



THE LAW SOCIETY  
OF NEW SOUTH WALES

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Mr Jonathan Smithers  
Chief Executive Officer  
Law Council of Australia  
DX 5719 Canberra

By email: [nathan.macdonald@lawcouncil.asn.au](mailto:nathan.macdonald@lawcouncil.asn.au)

Dear Mr Smithers,

### **Consultation on Human Rights and Technology**

Thank you for the opportunity to provide input to a potential Law Council of Australia submission to the Australian Human Rights Commission (“AHRC”) consultation on human rights and technology.

This submission is informed by our Human Rights Committee and our Privacy and Data Law Committee.

### **The human rights impact of new technologies: our focus in this submission**

New technologies<sup>1</sup> such as Artificial Intelligence (“AI”), robotics, the Internet of Things, and virtual reality have the potential to both promote and imperil human rights. The Issues Paper on Human Rights and Technology (“Issues Paper”) published by the AHRC in July 2018 identifies a suite of human rights that new technologies might affect, from the right to education, to the right to a fair trial, to the right to benefit from scientific progress. In this submission, the Law Society focuses primarily on the implications that new technologies hold for the right to privacy, the right to equality and non-discrimination, and the right to accessibility.

### **New technologies and marginalised groups in Australia**

The Issues Paper published by the AHRC observes that “specific groups will feel both the positive and negative impacts of new technologies differently to other Australians”.<sup>2</sup> At the level of access, this trend can be seen in the digital divide affecting many groups across Australia. The 2017 Australian Digital Inclusion Index found that several groups are particularly digitally excluded: people in low income households, people aged 65 and over, people with a disability, people who did not complete secondary school, Indigenous

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<sup>1</sup> In this submission, the Law Society of NSW uses the term “new technologies” as shorthand for the 12 types of technology highlighted at page 18 of the Issues Paper published by the AHRC, namely: new computing technologies; blockchain and distributed ledger technologies; the Internet of Things; AI and robotics; advanced materials; additive manufacturing and multidimensional printing; biotechnologies; neurotechnologies; virtual reality and augmented reality; energy capture, storage and transmission; geoengineering; and space technologies.

<sup>2</sup> Australian Human Rights Commission, *Human Rights and Technology Issues Paper* (2018) 20.

Australians, and people not in paid employment. Women in Australia are also less likely to be online than men, particularly those in the 65 and over age group.<sup>3</sup>

With an increasing number of jobs, social services and communications tools requiring internet connectivity and digital literacy, there is a real risk that this digital divide will contribute to already-marginalised groups missing out on new opportunities. To address this trend, policymakers, businesses, and the education sector should place a focus on improving the digital ability of people in marginalised groups, as well as addressing the affordability and accessibility of digital tools.

### **How should Australian law protect human rights in the context of AI informed decision-making**

In an article published in *Science* in August 2018, Mariarosaria Taddeo and Luciano Floridi of the University of Oxford described AI as “a powerful force that is reshaping daily practices, personal and professional interactions, and environments”.<sup>4</sup> As AI systems become more tightly woven into everyday life – from the household to the government level – the risk of AI informed decision-making having a negative impact on human rights grows. The Law Society notes that the continued rise of AI across many systems in everyday life has the potential to effectively institutionalise discrimination, diminishing accountability in relation to the making of AI informed decisions. As the Issues Paper notes, instances of unjust consequences arising from AI informed decision-making have already occurred internationally in areas including recruitment, performance management and issuance of bail.<sup>5</sup> Unless guidelines and regulation are introduced to ensure fairness, transparency and accountability of algorithmic decision-making, the complexity, intricacy and inscrutability of these systems could compound disadvantage for some sectors of the community.

We note that the EU Fundamental Rights Agency stated in a 2018 report that if AI informed decision-making models are informed by biased data or algorithms, “discrimination will be replicated, perpetuated and potentially even reinforced”.<sup>6</sup> We also note that in a report published in April 2018, the UK House of Lords Select Committee on Artificial Intelligence stated that “the prejudices of the past must not be unwittingly built into automated systems, and such systems must be carefully designed from the beginning.”<sup>7</sup>

The Law Society submits that fairness, transparency, non-discrimination and accountability should be the central focus of regulation in the area of AI so as to prevent inequality from becoming further entrenched within social, governmental and economic systems. The Law Society supports the establishment of appropriately regulated AI-informed decision-making processes which will allow for the benefits of AI to be provided to society while protecting fundamental rights, including the rights to privacy<sup>8</sup> and non-discrimination.<sup>9</sup>

The Law Society agrees with the position in the Issues Paper that robust and transparent procedures and guidelines are necessary regulatory steps to maximise the benefits and minimise the risks of AI in Australia. In particular, we note the importance of increased

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<sup>3</sup> Julian Thomas et al, *Measuring Australia's Digital Divide: The Australian Digital Inclusion Index 2017* (RMIT University, 2017) 5.

<sup>4</sup> Mariarosaria Taddeo and Luciano Floridi, ‘How AI can be a force for good’ (2018) 361(6404) *Science* 751.

<sup>5</sup> Australian Human Rights Commission, above n 2, 30.

<sup>6</sup> European Union Agency for Fundamental Rights, *#BigData: Discrimination in data-supported decision-making* (FRA Focus, 2018) 10.

<sup>7</sup> House of Lords of the United Kingdom Select Committee on Artificial Intelligence, *AI in the UK: ready, willing and able?* (House of Lords, 2018) 5.

<sup>8</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17.

<sup>9</sup> *Ibid*, art 24.

transparency as a guiding principle, which will work to equip the public with necessary information to prevent harm, as well as empower individuals to better comprehend, assess and query decisions made by AI systems. In this regard, the Law Society is of the view that members of the public should be aware of how and when AI systems are being used to make decisions about them, and the implications this will have.

### **The principles that should be applied to protect human rights in respect of new technologies**

The Law Society considers that the best approach to the development of legislation in this area is for laws to be principles-based, which will allow for flexibility and adaptability. As noted above, the principles that we believe should guide legislation in this area are: fairness, transparency, non-discrimination, and accountability. In practice, these principles would require that, for example:

- *Fairness.* Organisations must only collect data on a person for a legitimate purpose, and consider reasonable community expectations relating to the collection of this data.
- *Transparency.* An organisation must act with transparency when collecting, using and disclosing personal information, and disclose any use of data in an intelligible format. This should include the opportunity for individuals to correct records and to withdraw information. Furthermore, when AI informed decision-making has the potential to impinge on human rights, the source code that is the basis of these decisions should be open for public scrutiny.
- *Non-discrimination.* All algorithms that are used to make decisions about individuals must be evaluated for discriminatory effects, preferably prior to roll-out and on a periodic basis.
- *Accountability.* There must always be a line of responsibility for business and government actions to establish who is accountable for consequences arising from the use of new technologies.

### **Gaps in existing Australian legislation regulating the use of AI and related technologies**

The Law Society submits that the current legal framework for AI is inadequate and insufficient to protect human rights, and we consider recent issues relating to the adoption of AI around the globe highlight the potential for the utilisation of AI to create a complex web of legal, ethical and societal problems.

The Law Society supports the introduction of robust legal and regulatory guidelines to:

- regulate how AI algorithms are developed;
- regulate the areas where AI can be utilised in conjunction or in substitution for human expertise and labour; and
- establish effective monitoring and accountability measures to better identify, control and respond to AI issues.

The Law Society considers that the significant pace of change in this area will create challenges for the appropriate, timely and adequate development of robust measures, however we submit that it is essential for such measures to be developed noting the major changes that new technologies such as AI will have on the legal and economic landscape.

## Protecting the right to privacy in an era of new technology

The Law Society is of the view that laws protecting individuals against breach of privacy have not kept pace with technological developments, and should be reviewed and reformed. New technologies, such as those that enable corporations and governments to build up detailed profiles of individuals based on their personal data and browsing history, present an unprecedented scope for serious invasions of privacy. The right to privacy is recognised as a fundamental human right in the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* ("ICCPR"), the *Convention on the Rights of the Child* ("CRC") and other instruments and treaties.

Article 17 of the ICCPR states:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.<sup>10</sup>

Article 16 of the CRC is in similar terms in relation to children.

Australia's obligations under the ICCPR and CRC – which Australia ratified in 1980 and 1990 respectively – require enhanced protections against breach of privacy, to protect against incursions of privacy enabled by new technologies. The 2014 Australian Law Reform Commission ("ALRC") inquiry into Serious Invasions of Privacy in the Digital Era at Recommendation 5-1 and 5-2 outlined how the current gap in privacy legislation could be addressed. The Law Society continues to support the recommendation of the ALRC that a new Commonwealth Act enact a statutory cause of action for serious invasion of privacy.<sup>11</sup> In particular, the Law Society endorses the ALRC's recommendation that the new tort should cover two types of invasion of privacy: intrusion upon seclusion; and misuse of private information.<sup>12</sup>

As the ALRC recommended in 2014, the design of legal privacy protection should be "sufficiently flexible to adapt to rapidly changing technologies and capabilities, without needing constant amendments".<sup>13</sup> This recommendation is particularly salient in light of the exponential pace at which new technologies such as AI and blockchain are developing, and the evolving scope of their application.

## Regulating new technologies: lessons to learn from international human rights law and other countries

States and regional bodies across the world are grappling with similar problems of how to apply existing legislation to new technologies, and how to develop new regulations to address the gaps that emerge. In the European Union, Article 22 of the General Data Protection Regulation ("GDPR") contains rules to protect individuals in the context of automated decision-making with a legal or otherwise significant effect on them. The Law

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<sup>10</sup> *International Covenant on Civil and Political Rights*, above n 8, art 17.

<sup>11</sup> See:

<https://www.parliament.nsw.gov.au/lcdocs/submissions/51194/0015%20The%20Law%20Society%20of%20New%20South%20Wales%20.pdf>

<sup>12</sup> Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, ALRC Report 123 (2014), 9.

<sup>13</sup> Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, ALRC Report 123 (2014), 36.

Society is of the view that provisions in the GDPR protecting individual rights in the face of AI-informed decision making, as well as regulating the type of data that can be used, are a benchmark for how these issues should be approached.

The Law Society encourages the AHRC, along with government at the state and federal level in Australia, to continue to learn from international best practice in the regulation of new technologies. We therefore support the ongoing partnership between the AHRC and the World Economic Forum, and await the White Paper that will result in early 2019.

### **The role and responsibilities of technology companies in respecting human rights**

In addition to the role of government in regulating new technologies, companies that are creating and operating new technologies have their own responsibility to respect human rights. These responsibilities are articulated by the UN Guiding Principles for Business and Human Rights (“UNGPs”), which were endorsed by the UN Human Rights Council in 2011. Under the UNGPs companies are expected to respect human rights and avoid causing adverse human rights impacts through their activities. The UNGPs recommend that companies ensure compliance with this responsibility to respect human rights through:

- expressing their commitment through a statement of policy;
- implementing effective human rights due diligence to identify, prevent and address actual or potential human rights impacts;
- mainstreaming human rights consideration across business operations and activities based on that due diligence; and
- enabling access to effective grievance mechanisms by affected groups and individuals.<sup>14</sup>

To maximise the potential benefits that new technologies hold for human rights, while minimising the risks, the Law Society recommends that technology companies operating in Australia follow the UNGP steps outlined above. To spur action within the private sector, we recommend that the Commonwealth Government develop guidance for businesses on conducting effective human rights due diligence in accordance with the UNGPs. The Law Society also recommends that the Government continue reform of the National Contact Point for the OECD Guidelines on Multinational Enterprises to ensure additional resources for joint fact-finding, improved mediation services and determination of grievances where relevant.

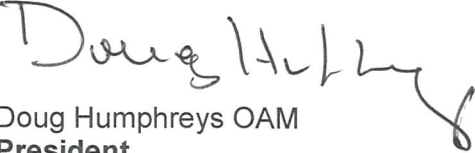
In recognition of the important role that companies have to play in this area, we recommend that the AHRC build a focus on the human rights responsibilities of companies as it implements its project on human rights and technology. We also encourage the AHRC to consult with experts on business and human rights, both within Australia and internationally, to inform their consideration of these important issues.

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<sup>14</sup> *United Nations, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (2011) HR/PUB/11/04

Thank you for the opportunity to provide input on this topic. Should you have any questions or require further information please contact Andrew Small, Policy Lawyer, on (02) 9926 0252 or email [andrew.small@lawsociety.com.au](mailto:andrew.small@lawsociety.com.au).

Yours sincerely,

A handwritten signature in black ink that reads "Doug Humphreys". The signature is written in a cursive style with a long, sweeping tail on the final letter.

Doug Humphreys OAM  
**President**