14 April 2022

Ms Margery Nicoll
Acting Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: matthew.wood@lawcouncil.asn.au

Dear Ms Nicoll,

Automated Decision Making and AI Regulation – Issues Paper

Thank you for the opportunity to contribute to a Law Council submission on the Issues Paper relating to Automated Decision Making ("**ADM**") and Artificial Intelligence ("**AI**") Regulation. The Privacy and Data Law and Public Law Committees of the Law Society contributed to this submission.

General Comments

We acknowledge that a careful balance needs to be achieved between encouraging incorporation of ADM and AI, and putting in place sufficient safeguards to protect from unintended bias and outcomes that erode public trust and confidence in the technology.

Notwithstanding the existence of the *Automated decision-making better practice guide*,[1] there are examples of poorly executed automated decision-making processes. One obvious example is Centrelink's Online Compliance Intervention scheme, popularly known as the "Robodebt" scheme, which was in place between July 2015 and November 2019. The shortcomings of Robodebt suggest that best practice guidance alone may not be sufficient. In our view, achieving the correct balance involves the development and application of overarching and enforceable principles, ideally set out in legislation.

The Law Society is supportive of a whole-of-government approach to digital strategy and, in particular, ADM. Such an approach is important to ensure that a consistent and principled approach is taken across government agencies, and that AI quality or safeguards are not dependent upon which department or portfolio the project is housed in. In this regard, while the ongoing role of the Digital Transformation Agency ("**DTA**") is supported, it is important that the DTA include a branch with expertise in public law and human rights, which is able to intermediate between both digital technology specialists and policymakers, including the legal profession.

We consider it is critical to avoid fragmentation through a piecemeal approach to the regulation of AI and ADM. An overarching regulatory framework that specifies individual rights and

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[1] Commonwealth Ombudsman, 'Automated decision-making better practice guide' (Web Page, 2019).

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governmental obligations, as described in the Law Council's Background Paper,[2] may achieve this. A consumer-liability approach may be effective in guiding the responsible development and oversight of AI and ADM technologies and reducing the burden on the individual who may struggle to gather evidence to challenge an automated-decision. An oversight body such as the Information Commissioner or Ombudsman could assist by monitoring implementation of technologies in the public and private sectors. Within that broader framework, there should remain sufficient scope for sectors to evolve existing regulation to ensure fit-for-purpose regulation of AI within those sectors.

It is our view that governments should not seek to prevent or limit people affected by fully or partially automated decisions from accessing administrative law review and accountability mechanisms, such as the Commonwealth Ombudsman, merits review and freedom of information applications. We note that access to these forms of review was restricted by Centrelink throughout the operation of the Robodebt program. Independent review could have improved the operation of that service and reduced the magnitude of its harm. The impact of restricting access to administrative law forums is evident in the eroding of public trust that resulted from that program. The costs associated with implementing accountability will ultimately result in better systems and processes.

Issues Paper Questions

1. **What are the most significant regulatory barriers to achieving the potential offered by AI and ADM? How can those barriers be overcome?**

In our view, the removal of regulation to facilitate innovation through the adoption of AI may be premature. There remain significant outstanding questions that regulators must be prepared to engage with when adopting AI and ADM. Rather than reducing regulation, we consider at this time there is an opportunity to promote regulatory engagement with the key issues that ADM presents for the public sector.

Whilst not a regulatory barrier, a significant barrier to achieving the potential offered by AI and ADM is the loss of public trust following the Robodebt program. A step towards overcoming this would be to ensure existing regulators, and new ones as needed, are equipped to deal with evolving AI and ADM and having simple and inexpensive methodologies by which the public can interact with new systems.

In addition to this, a simple, inexpensive and readily available dispute resolution mechanism would allay concerns relating to the adoption AI and ADM.

7. **Is there a need for new regulation or guidance to minimise existing and emerging risks of adopting AI and ADM?**

Where an automated decision-making tool is used to make a discretionary decision, we suggest that the tool produce an output report which can be provided to an affected citizen in such a way that they are able to interrogate the results and identify errors (rather than, for example, incomprehensible 'raw data' which would require expert knowledge to interpret). This is consistent with the Australian Human Rights Commission's recommendation that individuals have a right to reasons for automated decisions affecting them.[3]

The Law Society is supportive of the proposal in the Background Paper that an algorithmic impact assessment be required before a government agency proposes to engage in

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[2] Law Council of Australia, *Background Paper: Law Council Advocacy on Automated-Decision Making* (9 November 2021) 28-32.
[3] Australian Human Rights Commission, *Human Rights and Technology* (Final Report, 2021) 62.

automated decision-making in the course of the exercise of statutory or administrative power. The impact assessment should be required to consider matters such as:

- the impact on individuals of adverse outcomes in terms of their civil, political, social and economic rights;
- the extent to which automation of such decisions is consistent with rule of law principles, government accountability and the dignity of all persons within the community;
- the safeguards and review mechanisms built into the proposal, in particular the accessibility and usability of the mechanisms; and
- disproportionate impacts of the use of automated or purely digital methods on populations experiencing disadvantage, including persons with a disability, older persons and persons experiencing technological exclusion.

We further suggest the adoption by government of ADM should be subject to the scrutiny of a single regulator with responsibility for approval of use of ADM, and the issuing of reports and directions,[4] including reports to Parliament, noting that there may be a need for suitably narrow exemptions from this form of regulation (such as in the fields of defence, intelligence, and foreign policy matters).

There will also be resourcing implications in the form of additional Commonwealth funding to train and upskill the public service to understand the public law and human rights implications of automation, and to ensure informed policy innovation starts at the agency level (and is not isolated within the DTA).

8. Would increased automation of decision making have adverse implications for vulnerable groups? How could any adverse implications be ameliorated?

We consider that increased automation poses significant risks of adverse implications for vulnerable groups. Issues of algorithmic bias, technology deference and a decreased ability to understand or interpret decisions are significant concerns with government use of ADM, particularly when employed in the context of service delivery to vulnerable populations.
This reinforces the importance of safeguards such as the impact assessment and regulatory model identified in the Background Paper. We reiterate our suggestion of a tool to produce an output report which can be provided to an affected citizen in such a way that they are able to interrogate the results and identify errors to assist with seeking review of a decision.

Furthermore, the risk of technology driving regulation may exacerbate the adverse impacts on vulnerable people by reducing the fairness of the system and limiting the opportunity to tailor decisions to individual circumstances. This can occur where regulations are designed to be administered automatically, with a preference for rules at the expense of fairness. Where decisions involve vulnerable people (especially social security and some immigration decisions), government must ensure that services are accessible to those groups. For example, this may involve the retention of manual processing options, keeping humans in the decision-making loop to determine appropriate exceptions to rules.

9. Are there specific circumstances in which AI or ADM are not appropriate?

We consider that the Law Council's submission should raise serious concerns about the passage of recent legislation which appears to give nearly unfettered authority to administrative decision-makers to enter into arrangements for ADM.[5] We further suggest

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4 Law Council of Australia, *Background Paper: Law Council Advocacy on Automated-Decision Making* (9 November 2021) 32 [157].
5 Law Council of Australia, *Background Paper: Law Council Advocacy on Automated-Decision Making* (9 November 2021) 3; *Australian Citizenship Act 2007* (Cth) ss 48-49; *Biosecurity Act 2015* (Cth) s 541A; *Business Names Registration Act 2011* (Cth) s 62F; *Designs Act 2003* (Cth) s 135A; *Fisheries Management*

endorsing the conclusion of the 2004 Administrative Review Council Report No. 46 (*Automated Assistance in Administrative Decision-Making*) that discretionary powers should not be the subject of complete automation, but rather, automated processes may be used as an administrative tool to assist an officer.[6]

10. Are there international policy measures, legal frameworks or proposals on AI or ADM that should be considered for adoption in Australia? Is consistency or interoperability with foreign approaches desirable?

Australia needs much stronger data protection and privacy laws to manage the data collected by automated systems. We refer to the EU Data Protection laws, as they are cited as a best practice example by experts in the field.[7] Careful consideration should be given to the potential utility of this regime in the ADM and AI setting, where appropriate, in the Australian context.

Thank you for the opportunity to contribute to the Law Council's submission. Questions at first instance may be directed to Stephanie Lee, at 9926 0275 or stephanie.lee@lawsociety.com.au.

Yours sincerely,

Joanne van der Plaat
President

Act 1991 (Cth) div 1, pt 9; *Imported Food Control Act* 1992 (Cth) s 20A; *Migration Act 1958* (Cth) ss 495A-495B; *Military Rehabilitation and Compensation Act 2004* (Cth) s 4A; *Patents Act 1990* (Cth) s 223A; *Plant Breeder's Rights Act 1994* (Cth) s 76B; *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (Cth) s 3A; *Social Security (Administration) Act 1999* (Cth) s 6A; *Trade Marks Act 1995* (Cth) s 222A; *Veterans' Entitlements Act 1986* (Cth) s 4B.

[6] Administrative Review Council, *Automated Assistance in Administrative Decision-Making* (Report No 46, November 2004) 15-16.

[7] *Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data* (General Data Protection Regulation) [2016] OJ L 119/1.