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Dear Dr Popple,

GUIDANCE FOR TRANSPARENCY IN AUTOMATED DECISION MAKING

The Law Society is grateful for the opportunity to contribute to the Law Council's submission to the Office of the Australian Information Commissioner (**OAIC**) in response to its consultation and accompanying Issues Paper on guidance for transparency in automated decision making (**ADM**). The Law Society's Public Law and Privacy and Data Law Committees contributed to this submission.

General Comments

The Law Society is supportive of the way in which the *Privacy and Other Legislation Amendment Act 2024* (Cth) introduced an obligation within Australian Privacy Principle 1 of the Australian Privacy Principles (**APPs**) to include information about ADM in APP entities' privacy policies. We consider that it is an important cornerstone of fair and transparent government decision-making that entities are required to publicise the kinds of personal information used in, and types of decisions made by, computer programs, where the decision could reasonably be expected to significantly affect the rights or interests of an individual.

While the Issues Paper suggests that these reforms bring Australia in line with comparable international jurisdictions,¹ it is important to clarify that the protections in Australia are nevertheless not as comprehensive as the European General Data Protection Regulation. For example, the Australian regime does not provide for a comparable right for individuals not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning them or similarly significantly affects them.²

In our view, it is important that the OAIC, in preparing its guidance on ADM, does not focus exclusively on the contents of the disclosure, but also on the effectiveness of the notice provided to individuals who may be affected by the entities' use of ADM. It is well-recognised that most people do not read all privacy policies that affect them. These policies have become increasingly lengthy and detailed, and it is often the case that an individual

¹ Office of the Australian Information Commissioner, Automated Decision-Making Transparency Obligation (APP 1) – Issues Paper, 3.

² Regulation (EU) 2016/679, General Data Protection Regulation, Art 22(1).

has no choice but to accept them in order to progress in their engagement with the entity. This situation is exacerbated for certain cohorts, for example people with low literacy levels or English language skills.

In our view, the OIAC guidance should emphasise the desirability of providing effective notice. We suggest a process whereby the entity should alert an affected individual using clear, simple language at the time at which the ADM will be used in a decision that could reasonably be expected to significantly affect their rights or interests. A link to the entity's privacy policy could be provided to the individual at this time. In our view, this process would assist in ensuring that the individual is effectively notified, even though they may need to seek help to access and interpret the detailed information in the entity's privacy policy.

We offer the following comments with respect to some of the discussion questions contained at Attachment A:

Question 1 – 'Substantially and directly' related to making a decision

In assessing whether the entity has arranged for a computer program to make, or do a thing that is substantially and directly related to making a decision, entities should recognise that including information in a privacy policy is not an onerous obligation. Transparency not only assists individuals in understanding the decision-making process, but also may enhance public trust and confidence in institutions more generally.

We consider it unhelpful to 'rank' the factors which could inform the assessment of whether a computer program substantially facilitates and is directly connected to a human decision-maker's decision. Depending on the type of decision, it is possible that all of the factors listed below or a combination of factors could be relevant in making a determination of whether the use is 'substantially and directly related', including:

- Degree of reliance on the ADM system output;
- Ability and likelihood of human override over an ADM decision or a broader consideration of human monitoring or oversight mechanisms;
- Nature of the output (advisory vs determinative);
- Transparency and explainability of outputs; and
- Integration of ADM into decision-making workflow.

Our preference, in keeping with the beneficial legislative underpinnings of the *Privacy Act 1988* (Cth) and Australian Privacy Principles, would be for the OAIC's guidance to encourage entities to favour disclosure in their policies where ADM in relation to a decision-making may arise. This is preferable to granular advice directed to weighting various factors, particularly when each decision may involve an interplay of various factors and may lead to inconsistent application of the legislation by different entities.

We suggest that the language of 'substantially and directly related' should be read with its plain language meaning. We do not consider it helpful to import requirements such as a 'predominant' relationship to the decision, which, arguably, would depart from the statutory intent. Rather, we suggest that the guidance should encourage disclosure where a connection is more than superficial or immaterial.

Questions 2 and 3– Fictional Edge Case: Generative AI with human oversight

The case study refers to a fictitious entity, the National Aged-Care Insurance Agency (**NACIA**) making decisions about eligibility for elderly people trying to access life-changing aged-care support through the use of a generative AI chatbot in circumstances where NACIA's human staff always have oversight and make the final decision about eligibility based on the recommendation provided by the chatbot.

In our view, it would be appropriate to characterise the NACIA's use of the chatbot as 'substantially and directly' related to the decision-making. The chatbot uses the personal data of the individual to make an initial recommendation as to eligibility. We suggest that this use is 'substantially and directly related' to the decision-

making process, even if, in the context of human oversight, it could not be characterised as the predominant mechanism by which a final decision is reached.

We note that this matter also raises other factors, including the significant legal consequences flowing from the final decision, even if this involves human oversight. Further context would need to be provided on the likelihood of human override and whether, as a practice within the agency, the output of the chatbot is treated as advisory or determinative.

Question 4- 6: Impact of decision for persons experiencing vulnerability

In our view, the 'significant' effect required by APP 1.7(b) in the *Privacy Act 1988* (Cth) should be construed as whether the decision changes or alters the nature of the right or interest by the individual. We do not agree with the suggestion in the Issues Paper that it is possible to 'rank' different factors (financial outcomes, sensitive information etc.) without an understanding of the particular right or interest that is being impacted in the circumstances.

We note the intention for the Guidance to distinguish between vulnerable and non-vulnerable persons. As no such distinction is contained in the legislation itself, it will be important for the Guidance to emphasise that in certain circumstances, the degree of vulnerability of the individual concerned may not be determinative of the nature of the legal right or interest.

By contrast, the legislation does expressly reference certain classes of rights as follows:

- a decision made under a provision of an Act or a legislative instrument to grant, or to refuse to grant, a benefit to the individual.
- a decision that affects the individual's rights under a contract, agreement or arrangement.
- a decision that affects the individual's access to a significant service or support.³

One example of a right could be a person's entitlement to a refund for faulty goods. If the ADM results in a change that diminishes that entitlement, it is likely that this would represent a 'significant' effect on the right. If it simply changes the way in which the entitlement is processed, this could, in the circumstances, be characterised as an insignificant effect on the right. From a statutory interpretation perspective, a factor such as vulnerability or other considerations such as whether different cohorts of individuals have more significant needs would not be relevant.

Nevertheless, from a procedural perspective, we consider it important that entities consider vulnerability as relevant to the way in which they communicate the use of ADM with cohorts whose rights may be affected. As suggested above, we consider effective and timely notice as an important aspect to ensuring the protection of these cohorts.

Question 10: Meaning of 'making a decision'

In light of the carefully drafted elements of the provisions, which import requirements around the impacts of and relationships to the decision-making process, whether something is a 'decision' should not be construed in an overly technical or legalistic sense. In our view, 'decision' should be given its plain language definition.

We note that it may be inappropriate for granular components of the legislation with clear dictionary definitions to be overlaid with guidance. This may create the risk that entities will interpret the APPs narrowly and argue that an obligation does not apply to them as a point of technicality.

³ *Privacy Act 1988* (Cth), APP s 1.9.

Question 11: 'Arranged for'

The language of 'arranged for a computer program to make, or do a thing that is substantially and directly related to making, a decision' should be given its ordinary meaning. This language would capture the entity/entities that have procured, are responsible for, and have oversight of, the use of the computer program to make or assist a decision. This can be contrasted to an entity that develops and hosts the relevant software.

Question 12:

We agree with the principles set out by the OAIC in the Issues Paper vis-à-vis meaningful and accessible information around the use of ADM, including the need for plain language explanations, pathways to enable consumers to request further information and the need to clearly inform affected individuals about whether a decision is reviewable, the applicable time limits and next steps from a procedural point of view.

In addition, as noted above, we consider the timing of disclosure to be important. It is unlikely that most people affected by government decisions will undertake a detailed review of an entity's privacy policy in anticipation of future dealings with that entity. We consider it most appropriate an individual is informed at the point at which the ADM will be used in a decision that could reasonably be expected to significantly affect their rights or interests.

Thank you for the opportunity to comment. Questions at first instance may be directed to Sophie Bathurst, Senior Policy Lawyer, at (02) 9926 0285 or Sophie.Bathurst@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Ronan MacSweeney', with a stylized flourish at the end.

Ronan MacSweeney

President