



THE LAW SOCIETY
OF NEW SOUTH WALES

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20 October 2023

Hon Jeremy Buckingham MLC
Chair
Portfolio Committee No. 1 – Premier and Finance
NSW Parliament

Submission via online portal

Dear Chair,

Inquiry into artificial intelligence in New South Wales

Thank you for the opportunity to make a submission to the NSW Parliamentary inquiry into artificial intelligence (AI) in NSW. The Law Society's Privacy and Data Law and Public Law Committees have contributed to this submission.

In this submission we focus primarily on the Terms of Reference that broadly consider the effectiveness of current laws and regulations governing AI, the future of AI law and policy, and the legal and human rights implications of AI. We welcome the release of the Terms of Reference and look forward to reviewing the detailed findings and recommendations of the Inquiry in due course.

The broad context of AI regulation

AI in Australia has recently been the subject of extensive consideration at multiple levels of government and across various industries. Relevantly, the Commonwealth Department of Industry, Science and Resources recently sought views on its Discussion Paper entitled 'Safe and responsible AI in Australia' which considered:

...potential gaps in the existing domestic governance landscape and any possible additional AI governance mechanisms to support the development and adoption of AI.¹

This follows a number of major consultations and reviews at a federal level, including by the Australian Human Rights Commission² and Australian Competition and Consumer Commission,³ which considered the legal and policy implications of emerging technologies,

¹ Department of Industry, Science and Resources, *Safe and responsible AI in Australia*, (Discussion Paper, June 2023) 4.

² Australian Human Rights Commission, *Human Rights and Technology* (Report, March 2021).

³ ACCC, *Digital Platform Services Inquiry* (Interim Report, September 2020); ACCC, *Digital Platform Services Inquiry: No. 2 – App marketplaces* (Interim Report, March 2021); ACCC, *Digital Platform Services Inquiry: No. 3 – Search defaults and choice screens* (Interim Report, September 2021); ACCC, *Digital Platform Services Inquiry: No. 4 – General online retail marketplaces* (Interim Report, March 2022); ACCC, *Digital Platform Services Inquiry: No. 5 – Regulatory reform* (Interim Report, September 2022); ACCC, *Digital Platform Services Inquiry: 6: Report on social media service* (Interim Report, March 2023).

including AI. We also note that AI use and regulation must be viewed against the backdrop of the significant, ongoing reform of the *Privacy Act 1988* (Privacy Act), being the primary and authoritative piece of Australian privacy law.

Various states are considering AI as part of their respective digital strategies and broader policy agendas. South Australia's Parliament, for example, recently established the Select Committee on Artificial Intelligence, which is currently conducting a comparable inquiry into AI.⁴

At a business level, approaches to AI governance have "tended to be industry-led and voluntary."⁵ However, the NSW Government is also currently reviewing the use of AI and automated decision-making (ADM) within specific industries, including, for example, the real estate sector.⁶

In addition, we draw the Inquiry's attention to the developing case law concerning AI use in Australia,⁷ as well as the various forms of guidance on AI and ADM issued by regulators at a federal⁸ and state level.⁹

In our view, the fragmentary approach to AI law and policy in Australia, particularly in the uncertain context of the Privacy Act review, represents a significant challenge for this Inquiry, both in evaluating the current state of the law, and in developing policy initiatives to promote safe and responsible AI in NSW.

Accordingly, we call for the Inquiry to adopt a thorough, holistic view of AI use and regulation in Australia, and support, to the greatest extent possible, consistency in and harmonisation of the relevant law. We suggest that the Inquiry should synthesise the significant work already conducted by the Australian Government and others on AI regulation and draw upon the findings and proposals of the major reviews to date. We also call for increased coordination between the states and the Commonwealth in developing future AI policies and initiatives to promote consistency in the law and enable synergies in the various initiatives to be fully realised.

Approach to AI regulation

The Law Society generally supports the development of a regulatory framework that ensures the safe and responsible use of AI, while promoting innovation within Australian private and public sector organisations. Given that the mainstream use of AI technologies is relatively new, we acknowledge that the possibilities for its use, and misuse, continue to evolve. For example, in the context of higher education, we note that AI has been used to both circumvent usual ways of testing students, as well as to detect inappropriate use of AI. Regulation must be flexible enough to permit innovation, while protecting against its misuse.

⁴ Parliament of South Australia, Select Committee on Artificial Intelligence

<https://www.parliament.sa.gov.au/en/News/2023/07/11/03/37/Select-Committee-on-Artificial-Intelligence>.

⁵ Human Technology Institute (UTS), Submission to the Department of Industry, Science and Resources, *Safe and responsible AI in Australia Discussion Paper*, 9 August 2023, 6.

⁶ NSW Department of Customer Service, *Improving NSW rental laws*, (Consultation Paper, July 2023) 14-15.

⁷ *Commissioner initiated investigation into Clearview AI, Inc. (Privacy)* [2021] AICmr 54 (14 October 2021); *Clearview AI Inc and Australian Information Commissioner* [2023] AATA 1069.

⁸ Commonwealth Ombudsman, *Automated Decision-making: Better Practice Guide* (Guidance, 2019).

⁹ NSW Ombudsman, *The new machinery of government: using machine technology in administrative decision-making* (Special Report, 29 November 2021).

We have previously advocated for the development of a federal framework for AI regulation that is flexible, scalable and principles-based.¹⁰ To the extent that it may assist with the Inquiry's consideration of these matters, we reiterate our previous views, that Australia's AI regulatory framework should:

- Build upon, and be adapted to, existing processes that Australian organisations have in place.
- Be consistent with related legislation, including privacy, data security, product safety, consumer protection, intellectual property, defamation, and human rights law. It is also relevant to consider related law reform initiatives, including efforts to protect against misinformation and disinformation in the public and commercial contexts.
- Be cognisant of evolving regulations in other jurisdictions, including internationally, which might apply at various points in a data-driven service supply chain.
- Reflect Australia's unique economic conditions and place in the global economy.
- Enable Australian organisations to grow as developers and creators of AI.

We suggest the Inquiry should consider the regulatory approaches adopted in key jurisdictions internationally, noting the inherently borderless nature of data and cloud-based services, and the need to enable interoperability across regulations. For example, we note that the European Union is currently developing AI-specific legislation,¹¹ while other major economies are also considering implementing interoperable, risk-based AI regulations.¹²

NSW Government's policy response to AI

We note that under item 1(j) of the Terms of Reference, the Inquiry will consider the effectiveness of the NSW Government's policy response to AI including the Artificial Intelligence Strategy¹³ (Strategy), the NSW Artificial Intelligence Assurance Framework¹⁴ (Assurance Framework) and the Mandatory Ethical Principles for the use of AI¹⁵ (Ethical Principles).

We see merit in government acting as a role model and leading by example in the adoption of ethical AI and responsible technology practices. In our view, the public sector should be held to a higher standard of responsible use of AI. Government should be a model user of AI, assisting the creation of appropriate behaviours and standards, which can then be applied more broadly to the private sector's use of AI. Accordingly, we welcome this timely review of the Strategy, Assurance Framework and Ethical Principles, to ensure that they remain effective and fit for purpose.

We also suggest that in reviewing the NSW Government's policy response to AI, the Inquiry should consider whether there may be scope to expand or adapt the Assurance Framework and Ethical Principles, to:

¹⁰ [Letter from the Law Society](#) to the Law Council of Australia dated 17 July 2023; Law Council of Australia, Submission to the Department of Industry, Science and Resources, *Safe and responsible AI in Australia Discussion Paper*, 17 August 2023, 7-9.

¹¹ European Parliament, 'Proposal for a Regulation on a European Approach for Artificial Intelligence' <https://www.europarl.europa.eu/legislative-train/theme-a-europe-fit-for-the-digital-age/file-regulation-on-artificial-intelligence>.

¹² Human Technology Institute (UTS), *The State of AI Governance in Australia*, (Report, May 2023), 51.

¹³ NSW Government, *Artificial Intelligence Strategy* <https://www.digital.nsw.gov.au/policy/artificial-intelligence/artificial-intelligence-strategy>.

¹⁴ NSW Government, *Artificial Intelligence Assurance Framework* <https://www.digital.nsw.gov.au/policy/artificial-intelligence/nsw-artificial-intelligence-assurance-framework>.

¹⁵ NSW Government, *Mandatory Ethical Principles for the use of AI* <https://www.digital.nsw.gov.au/policy/artificial-intelligence/artificial-intelligence-ethics-policy/mandatory-ethical-principles#anchor-transparency>.

- assist private organisations in NSW in building and employing AI-enabled products; and/or
- serve as the basis for a similar framework nationally.

Of course, this approach is subject to the Inquiry's findings regarding the effectiveness of the Assurance Framework and Ethical Principles.

We also note that transparency and accountability are key components of the Assurance Framework and Ethical Principles, particularly as they relate to ADM. Citizens should know when and how ADM is being used in any way which significantly affects their human rights, their legitimate expectations to be informed of how and why they are being singled out for differentiated treatment, and their legitimate expectation that an automated decision is reasonable having regard to the circumstances in which it is made and the impact that this automated decision might reasonably be expected to have on affected humans and the environment.

While the Ethical Principles state that "review mechanisms will ensure citizens can question and challenge AI-based outcomes," we note it is often not possible to explain the inner workings of many automated systems at all, or at least not in a way that meaningfully helps individuals to understand how decisions have been made. In this regard, we refer the Inquiry to research on this topic, which suggests ways in which automated decision-making can be usefully explained, much of which is summarised in this media report by Julian Fell, Ben Spraggon and Matt Liddy, "How to wrench open the black box of algorithms that decide our fate".¹⁶

In considering a nationally consistent approach to regulating ADM, we suggest that the Inquiry should give due consideration to the relevant findings of the Attorney-General's Privacy Act Review Report,¹⁷ which considered the complex issue of ADM in detail, as well as the Government's Response to the Privacy Act Review Report.¹⁸ We also refer the Inquiry to the relevant recommendations of the Report of the Royal Commission into the Robodebt Scheme, which proposed, *inter alia*, legislative reform at the Commonwealth level to introduce a consistent legal framework in which automation in government services can operate.¹⁹

Human rights

In considering the human rights implications of the widespread adoption of AI and ADM, the Inquiry should give due consideration to the challenges posed by algorithmic bias, and its potential impact on vulnerable people, including children.²⁰

Data-driven AI enables, intentionally or unintentionally, differentiated treatment of individuals and groups in Australian society, which may contribute to bias or other errors. Data-driven AI outputs may be based upon, create or amplify misinformation or disinformation, or produce outputs that are otherwise insufficiently robust or unsafe for the reliance that humans place upon those outputs. Data used to produce those outputs may inappropriately reveal

¹⁶ 12 December 2022, ABC News. Available online: <https://www.abc.net.au/news/2022-12-12/robodebt-algorithms-black-box-explainer/101215902>.

¹⁷ Australian Government Attorney General's Department, *Privacy Act Review Report 2022*, (February 2023), Chapter 19.

¹⁸ Australian Government, *Government Response: Privacy Act Review Report*, (September 2023), Proposals 19.1 – 19.3.

¹⁹ Commonwealth, Royal Commission into the Robodebt Scheme, *Report*, (7 July 2023) Recommendations 17.1 and 17.2.

²⁰ We note that the eSafety Commissioner has powers relevant to this context. Given the potentially broad reach of AI, we highlight this example to underscore the importance of coordination between all jurisdictions on the regulation of AI.

information about an individual person's characteristics, interests, attributes and activities in both public and private spaces. Both regulated personal information, and other non-identifying information, may be used in ways that are beneficial, or in ways that are unreliable, unsafe or otherwise cause harms to those persons, impacting their human rights and legitimate expectations to be informed of that use.

While the appropriateness and transparency of AI uses are broad questions, we suggest that the Inquiry should nonetheless include a thorough consideration of the human rights impacts of AI, and consider appropriate regulatory safeguards to manage both data quality and bias.²¹

The Law Society has also long supported the adoption of specific human rights legislation in NSW, which we note may assist in strengthening AI-related privacy protections, and better align the legal framework in NSW with other jurisdictions such as the European Union. In the absence of a federal or state-based Bill of Rights, it may also be appropriate for the Inquiry to consider a harm minimisation approach to AI regulation.

If you have any questions in relation to this submission, please contact Nathan Saad, Policy Lawyer, by phone (02) 9926 0174 or by email to nathan.saad@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'CBanks', written in a cursive style.

Cassandra Banks
President

²¹ See ISO/IEC CD TS 12791 Information technology — Artificial intelligence — Treatment of unwanted bias in classification and regression machine learning tasks <https://www.iso.org/standard/84110.html?browse=tc>.