



THE LAW SOCIETY
OF NEW SOUTH WALES

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Dr James Popple
Chief Executive Officer
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By email: john.farrell@lawcouncil.asn.au

Dear Dr Popple,

Data and Digital Government Strategy

Thank you for the opportunity to contribute to the Law Council's submission to the Attorney-General's Department in relation to its initial Data and Digital Government Strategy ("Strategy"). The Law Society's Privacy and Data Law Committee has contributed to this submission. The Law Society welcomes the release of the Strategy.

General comments

As a general observation, we support the harmonisation of Australia's privacy, data and cyber security regimes, and emphasise the need to mitigate the regulatory burden on affected entities caused by overlapping and inconsistent state and federal laws and regulation. In implementing the Strategy, it is necessary to have regard to these laws and consider how the human centric objectives can be met.

There is much discussion in the Strategy about data and data sets. In many cases, data points reveal information about an individual person's characteristics, interests, attributes and movements and activities in both public and private spaces. This information may or may not be revealing of the identity of that person, and therefore regulated personal information. However, both identifying and non-identifying data points may be combined or otherwise used to affect how an individual is treated, either favourably or unfavourably, on an individual basis, or as a member of a particular group. For example, persons inferred to be children based on relevant data points are excluded from the promotion of gambling services.

Accordingly, both regulated personal information, and other non-identifying information, may be used in ways that are beneficial to society and the affected persons, or in ways that cause harms to those persons or otherwise impact their human rights. It may also impact their legitimate expectations to be informed when and why they are being singled out for differentiated treatment. The Strategy should reflect the need for government and its agencies to ensure that data enabled differentiated treatment of individuals and groups in Australian society is reasonable, appropriately transparent and justified, as well as (and not only) consistent with each Australian's privacy rights and other human rights.

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CONSTITUENT BODY

The questions of whether data enabled differentiated treatment of individuals and groups in Australian society was lawful, or otherwise reasonable, appropriately transparent and justified, were central in the Report of the Royal Commission into the Robodebt Scheme.¹ We suggest that due consideration must be given to the Report's recommendations in further developing the Strategy. This is important in ensuring that Australian citizens have confidence that Australian governments and their agencies are trustworthy in their data practices and that these practices are demonstrably and not just asserted to be, consistent with achieving the objective of social beneficence without compromising legality and rights and the legitimate expectations of Australians to be informed when and why they are being singled out for differentiated treatment. Regardless of whether the illegality of the Robodebt Scheme has counterparts elsewhere, Australian governments and their agencies must now take more active steps to demonstrate that they accept responsibility and accountability in their data practices. By doing so they will nurture the confidence of citizens that Australian governments and their agencies are trustworthy in their data practices.

In considering the further development of Australia's privacy laws, as compared to the European General Data Protection Regulation ("GDPR"), it is important to note that Australia does not have a federal Bill of Rights to support the jurisprudence that underlies how the GDPR is interpreted and applied in European courts. The GDPR is given a more extensive and protective application than Australia's privacy laws because European courts give effect to human rights jurisprudence when interpreting the GDPR. Without similar rights-based jurisprudence in Australia, it is particularly important that Australian governments and their agencies are demonstrably data trustworthy. Demonstrable data trustworthiness requires that each Australian government agency acts with careful deliberation in their sharing and uses of data points, including by taking active steps to demonstrate that differentiated treatment of Australians is reasonable, appropriately transparent and justified.

Technological Neutrality

We are mindful that this Strategy is being developed in a period of significant technological change and that even in the last year advances in artificial intelligence and machine learning have caused changes to occur which were not previously possible.

Any strategy will become outmoded, and possibly even obsolete and counter-productive, within historically short periods of time, due to rapid and unpredictable technological changes and myriad tasks for which data-enabled AI is being deployed. Accordingly, we suggest that the Strategy must include appropriate review mechanisms.

We note that figure 1 on page 23 of the Strategy sets out the policy landscape but does not provide in any explicit way any independent oversight or review mechanism in the development of the Strategy. While we note the role of the Digital Investment Oversight Framework, we query whether this oversight at the Australian Public Service Reform level is sufficient.

ACTION MISSION 1 Delivering for all People and Business

We support the Strategy's commitment to:

committing to omni-channel service delivery to ensure all services that are delivered digitally can also be accessed over the phone or face-to-face such that no-one is excluded²

¹ The Royal Commission into the Robodebt Scheme, published 7 July 2023, accessed at <https://robodebt.royalcommission.gov.au/system/files/2023-07/report-of-the-royal-commission-into-the-robodebt-scheme.pdf>.

² Australian Government Digital Transformation Agency, *Data and Digital Government Strategy*, (June 2023) 10.

We have mentioned previously in our submission on the Australian Cybersecurity Strategy Discussion Paper the need to uplift cyber skills in Australia for legal professionals and others. In order to deliver for all people and all businesses, the Strategy needs to bring the populace with it and include significant educational proposals. We draw an analogy with the Attorney General's *Privacy Act Review Report*³ where a number of proposals included significant education and information roles for the privacy regulator, the Office of the Australian Information Commissioner. We consider there is a significant role for government in educating individuals and businesses to be able to better access digital services from government.

ACTION MISSION 2 Simple and Seamless Services

We support in principle the digital by design and “tell us once” approach which enhances information sharing between various departments. However, we note the need for Australian government agencies to demonstrate data trustworthiness- that they only share and use data points after careful deliberation as to whether that sharing and use is reasonable and justified, as well as lawful, is appropriately transparent and open, and that there is robust data security. We draw attention to the “Privacy by Design” principles which have been successfully implemented by organisations and governments since their development in 1995 and suggest that an equivalent architecture be built into the “digital by design” phase of the Strategy. We further note the crossover with the need for cyber risk to be managed and query central control versus distributed ledger-style approaches.

ACTION MISSION 3 Government for the Future

While we support the proactive adoption of emerging data and digital technologies to provide tools and techniques to benefit the Australian population, we suggest that implementation of new technologies should be subject to a robust scheme of independent oversight, under which relevant technologies are regularly tested to monitor for the emergence and mitigation of unforeseen risks. We suggest that this oversight could be established as part of the Digital Investment Framework.

FOUNDATION MISSION 4 Trusted and Secure

The building of trust relies on transparency and engaging the public and all stakeholders in the process. On this basis, we would recommend a phased introduction of changes with a lead time to allow consultation, information, and education to occur so that the public is ‘brought on the journey’ to a digital regime. We note some previous digital initiatives appear to have been unsuccessful in their take up due to a perceived lack of benefit to individuals and a lack of information and lead time. We contrast these with initiatives which have had successful take up, such as the digital driver’s licence in New South Wales where there was a perceived benefit and also testing and education prior to the introduction of the technology.

In relation to legislation fit for the data and digital age, we reiterate our comments that harmonisation of Australia’s privacy, data and cyber security regimes is supported. We consider many existing laws could cover digital activities by amending existing regulation and/or guidelines to extend their operation. Moreover, we consider that technological neutrality is an underlying principle that should be considered in the development of new legislation generally.

FOUNDATION MISSION 5 Data and Digital Foundations

We reiterate the need to educate not only the Australian Public Service but the general populace to ensure the benefits of the Strategy are realised.

³ Australian Government Attorney General’s Department, *Privacy Act Review Report 2022*, (February 2023).

Strategy Enablers

In relation to the Governance enabler, we reiterate the need for regular review and incorporating feedback from persons not involved in the design or implementation such that periodic independent review will ensure that the Strategy remains fit for purpose.

We hope this input is of assistance. Please contact Nathan Saad, Policy Lawyer, on (02) 9926 0174 or nathan.saad@lawsociety.com.au in the first instance if you have any queries.

Yours sincerely,

A handwritten signature in black ink that reads "CBanks". The signature is written in a cursive, flowing style.

Cassandra Banks
President