QUT

# Digital Media Research Centre

## DMRC Submission to Human Rights and Technology Discussion Paper, 14 April 2020

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We thank the Commission for an extremely thoughtful Discussion Paper and an engaged process over a sustained period. We are in broad agreement with the proposed recommendations of the Commission set out in the Discussion Paper. Here, we offer a few targeted comments on specific issues.

The Digital Media Research Centre at Queensland University of Technology is a leading research centre in digital humanities and social science research with a focus on communication, media, and the law. The DMRC is one of the nodes of the newly formed ARC Centre of Excellence for Automated Decision-Making and Society (ADM+S). Scholars in the ADM+S are undertaking important research on many of the issues raised by the Discussion Paper. This includes ongoing work to investigate how to best develop regulatory regimes that are able to effectively protect and promote human rights. We look forward to ongoing collaboration with the Commission and other bodies as Australian law and policy continues to develop to address these important social issues.

### Question A: proposed definition of 'AI-informed decision making'

We support the Commission's proposed definition. The term 'materially assisted' is useful. We think that some further clarity may ultimately be required to explain the bounds of a 'significant effect'. Since much turns on this definition in the Commission's later proposals, we suggest that it is worth clarifying what types of uses of AI by private companies will fall into this definition. This can perhaps be done through examples in any implementing legislation, rather than by adding additional terms to the definition.

## Proposal 3: ALRC inquiry into the accountability of AI-informed decision making.

The ALRC has recently suggested a law reform inquiry on automated decision-making and administrative law. This inquiry would explore how fairness, transparency and accountability can be improved in public uses of AI. We strongly support the ALRC's proposal to review administrative law. However, we also agree with the Commission about the importance of also considering broader questions about how Australian law could better protect the principle of legality and the rule of law, and to promote human rights, particularly in the private sector. We make no strong recommendation here as to whether these inquiries should be distinct or joint, but we do believe both are important.

## Proposal 4: The Australian Government should introduce a statutory cause of action for serious invasion of privacy.

We strongly support the proposed adoption of Proposal 4, the belated implementation of a statutory cause of action for serious invasions of privacy. As detailed in the Discussion Paper, the Australian Law Reform Commission has twice recommended the introduction of a statutory cause of action in ALRC 108 and 123. Similarly, the state law reform commissions of Victoria and New South Wales have also recommended comparable legislative responses in their respective states. Most recently, the Australian Competition and Consumer Commission (ACCC) also recommended the implementation of a statutory cause of action, predicated on the findings of ALRC 123.

The introduction of a statutory cause of action would assist to ameliorate the perceived weaknesses of the Australian privacy law framework that has unfortunately been augmented by the leading High Court case on individual privacy protections, *Lenah Meats v Australian Broadcasting Corporation*. The High Court's fragmented decision in *Lenah Meats* has not provided a sufficiently strong enough precedent to encourage appellate state-based courts to develop innovative common law privacy protections, as is the widely perceived intention of Gummow and Hayne JJ's joint decision. While a small number of lower court decisions embarked on this process, namely, *Doe v ABC* in Victoria and *Grosse v Purvis* in Queensland, state-based appellate courts have eschewed the *Lenah Meats* invitation for juridical development and have instead applied the traditional breach of confidence approach in potentially privacy related cases (see e.g. the Victorian decision of *Gillers v Procopets* and the Western Australian decision of *Wilson v Ferguson*). Moreover, Justice Kelly in the South Australian Supreme Court decision of *Sands v State of South Australia*, has even questioned whether *Lenah Meats* 'held out any invitation to intermediate courts in Australia to develop a tort of privacy…'

Unfortunately, the limited ratio of *Lenah Meats* has meant that common law developments in relation to an Australian tort of privacy has stymied at a time when most other common law jurisdictions have been active in this area, most notably, the judicial development of the tort of misuse of private information in the United Kingdom. Given the perceived absence and willingness of state-based courts to develop common law privacy protections, and the seeming absence of a privacy champion amongst the various Australian judiciaries, the implementation of a statutory cause of action is likely to be the most effective and judicious means by which to implement an individual privacy protection mechanism in Australian law. Accordingly, the recommendations put forward in ALRC 123 would assist to bring the Australian common law in line with the developments that have taken place in the last two decades, particularly in the UK. To do so would mean that there is already a significant body of potentially comparable caselaw, minus the obvious implications arising from the *Human Rights Act 1998* (UK), that could further inform the development of a newly implemented Australian statutory cause of action. In that sense, the implementation of the action, should be an incremental step to bring Australian law in line with international developments rather than a radical departure from existing and impotent precedent.

However, while we agree that Proposal 4 should be implemented, we contend that the implementation of a statutory cause of action for serious invasions of privacy should not be seen as a panacea to the

weaknesses of Australia's overall information privacy law framework. Significant attention should also be given to an overhaul of the Privacy Act 1988 (Cth) to the extent that it does become the model law for state-based implementations that it was intended to be following ALRC 108. That did not happen due to the perceived weaknesses of the Federal Government's 2014 response to the first tranche of the ALRC's recommendations of 2008. As a result, the current information privacy law framework in Australia is fragmented with conceptually similar laws applying in variously different ways.

The Discussion Paper rightly acknowledges that the advent of machine learning structures for public and private sector decision-making will have a significant impact upon the collection and use of personal information. Similar concerns were raised by the ACCC in the Digital Platforms Report with specific reference to private sector developments. It is vital that Australia has a less fragmented and strengthened information privacy law framework that provides coherent and strong protections across the totality of its jurisdictions. This is particularly so in the absence of a broader human rights framework to guide the development of common law protections of privacy and information privacy law as is unfolding in both the UK and the EU more generally.

### Proposal 6: Government deployment of AI-informed decision-making systems

In addition to the factors outlined, we believe that any proposed Government use of automated decision-making systems go through a full human rights impact assessment. This process would, if done well, help to avoid severe negative consequences, like Centrelink's online compliance system debacle, which could have been foreseen and addressed prior to deployment.

### Proposal 7: Right to explanation

We suggest Proposal 7 does not go far enough as applied to private sector entities. Where an individual's legal or other substantial interests are impacted by a decision informed by AI, we suggest that they ought to be entitled to an explanation, regardless of whether the decision was made by a public or a private entity. Rather than mirroring current entitlements to provide explanations (which are predominantly limited to public decision-makers), we urge the Commission to consider a more expansive right to reasons that includes an effective mechanism to correct errors.

### Question B: Where a person is responsible for an AI-informed decision and the person does not provide a reasonable explanation for that decision, should Australian law impose a rebuttable presumption that the decision was not lawfully made?

We agree that a rebuttable presumption that a decision was not lawfully made if a person responsible for an AI-informed decision does not provide a reasonable explanation for the decision would be generally desirable. It would reinforce the desirability of meaningful human input and of a rational basis for making decisions that affect individuals' legal rights and interests. However, we also suggest that great care be taken to avoid unanticipated negative consequences when making amendments to administrative law to deal with AI-informed decisions. As the Commission notes, the unsettled case law about what constitutes a reviewable 'decision' raises concerning problems that could seriously interfere with due process and the rights of individuals. A thorough ALRC inquiry could usefully help ensure that any proposed amendments do not interfere with procedural justice. We also believe that the implications of such a presumption for the private sector are worth exploring in much more detail, and we welcome the Commission's suggestion that the ADM+S Centre of Excellence continue this work.

### Proposal 10: The Australian Government should introduce legislation that creates a rebuttable presumption that the legal person who deploys an AI-informed decision-making system is legally liable for the use of the system.

As the Commission recognises in the Discussion Paper, we expect that most questions of liability will be able to be resolved by courts applying existing law. However, to the extent that an explicit presumption is required, we support this proposal as an appropriately tailored rebuttable presumption. We note that any implementing legislation will need to be carefully drafted to avoid potential uncertainty in differentiating between the person who is 'responsible for' a decision and the person who may be responsible for technically 'deploying' a system.

### Question D: How should Australian law require or encourage the intervention by human decision makers in the process of AI-informed decision making?

We suggest that it is important to define the types of high stakes decisions to which a requirement for human input should apply. Canada's Directive of Automated Decision-Making, which requires human intervention for high impact decisions, seems to provide a good model for effective risk-based regulation in Australia.

### Question E: Human rights impact assessment

Completion of a human rights impact assessment should be mandatory for all public deployments of AI decision-making tools. Ideally, any high-risk deployments of AI decision-making systems by private sector entities should also be required to complete a human rights impact assessment. The disclosure requirements of the Modern Slavery legislation provide an initial starting point for identifying how mandatory disclosure for private sector entities can help improve compliance with human rights norms across supply chains (including when automated systems are developed overseas and deployed in Australia).

### Proposal 18: Procurement rules

We strongly support procurement rules for public entities that require comprehensive human rights impact assessments and safeguards for human rights (including transparency and adequate mechanisms for appeal and redress).

### Proposal 22: Audio-description and captioning

We strongly support the imposition of new requirements to improve audio-description and captioning for broadcasting services. Given the ongoing reviews of Broadcasting rules that seek to develop technology-neutral rules for a converged environment, we suggest these rules should also apply to major commercial providers of screen content online.