CHOICE

SUBMISSION TO THE DEPARTMENT OF INDUSTRY, SCIENCE AND RESOURCES

SAFE AND RESPONSIBLE AI IN AUSTRALIA: DISCUSSION PAPER

AUGUST 2023

About Us

CHOICE is the leading consumer advocacy group in Australia. CHOICE is independent, not-for-profit and member-funded. Our mission is simple: we work for fair, just and safe markets that meet the needs of Australian consumers. We do that through our independent testing, advocacy and journalism.

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Introduction

Consumers in Australia need strong protections from the use of artificial intelligence (**'AI'**).

While AI has the potential to provide benefits to the community, people are also exposed to the harms of poorly-regulated AI systems. AI systems, some of which are operated by the most powerful technology firms in the world, affect many aspects of consumers' lives. Consumers have already experienced a number of harms arising from AI systems, including algorithmic discrimination and perpetuation of bias, AI-assisted scams, the spread of misinformation, and chatbots promoting harmful behaviour.[1] CHOICE's research has found that 71% of consumers are concerned about their data being used in automated decision making. Over half of consumers are concerned about how their data is being used to personalise products and services marketed to them.[2]

Businesses that use AI should not be trusted to regulate themselves. Strong laws, enforced by well-resourced regulators are needed to promote the responsible use of AI and protect consumers from further harm. Given the uniqueness and growing complexity of harm arising from AI, CHOICE supports the introduction of economy-wide legislation to regulate the use of artificial intelligence in Australia (**'AI legislation'**). This legislation should adopt a risk-based framework, where the use of AI is classified according to the level of risk, with legal restrictions and prohibitions on high-risk uses.

The introduction of specialist legislation should be a complement to existing regulation. The use of AI is already subject to legislation in a range of areas, including privacy, consumer protection, competition and financial services. CHOICE strongly urges existing regulators to investigate and monitor the use of AI and take enforcement action where they find evidence of use of AI that creates harm to consumers. Specialist regulation should address the particular characteristics of AI that may not be adequately addressed by other, technologically neutral legislation, given the complexity and rapid growth of the harms of AI.

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[1] The Greenlining Institute, 2021, *Algorithmic Bias Explained*, https://greenlining.org/wp-content/uploads/2021/04/Greenlining-Institute-Algorithmic-Bias-Explained-Report-Feb-2021.pdf; WIRED, 2023, "AI Is Being Used to 'Turbocharge' Scams", https://www.wired.co.uk/article/security-roundup-ai-scams-voice-cloning; Axios, 2023, "GPT-4 readily spouts misinformation, study finds", https://www.axios.com/2023/03/21/gpt4-misinformation-newsguard-study; The Guardian, 2023, "US eating disorder helpline takes down AI chatbot over harmful advice". https://www.theguardian.com/technology/2023/may/31/eating-disorder-hotline-union-ai-chatbot-harm.
[2] CHOICE Consumer Pulse June 2023 is based on a survey of 1,087 Australian households. Quotas were applied for representations in each age group as well as genders and location to ensure coverage in each state and territory across metropolitan and regional areas. Fieldwork was conducted from 7th to 22nd of June 27, 2023.

CHOICE supports the creation of a well-funded, specialist AI Commissioner to enforce specialist AI legislation with a full range of regulatory powers. The AI Commissioner should collaborate and work closely with existing regulators, and bring specialist regulatory experience to address the growing harms of AI. Consumers should also have access to redress if they have been harmed by an AI system. CHOICE supports the establishment of a digital ombudsman as recommended by the Australian Competition and Consumer Commission (**'ACCC'**), whose role should include determining complaints where consumers have been harmed online, including by an AI system.

This consultation comes at a critical time, as Australia risks lagging behind international developments in the regulation of AI. The Federal Government has an opportunity to create an enduring regulatory framework to ensure the safe and fair use of AI in Australia.

Recommendations

The Federal Government should:

1. introduce economy-wide legislation to regulate the use of AI in Australia.
2. develop a risk-based framework as part of the AI legislation. This framework would allow the use of AI to be classified according to the level of risk, with legal restrictions and prohibitions on high-risk uses of AI.
3. legislate key consumer rights in the AI legislation, including a requirement for AI systems to be
   a. safe;
   b. fair;
   c. reliable;
   d. transparent; and
   e. accountable.
4. legislate a clear, fair and commonly accepted definition of AI. This definition should be technology-neutral and future-proofed for emerging applications of AI.
5. strengthen existing laws to address sector-specific risks of AI, including but not limited to:
   a. legislating a general safety provision in the Australian Consumer Law (**'ACL'**);
   b. legislating an economy-wide prohibition on unfair trading practices in the ACL; and
   c. modernising Australia's privacy laws, to ensure collection and use of personal data is fair and reasonable.
6. establish an AI Commissioner, with adequate resources and a full range of regulatory powers, including criminal and civil penalty powers. The AI Commissioner could be co-housed within an existing regulator, such as the ACCC.
7. legislate powers for the AI Commissioner to intervene in the market when there is significant consumer detriment.
8. establish a digital ombudsman with the power to determine complaints where consumers have been harmed online, including by AI systems.

Protecting the community with AI legislation

The use of AI in Australia needs to be safe, fair, reliable, transparent, and accountable. CHOICE recommends the Federal Government establish economy-wide legislation on AI to ensure consumers are protected. This is the proposed approach in Canada with the *Artificial Intelligence and Data Act* and the European Union with the *Artificial Intelligence Act.*[3] Standalone AI legislation should also be supported by amendments to other existing legislation.

The AI legislation should be based on a risk-based framework. This framework would determine whether an AI system is subject to any restrictions or assurances based on the risk of the application. Certain harmful uses of AI would be prohibited under this framework. Similarly, certain low-risk uses of AI would only be subject to existing laws.

The EU's framework is the most advanced risk-based model currently being considered. Under the EU proposal, all businesses using an AI system would be subject to a risk-based framework. High-risk technologies would be subject to restrictions or prohibitions. For example, the proposed EU *AI Act* classifies "subliminal techniques" which cause physical and psychological harm as an unacceptable risk and would prohibit these techniques in AI systems.

Sector-specific legislation, voluntary industry codes, and standards are alone inadequate in protecting consumers from harmful and unsafe uses of AI. Large technology companies have not demonstrated they have the ability to self-regulate responsibly, with some knowingly breaking the law as a business strategy and others facing action from regulators for breaching consumer protection laws.[4] Many of the Big Tech companies that are deploying AI systems have already contributed to widespread consumer harm, including from the use of social media platforms.[5]

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[3] Innovation, Science and Economic Development Canada, "The Artificial Intelligence and Data Act (AIDA) – Companion document", https://ised-isde.canada.ca/site/innovation-better-canada/en/artificial-intelligence-and-data-act-aida-companion-document; Official Journal of the European Union, 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206; European Parliament, 2023, "Texts adopted", https://www.europarl.europa.eu/doceo/document/TA-9-2023-0236_EN.html.

[4] The Guardian, 2022, "The Uber files: firm knew it launched illegally in Australia, then leaned on governments to change the law", https://www.theguardian.com/news/2022/jul/15/the-uber-files-australia-launched-operated-illegally-document-leak; Bloomberg, 2023, "Meta Loses EU Court Fight Over Antitrust Crackdown on Data", https://www.bloomberg.com/news/articles/2023-07-04/meta-loses-eu-court-fight-over-german-attack-on-facebook.

[5] ACCC, 2022, *Digital platform services inquiry: Interim report No. 5 – Regulatory reform*, https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20September%202022%20interim%20report.pdf.

Existing sector-specific legislation will offer some protection, but relying on sector-specific approaches risks creating a piecemeal approach to consumer protection and may not adequately address the use of AI by businesses in emerging sectors such as HealthTech and FinTech. This approach also risks creating loopholes for businesses that design their practices to escape the scope of sector-specific legislation. Given potential widespread harms, clear and strong regulation of all harmful uses of AI – regardless of sector – would establish consistent rules for all businesses and consistent protections for consumers.

CHOICE supports the Federal Government codifying a common definition of 'artificial intelligence'. This definition should be technology neutral and future-proof for new, unforeseen technology. A legislated definition is needed to encompass all uses of AI across the economy and protect consumers from existing and future AI systems.

Principles for safe and responsible AI in Australia

The Federal Government should codify key consumer rights in the AI legislation. This would protect consumers from harm by AI systems and create strong obligations on businesses that operate AI systems. These should not seek to replicate or replace protections enshrined in other legislation like the ACL. They should be designed to address the particular risks arising from AI that may not be adequately covered by existing legislation.

These protections can be drawn from existing frameworks, including Australia's AI Ethics Principles[6] and the US's National Institute of Standards and Technology's characteristics of AI "trustworthiness".[7] They should require AI systems to be:

1. **Safe.** AI systems should be safe for consumers to use.

2. **Fair.** AI systems should be fair and free from unlawful discrimination.

3. **Reliable.** Developers and operators of AI systems should ensure their systems are reliable and regularly monitored for accuracy.

4. **Transparent.** Consumers should know when and how an AI system is being used in a product or service, and have the opportunity to give or withdraw consent.

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[6] Department of Industry, Science, and Resources, "Australia's AI Ethics Principles", https://www.industry.gov.au/publications/australias-artificial-intelligence-ethics-framework/australias-ai-ethics-principles.
[7] National Institute of Science and Technology, "Trustworthy and Responsible AI", https://www.nist.gov/trustworthy-and-responsible-ai.

5. **Accountable**. There must be clear human oversight and personal accountability in all high-risk AI systems, and consumers should have a right to redress and compensation for any damages suffered from the harmful use of AI.

Existing laws should be strengthened

Existing legislation such as the ACL and *Privacy Act* should be modernised in ways that recognise the growing risks from AI and other emerging technology. CHOICE supports the Consumer Policy Research Centre's approach of strengthening data protections and consumer rights as critical to the regulation of AI systems. CHOICE recommends the following three reforms to further protect consumers from AI harms, as well as strengthen the rights of consumers in other markets:

1. The Federal Government should legislate a broad general safety provision in the ACL. A general safety provision would provide an overall pre-market control on unsafe AI systems entering the market, thereby reducing the significant risk of consumer harm that can be caused by unsafe products. Businesses are best placed to observe and act on safety risks, and the introduction of this duty would ensure that responsibility for the safety of products is placed with AI developers and operators.

2. The Federal Government should amend the ACL to prohibit unfair trading practices. This should include a general, principles-based prohibition of practices that are unfair, as well as prohibition of specific trading practices that are oppressive, exploitative or contrary to consumer expectations of fairness in the market. If well designed, this would prevent the unfair use of AI systems by businesses, including practices that involve tricking people into making decisions that aren't in their best interests, or the use of biased or discriminatory algorithms.

3. The Federal Government should adopt the recommendations made by the Attorney-General's Department's Review of the Privacy Act.[8] In particular, a fair and reasonable use test would create a requirement for businesses to only collect and use data for its intended purposes, and to only store and use it for as long as necessary. CHOICE also supports further recommendations in the Privacy Act Review that specifically address AI, such as requiring transparency on what

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[8] Attorney-General's Department, 2023, *Privacy Act Review Report,*
https://www.ag.gov.au/rights-and-protections/publications/privacy-act-review-report.

information is used in automated decisions with legal or similarly significant effects on individuals, and transparency on how these decisions are made.

The Federal Government should also consider whether additional sector-specific legislation on AI should be introduced. This would complement baseline protections enshrined in AI legislation. Sector-specific reforms should be targeted at industries where potential risks are greater. This may include high-risk essential sectors such as healthcare, as well as high-risk technologies such as facial recognition technology that present immediate risks to the community.[9] Sector-specific and technology-specific legislation should be a complement to economy-wide legislation.

Recommendations 1-5

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4. legislate a clear, fair and commonly accepted definition of AI. This definition should be technology-neutral and future-proofed for emerging applications of AI.
5. strengthen existing laws to address sector-specific risks of AI, including but not limited to:
   a. legislating a general safety provision in the ACL;
   b. legislating an economy-wide prohibition on unfair trading practices in the ACL; and
   c. modernising Australia's privacy laws, to ensure collection and use of personal data is fair and reasonable.

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[9] Human Technology Institute, 2022, *Facial recognition technology: Towards a model law,* https://www.uts.edu.au/human-technology-institute/projects/facial-recognition-technology-towards-model-law.

Enforcing AI laws with empowered regulators

A specialist AI Commissioner is needed to address the emerging harm of AI

CHOICE supports the establishment of a standalone AI Commissioner. Given the complexity of AI and the complexity of harm experienced by consumers, a specialist and well-resourced regulator is needed. This will future-proof Australia from the emerging AI harms as the technology evolves and its impact on our community increases. This regulator could be housed within an existing regulator, such as the ACCC.

The key role of the AI Commissioner should be to enforce new economy-wide laws to regulate the use of AI. This regime should operate in parallel to existing regulation in areas such as general consumer protection and privacy. To be effective, an AI regulator should have strong and tailored powers to regulate the use of AI. These should include but are not limited to:

1. **Enforcement powers.** The AI Commissioner should have a full range of regulatory powers, including information-gathering powers, the power to conduct investigations into systemic issues and publish thematic reports, the power to issue warnings and infringement notices and the power to seek civil and criminal penalties through enforcement action.

2. **Impact assessments.** Businesses operating high-risk AI systems should be required to provide the AI Commissioner with an impact assessment on the risks posed by their systems and the measures they have taken to mitigate these risks. Details of these impact assessments should be published on a public register.

3. **Product intervention powers.** Given the potential harm of high-risk AI, the AI Commissioner should also have powers to proactively intervene where AI systems are causing harm. This could be modelled on Australian Securities and Investment Commission's (**'ASIC'**) product intervention powers. ASIC can temporarily intervene in the market, including by banning financial or credit products, when the product "has resulted, will result or is likely to result in significant consumer detriment".[10] The Consumer Policy Research Centre proposed a similar regulatory

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[10] Pt 7.9A of the *Corporations Act 2001* and Pt. 6-7A of the *National Consumer Credit Protection Act 2009.*

power based on ASIC's model in their recommendation for a privacy safety regime.[11]

The AI Commissioner could also be responsible for coordinating a forum for existing regulators such as the ACCC, ASIC, Office of Australian Information Commissioner, eSafety Commissioner and Australian Human Rights Commission, to collaborate on AI regulation.

Existing regulators should use their powers against the illegal use of AI

Some of the harms caused by AI already fall within legislation enforced by existing regulators such as the ACCC and the ASIC. These regulators should use their powers to take action against harmful uses of AI. The Commissioner of the Federal Trade Commission in the United States has said:

> "If AI tools are being deployed to engage in unfair or deceptive practices, or unfair methods of competition, the FTC will not hesitate to crack down on unlawful conduct."[12]

Existing regulatory bodies should also coordinate efforts to tackle the harms of AI. This could be achieved through an information-sharing arrangement similar to the Digital Platform Regulators Forum, which is tasked with protecting Australians online.[13]

Consumers need external dispute resolution when experiencing AI harms

Consumers who have been harmed by AI need access to redress. The Federal Government should establish a digital ombudsman to handle complaints, including complaints related to AI systems. Digital harms often overlap multiple areas of harm, or may be ambiguous. If a consumer has a complaint that has arisen in a digital context, it may be easier for them to identify the digital ombudsman as a place to seek redress than to identify whether it involves a breach of privacy, human rights or consumer protection law. The digital ombudsman should take responsibility for referring complaints to other regulators or complaints handling bodies where appropriate. Further details on a digital

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[11] Consumer Policy Research Centre, 2023, *In Whose Interest?,* https://cprc.org.au/wp-content/uploads/2023/03/CPRC-working-paper-In-whose-interest-March-2023.pdf.
[12] Federal Trade Commission, 2023, "Statement of Chair Lina M. Khan Regarding the Joint Interagency Statement on AI", https://www.ftc.gov/system/files/ftc_gov/pdf/remarks-of-chair-lina-m-khan-re-joint-interagency-statement-on-ai.pdf.
[13] Australian Competition & Consumer Commission, 2022, "Communique | Digital Platforms Regulators Forum", https://www.accc.gov.au/about-us/media/media-updates/communique-digital-platforms-regulators-forum.

ombudsman model can be found in CHOICE'S submission to the Attorney-General's Department Discussion Paper on the Review of the Privacy Act.[14]

Recommendations 6-8

The Federal Government should:

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7. legislate powers for the AI Commissioner to intervene in the market when there is significant consumer detriment.
8. establish a digital ombudsman with the power to determine complaints where consumers have been harmed online, including by AI systems.

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[14] CHOICE, 2022, *Submission to the Attorney-General's Department on the Review of the Privacy Act*, https://www.choice.com.au/consumer-advocacy/policy/policy-submissions/2022/february/review-of-the-privacy-act.