

Observations about preventing harm using existing law

Protections do not exist to address the scale, speed and severity of all harms that arise from the use of AI in high-risk settings. This attachment presents observations regarding the application of existing law to the development and deployment of AI. **Section 47C**

- **Legal protections insufficient for AI harms:** Some examples to support this include:
 - Federal anti-discrimination laws do not consistently impose a positive duty on individuals and organisations to take reasonable and proportionate measures to eliminate unlawful discrimination including from AI-enabled decisions.
 - Complainants face barriers getting the necessary evidence to prove a case of AI-enabled discrimination under existing laws in Australia.¹
 - Work, health and safety laws have few requirements for AI developers early in the supply chain to include safety by design features in the AI they create, although they do require entities using AI to manage risks of this use.²
- **Heavy reliance on remedies post-harm:** Where remedies for a harm are available, individuals can struggle to access these or such remedies are only available after the harm has occurred. For example, Australia's negligence, defamation, privacy, copyright and consumer laws all rely on individuals commencing proceedings in the courts or making a complaint to the relevant regulator (e.g. in the case of privacy and consumer protections) post the harm occurring.
- **Uncertainties and issues with liability and consumer law:** There is a lack of clarity regarding how responsibilities and liability are allocated when harm results from AI, as well as the application of how Australian Consumer Law (ACL) protections apply to AI. For example:
 - The Law Council of Australia points to definitional uncertainty under the ACL provisions as they are applied to an AI enabled 'good' or 'service'.³
 - It is unclear how statutory guarantees under the ACL, which require goods and services to be of acceptable quality, such as durability, will apply to evolving, self-learning AI technologies.⁴
 - Consumer law bans unconscionable conduct, but the standard is high; it must go beyond unfairness. Whether conduct is unconscionable is determined by courts on a case-by-case basis.

¹ Alysia Blackham, '[Setting the Framework for Accountability for Algorithmic Discrimination at Work](#)' (2023) *Melbourne University Law Review*, Vol 47(1): 63 at 101

² DEWR's response to the Department's request to consider the application of laws in their portfolio to three scenarios describing AI harms (see Attachment C).

³ [Law Council of Australia submission](#) to the Review of AI and the Australian Consumer Law

⁴ Treasury's [Review of AI and the Australian Consumer Law discussion paper](#), October 2024.

- Since AI outputs are probabilistic, the causation element of a negligence action (involving ‘reasonable foreseeability’) could be particularly difficult to prove,⁵ particularly those using unsupervised⁶ or reinforcement learning,⁷ such as those used in models like Gemini and GPT-4.
- **Transparency and supply chain challenges:** There are limited rules or laws that require transparency across the AI supply chain. For example:
 - Businesses early in the AI supply chain are not required to disclose details on the performance or limitations of their AI in specific applications. As a result, businesses downstream struggle to determine if the AI product they have purchased is suitable and safe for their use case.
 - From 10 December 2026, businesses subject to the *Privacy Act 1988* will be required to disclose the use of personal information by computer programs in their privacy policies. Although this increases transparency, it assumes consumers know about disclosures in privacy policies. In 2020, a survey showed only 20% of Australians read privacy policies and are confident they understand them.⁸ The survey found that the key reason Australians don’t read the privacy policy is due to the length and complexity of the language.

Status of the three reviews of existing laws

There is work underway across government to better understand the application of existing laws to the use of AI in high-risk settings. This work includes reviews of health and aged care sector regulation, the Australian Consumer Law and copyright law.

- DHDA conducted public consultation on AI in health care settings in September and October last year. The DHDA has finalised the report, pending Ministerial approval to publish.
- The Therapeutic Goods Administration (TGA) similarly conducted a review and public consultation on regulation of AI in medical devices. The review found that medical device regulation will require amendments to accommodate AI risks. The TGA has commenced work to update definitions in their legislation to clarify responsibility and appropriately capture activities now performed by AI systems, working closely with DISR to mitigate the risk of key definitions fragmenting across the statute book.
- The Treasury conducted a review into how Australia’s consumer protection framework will respond to the increased availability of AI-enabled goods and services which may amplify existing or create new risks. For example, some stakeholders are uncertain about whether an AI-enabled ‘good’ or ‘service’ falls within the definitions of these terms under the Australian Consumer Law. The report has now been finalised and Treasury will brief the new Assistant Minister for Productivity, Competition, Charities and the Treasurer on the final

⁵ Shine Lawyers submission to the Safe and Responsible AI discussion paper, (2023)

⁶ Unsupervised learning is a model development process where the algorithm discovers patterns or relationships within unlabelled datasets on its own without the need for explicit guidance.

⁷ Reinforcement learning is a model training technique that uses rewards, feedback loops and proxy objectives. For example, through trial and error a model will produce an output, receive some feedback about this output, then learn from the feedback through interaction to maximise cumulative rewards over time.

⁸ Refer to the [Australian Community Attitudes to Privacy survey](#) run by the Office of the Australian Information Commissioner

report shortly. Treasury anticipates that the report will be shared with states and territories later in 2025 prior to its release. The review was designed to complement other work across Government, notably DISR's consultation on introducing mandatory guardrails for AI in high-risk settings.

- AGD is consulting with the Copyright and AI Reference Group (copyright owners and creative, media and technology stakeholders) to prepare for copyright issues emerging from AI. These include issues around the value of the work of human creators used in training AI datasets and the legal basis upon which this training occurs. AGD is briefing the Attorney-General on the next stage of consultation with the CAIRG including on the development of draft options for reforms to copyright law