising a reform process that implements these key recommendations.

As summarised in Table 1 below, there is an associated body of recommendations to meet those challenges, including to support safe and responsible AI. Most of these reform recommendations have not even been the subject of an official Australian Government response.

While some of these processes are sector specific, there are also emerging principles and practices of general application that could support the safe and responsible development and use of AI. Australia has a strong regulatory ecosystem, with well-developed and independent expertise. Many of the

processes identified in Table 1 are also the result of significant consultation with relevant experts.

It is important that the Australian Government approaches the question of reform in a way that promotes coherent and effective legislation throughout Australia. Australia's AI Regulatory Strategy needs to be coordinated and clear. This will provide certainty to Australian businesses, and more effective protection for the community.

As part of the approach to identifying gaps in law to regulate AI, HTI recommends a comprehensive stocktake of key government reviews relevant to AI, with a view to identifying reform recommendations that have not been addressed. This review could be conducted by an expert independent body, such as HTI, and should identify legislative reform that should be prioritised to protect against immediate harm arising from AI.

Table 1 – examples of proposals considering the impact of AI on Australian legislation

Process	Example
Federal regulator inquiries involving community consultation	Australian Competition and Consumer Commission (ACCC) Inquiry into Digital Platforms Services (2020-2025). ¹⁸ There have been six interim reports making recommendations for a range of measures to address emergent harms from digital platforms for consumers, small businesses, and competition. ¹⁹ The inquiry has examined specific business practices that will relate to the operation of AI, such as data governance. ²⁰
	Australian Human Rights Commission (AHRC) inquiry into human rights and technology. In its 2021 report, the AHRC makes various recommendations to promote responsible AI governance and ensure that new technologies are inclusive, accountable, and compliant with human rights. ²¹
	Attorney-General's Department review of the <i>Privacy Act 1988</i> (Cth) (Privacy Act). The 2022 report proposes reforms to the Privacy Act to strengthen the protection of personal information, give individuals greater control over their information, and provide new pathways for redress for privacy breaches. ²²
Federal regulator research, reports and practice guidance	The Australian Communications and Media Authority (ACMA) has released a series of occasional papers to inform its regulatory approach, focusing on a range of relevant areas such as a consideration of how regulatory technology can be applied in

¹⁸ *Competition and Consumer (Price Inquiry— Digital Platforms) Direction 2020* (Cth).

¹⁹ ACCC, *Digital Platform Services Inquiry* (Interim Report, September 2020); ACCC, *Digital Platform Services Inquiry: No. 2 – App marketplaces* (Interim Report, March 2021); ACCC, *Digital Platform Services Inquiry: No. 3 – Search defaults and choice screens* (Interim Report, September 2021); ACCC, *Digital Platform Services Inquiry: No. 4 – General online retail marketplaces* (Interim Report, March 2022); ACCC, *Digital Platform Services Inquiry: No. 5 – Regulatory reform* (Interim Report, September 2022); ACCC, *Digital Platform Services Inquiry: 6: Report on social media service* (Interim Report, March 2023).

²⁰ *Competition and Consumer (Price Inquiry— Digital Platforms) Direction 2020* (Cth) s 5(2)(c).

²¹ Australian Human Rights Commission, *Human Rights and Technology* (Report, March 2021).

²² Attorney-General's Department, *Privacy Act Review* (Report, 2022).

<p>examining different regulatory processes</p>	<p>different sectors and regulatory environments to support the accountable use of AI.²³</p> <p>Commonwealth Ombudsman guidance on government use of AI and automated decision making. In 2019, the Ombudsman published a practice guide to assist agencies in designing and implemented new automated systems.²⁴ The guide outlines principles for assessing the suitability of automated systems and ensuring transparency and accountability in automated administrative decision-making.</p>
<p>Regulatory action and test case litigation</p>	<p>ACCC v Trivago.²⁵ In January 2020, the Federal Court found that Trivago had mislead customers when representing that its website would help customers find the cheapest rates for a given hotel.²⁶ When determining which rates to highlight to customers, Trivago used an algorithm which placed significant weight on online hotel booking sites that had paid Trivago the highest cost-per-click fee. Consequently, in some cases, the website did not suggest the cheapest available offer, causing customers to overpay \$38 million when booking hotels. Trivago was ordered to pay penalties of \$44.7 million.</p> <p>Clearview AI and Australian Federal Police (AFP) – privacy regulator determinations. In 2021, the Information and Privacy Commissioner determined that Clearview AI had breached Australian privacy law by collecting Australians’ biometric information from the internet without their consent and disclosing it through a facial recognition service.²⁷ The Commissioner’s determination emphasised the lack of transparency around Clearview AI’s data collection practices, the monetisation of individuals’ data for an unreasonable purpose, and the risk of adverse outcomes for people included in the database. This decision was affirmed by the Administrative Appeals Tribunal.²⁸ The Commissioner separately found that the AFP breached federal privacy law by relying on Clearview AI’s services.</p>
<p>State regulator inquiries and practice guidance</p>	<p>NSW Ombudsman. In November 2021, the NSW Ombudsman published its report which provides guidance on practical steps that agencies must take when considering whether to adopt machine technology to support the exercise of administrative functions and decision making.²⁹ The Ombudsman also provides guidance and resources to assist agencies on this matter.³⁰</p> <p>Committee for Melbourne. In its 2020 report, the Committee considered the economic and social benefits that Australia could achieve by developing AI. The Committee also identified</p>

²³ Australian Communication and Media Authority (ACMA), *Australian Communications and Media Authority response to the Australian Competition and Consumer Commission Digital Platforms Inquiry Preliminary Report* (Position Paper, February 2019); ACMA, *Misinformation and news quality on digital platforms in Australia: A position paper to guide code development* (Position Paper, June 2020); ACMA, *Artificial intelligence in communications and media* (Occasional Paper, July 2020); ACMA, *Natural language processing technologies in government* (Occasional Paper, June 2021).

²⁴ Commonwealth Ombudsman, *Automated Decision-making: Better Practice Guide* (Guidance, 2019).

²⁵ *Australian Competition and Consumer Commission v Trivago N.V.* [2020] FCA 16.

²⁶ *Australian Competition and Consumer Commission v Trivago N.V.* [2020] FCA 16 [203].

²⁷ *Commissioner initiated investigation into Clearview AI, Inc. (Privacy)* [2021] AICmr 54 (14 October 2021).

²⁸ *Clearview AI Inc and Australian Information Commissioner* [2023] AATA 1069.

²⁹ NSW Ombudsman, *The new machinery of government: using machine technology in administrative decision-making* (Special Report, 29 November 2021).

³⁰ ‘Guidance for agencies: Automated decision-making in the public sector’, NSW Ombudsman (Web Page) <<https://www.ombo.nsw.gov.au/guidance-for-agencies/automated-decision-making-in-the-public-sector>>.

opportunities for the Victorian Government to lead AI initiatives and encourage Victorians to develop skills and literacy in AI.³¹

Recommendation 3: legal gap analysis regarding development & use of AI

The Australian Government should identify areas where AI presents an especially significant risk of harm, consider how existing laws apply, and prioritise new reform where those laws are found not to address those risks. This will better enable a gap analysis of Australian law as it applies to the development and use of AI, with a view to reform that appropriately balances technology-neutral and technology-specific law.

As outlined above, HTI recommends that Australian law should be technology-neutral, subject to some exceptions. There are a range of laws engaged by public and private sector use of AI, including, for example, privacy, criminal, consumer protection, cyber-security, and administrative law.

Some laws include provisions relating to the use of technology, but are otherwise technology-neutral. Some social security legislation, for example, provides for the use of 'technological processes' that may include automation or AI in establishing and varying employment plans.³²

In some cases, how AI is used and embedded within a sociotechnical system will challenge the application of technology-neutral law, and reform will be required. The application of technology-neutral legislation to the use of AI, including generative AI (see Box 2, below), has begun to be tested by regulators and in litigation both in Australia and overseas.

Box 2: Generative AI and Australian law

Generative AI applications, and the so-called 'foundation models' on which they are based (such as large language models), engage a range of Australian consumer, competition, privacy and intellectual property (IP) laws, including in relation to copyright, trademarks, patents, designs, and the assertion of moral rights. Common law obligations, such as in relation to the tort of passing off, are also relevant in this area.

Where privacy- or IP-protected information is used as training data for these foundational models, or where such information is entered into a generative AI application, there is at least a prima facie legal problem. In the United States, some legal action, including by the Federal Trade Commissioner, has already been commenced against companies at the forefront of generative AI, such as OpenAI.³³

Complex questions also arise when considering the IP implications of material created using generative AI. There is very limited judicial consideration of these

³¹ Committee for Melbourne, *The Future of Artificial Intelligence (AI) in Australia* (Report, December 2020).

³² *Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Act 2022* (Cth) s 40B provides 'The Employment Secretary may arrange for the use of technological processes in relation to...persons entering into employment pathway plans'.

³³ Ella Creamer, 'Authors file a lawsuit against OpenAI for unlawfully 'ingesting' their books', *The Guardian* (Article, 6 July 2023) <<https://www.theguardian.com/books/2023/jul/05/authors-file-a-lawsuit-against-openai-for-unlawfully-ingesting-their-books>>.

issues in Australia, although there have been related issues considered by the Federal Court. It has been determined, for example, that an inventor of a patent must be a natural person and, as such, AI cannot be considered an inventor under the *Patents Act 1990* (Cth).³⁴ It is also well settled that copyright cannot vest in computer-generated works, such as databases,³⁵ although in the United Kingdom and New Zealand, computer-generated work might be copyrightable.

The concept of a gap in regulation could be considered in several different ways. In addition to gaps in law, there may also be areas where additional powers should be given to existing regulators to combat the challenges posed by AI, such as enhanced powers to receive information about the operation of an AI system. There may also be examples where the harm arising from the lawful use of AI necessitates a change in law, or where the scale of harm from a breach of a law by the use of AI is significant but the consequence for the breach is insufficient to act as a deterrent.

The question then becomes how to approach the detailed legal work needed to consider how current law is challenged by AI, and where legislative reform may be needed. Rather than a broad-ranging legal gap analysis, HTI recommends identifying priority areas for immediate and short-term deep work. Priority areas should focus on areas where there is evidence of public concern and where there is serious risk of harm to individuals and society.

Recommendation 4: an AI Commissioner

To support the development of Australia's AI Regulatory Strategy, the Australian Government should establish an independent body, which we have called 'the AI Commissioner', to provide independent expertise on AI to government, regulators, and the private sector.

The AI Commissioner would have a range of functions, including to:

- provide independent expert advice on AI and provide support to Australian regulators, policy makers, government, and business
- act as a standing mechanism to identify significant developments in AI technology and emerging risks of harm
- consider the impact of AI on industry, individuals, and society, with particular focus on how AI is impacting the rights of those already marginalised and disadvantaged
- draw together policy from across Australian Government departments, both at federal and state/territory levels
- consult, on an ongoing basis, with experts across different sectors, professions, civil society, academia, and industry.

The remit of the AI Commissioner should be guided by the principles underpinning Australia's AI Regulatory Strategy, outlined above.

³⁴ *Commissioner of Patents v Thaler* [2022] FCAFC 62.

³⁵ *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458; *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* [2010] FCA 44.

In its report on Human Rights and Technology, the AHRC recommended the creation of an ‘AI Safety Commissioner’, performing an almost identical function as the AI Commissioner recommended here. We acknowledge that two of the authors of this submission were responsible for the AHRC’s recommendation. Across its extensive consultation with industry, regulators and government, academia, and civil society, the AHRC recorded strong support for an ‘independent statutory authority to help government and the private sector manage the rapid growth in AI, especially in decision making’.³⁶ HTI considers the case for such a body has only strengthened since it was recommended by the AHRC in 2021.

Recommendation 5: an AI Assurance Framework for the private sector

To support the safe and responsible use of AI by the private sector, the Australian Government should develop an AI assurance framework that applies to the private sector (an **Industry AI Assurance Framework**).

This proposed Industry AI Assurance Framework could be a co-regulatory measure, where government works with industry to establish governance, assurance, and assessment mechanisms that support organisations’ ability to meet their legal and governance obligations when developing and using AI. This proposed reform would draw on a significant body of research and regulatory initiatives in overseas jurisdictions on AI or algorithmic impact assessments. It would also be an opportunity to adopt a harmonised regulatory approach, given that Australia’s federal, state, and territory governments are increasingly adopting or considering AI assurance frameworks for use by the public sector.

AI assurance frameworks

AI assurance frameworks are practical tools to fill in the ‘missing middle’ between high-level AI ethics principles that reflect the expectations of citizens, and the often highly-technical design elements, software and hardware components, and human interaction systems that constitute AI system design and operation.

While not a term of art, an assurance framework is intended to provide trustworthy evidence to relevant stakeholders, based on an assessment of the risk and control environment of critical projects. Assurance frameworks are designed to operate in such a way as to give sufficient, continuous, reliable assurance to ensure that projects are being effectively developed and delivered in accordance with government objectives.³⁷

AI assurance frameworks are intended to help third parties without direct access to or authority over a particular system to develop trust in the compliance and risk management processes that govern it.³⁸ While not

³⁶ Australian Human Rights Commission, *Human Rights and Technology* (Report, March 2021).

³⁷ See for example ‘Project Assurance’, *Infrastructure NSW* (Web Page) <<https://infrastructure.nsw.gov.au/investor-assurance/project-assurance/>>; HM Treasury, ‘Assurance frameworks guidance’, *GOV.UK* (Web Page, 10 January 2014) <<https://www.gov.uk/government/publications/assurance-frameworks-guidance>>.

³⁸ Ghazi Ahamat, Madeleine Chang and Christopher Thomas, ‘The Need for Effective AI Assurance - Centre for Data Ethics and Innovation Blog’, *GOV.UK* (Blog Post, 15 April 2021) <<https://cdei.blog.gov.uk/2021/04/15/the-need-for-effective-ai-assurance/>>.

necessarily used as audit tools, assurance frameworks can also perform a similar function.

Australian public sector AI assurance frameworks

At the June 2023 Data and Digital Ministers Meeting, federal, state, and territory Ministers agreed to work towards a nationally consistent approach to the safe and ethical use of AI *by government*. A number of Ministers have since pointed to the prospect of developing an AI assurance framework that would apply to Australian Government agencies – modelled on the NSW AI Assurance Framework.

The NSW AI Assurance Framework (see Box 3 below) has become a national and international reference point for public and private sector bodies seeking to assess their use of AI systems. Several NSW Government agencies have used it to assess their proposed and active AI projects. It has also helped raise awareness among NSW Government agencies about taking a risk-responsive approach to developing and using AI.

HTI endorses the Australian Government’s consideration of a federal AI assurance framework for government agencies. HTI understands that, following the June 2023 Data and Digital Ministers Meeting, work towards an AI assurance framework related to government development and use of AI is being led within the Australian Government by the Minister for Finance.

Most relevantly therefore for DISR, HTI, in this submission, focuses on its recommendation for the development of an AI assurance framework that would be directed to the *private sector*. In other words, HTI urges the Australian Government to use the NSW AI Assurance Framework as a model for a separate but related reform that would apply this approach to industry.

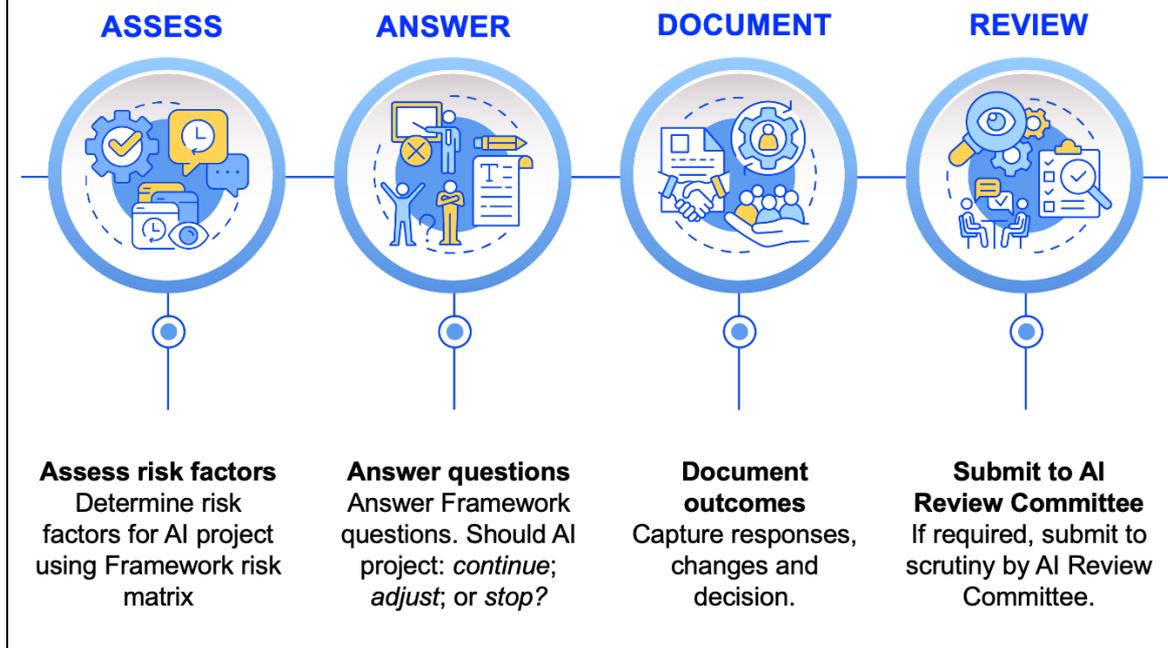
Box 3: NSW’s AI Assurance Framework

In Australia, only NSW has implemented an AI assurance framework. NSW’s AI Assurance Framework is the first mandatory formal government policy in Australia to promote the responsible and ethical development and use of AI systems by government. It contains obligations and considerations that apply to all NSW Government agencies in their development and use of AI.

As summarised in Figure 1 below, the NSW AI Assurance Framework operates as follows:

- subject to some exemptions, all NSW Government agencies must consider the NSW AI Assurance Framework for any project that relies significantly on AI. For smaller projects, the agency is required simply to undertake a self-assessment process by reference to the NSW AI Assurance Framework.
- for AI projects valued over \$5 million, or funded from the Digital Restart Fund, there is an external scrutiny process involving the NSW Government AI Review Committee.

Figure 1: Operation of NSW AI Assurance Framework



An Industry AI Assurance Framework

The same reasons that make AI assurance frameworks attractive as compliance tools within the public sector also apply to the private sector. An Industry AI Assurance Framework would provide a convenient way of combining the key legal requirements with good-practice considerations relevant in the development and use of AI by industry, especially where systems could unlawfully limit the rights of Australians or otherwise cause significant harm.

In addition to drawing attention to obligations arising from primary legislation, an Industry AI Assurance Framework could also give additional impetus to leading soft law measures, such as international technical standards. Moreover, if the Industry AI Assurance Framework itself were a form of subordinate legislation, it could be updated more expeditiously than primary legislation – something that is especially important in the context of a rapidly-evolving field such as AI.

There is currently no mandatory AI assurance framework that applies to the private sector in Australia. For three reasons, however, an Industry AI Assurance Framework likely would be familiar – at least in many key respects – for the private sector in Australia.

First, the concept of an AI assurance framework draws heavily on a significant body of research related to AI or algorithmic impact assessments. Such measures were strongly supported by stakeholders in industry and community consultation conducted by the AHRC, and ultimately by the AHRC itself.³⁹ They have also been supported in leading research,⁴⁰ and by international bodies.⁴¹

³⁹ Australian Human Rights Commission, *Human Rights and Technology* (Report, March 2021), Chapters 5 and 7.

⁴⁰ See, eg, AI Now Institute, *Algorithmic Impact Assessments: A Practical Framework for Public Agency Accountability* (Report, April 2018).

⁴¹ See, eg, Council of Europe, *Unboxing Artificial Intelligence: 10 Steps to protect Human Rights* (Recommendation, May 2019) 7.

Secondly, an Industry AI Assurance Framework could incorporate or emulate co-regulatory measures that have had proven success, including in the area of audit and risk.

Thirdly, while the current NSW AI Assurance Framework – and others being considered by Australia’s Data and Digital Ministers – apply directly to the public sector, such frameworks necessarily have a ‘horizontal effect’ that applies to the private sector. Government agencies rarely, if ever, develop AI tools entirely in house. Almost always, they do so through partnerships or outsourcing arrangements involving private sector companies. This means that the requirements in, say, the NSW AI Assurance Framework would be familiar to any company engaging in such government work. In this way, an Industry AI Assurance Framework would simply be an incremental extension of an already-familiar set of obligations and considerations.

HTI has extensive experience and expertise developing AI assurance frameworks for the public and private sector. HTI is currently working on a review of the NSW AI Assurance Framework, and is working with several Australian businesses to develop commercial assurance processes.

HTI would be pleased to provide further information to DISR on this work.

Recommendation 6: an Australian AI Act

Finally, to draw these strands together, Australia should adopt framework legislation for AI. The proposed Australian AI Act would present an opportunity to advance the four reform processes outlined above.

HTI does **not** recommend that Australian Parliament adopt a single statute that attempts to be a comprehensive source of all legal obligations applicable to the development and use of AI. While this regulatory approach may be more appealing in some other jurisdictions, it would not be appropriate in the Australian context. Hence, HTI does not recommend that the Australian Government seek to replicate the structure and text (ie, the specific wording of the provisions) of the EU’s draft AI Act in Australian law.

As previously noted, HTI also urges the Australian Government to develop and adopt technology-neutral legislation wherever possible, reserving technology-specific rules for AI systems only when broad-based instruments cannot effectively achieve the relevant regulatory objectives for a particular technology.

However, this submission emphasises the importance of ensuring that, in adopting its own regulatory approach, the Australian Government nevertheless ensures that Australians receive an equivalent level of protection when compared with citizens from the EU in respect of threats of harm associated with the development and use of AI.

Without in any way derogating from this recommendation, HTI considers there would be utility in adopting an Australian AI Act. This reform would be focused on the following:

- it would provide a mechanism by which to introduce a range of legislative reforms, including to other legislation, arising from the leading official reviews referred to in Recommendation 2 above.
- as framework legislation, the proposed Australian AI Act could be a central source of legislative authority on a range of legal issues associated with AI – especially in defining key terms. For example, this Act could clarify the definition of ‘reasons’ as it applies in the context of AI-informed decision making.
- the proposed Australian AI Act could provide the legislative basis for establishing the AI Commissioner referred to in Recommendation 4 above, as well as this body’s functions and statutory independence.
- the proposed Australian AI Act could vest a rule-making power in the Minister for Industry and Science. This would enable the Minister to use subordinate legislation for co-regulatory initiatives such as the creation and updating of an Industry AI Assurance Framework, as outlined in Recommendation 5 above.