



Maurice Blackburn Pty Limited  
ABN 21 105 657 949

Level 21  
380 Latrobe Street  
Melbourne VIC 3000

DX 466 Melbourne  
T (03) 9605 2700  
F (03) 9258 9600

17 April 2020

Human Rights and Technology  
Australian Human Rights Commission  
GPO Box 5218  
SYDNEY NSW 2001

**By Online Submission**

Dear Sir/Madam,

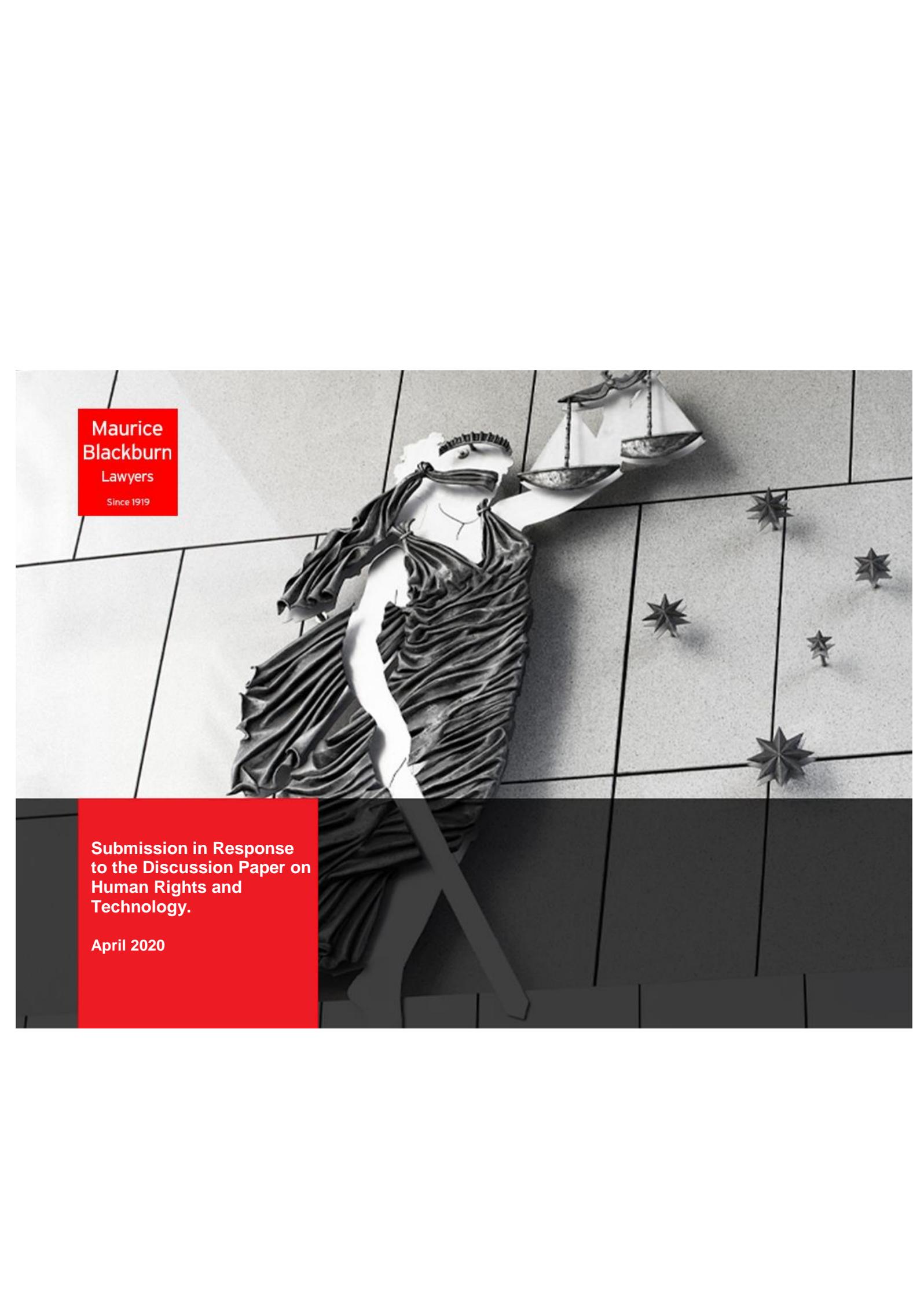
We welcome the opportunity to provide feedback in relation to the Discussion Paper on Human Rights and Technology.

Please do not hesitate to contact me and my colleagues on [REDACTED] or at [REDACTED] if we can further assist with the Commission's important work.

Yours faithfully,

[REDACTED]

[REDACTED]  
**Principal Lawyer  
Social Justice Practice  
MAURICE BLACKBURN**



**Maurice  
Blackburn**  
Lawyers  
Since 1919

**Submission in Response  
to the Discussion Paper on  
Human Rights and  
Technology.**

**April 2020**

## Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 33 permanent offices and 30 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

## Our Submission

Maurice Blackburn is grateful for the opportunity to make a submission to the Australian Human Rights Commission in response to questions raised in the *Human Rights and Technology Discussion Paper* (“**the Discussion Paper**”).<sup>1</sup>

The Discussion Paper identifies the new and significant ways in which AI interacts with fundamental human rights. Maurice Blackburn notes the importance of developing a sophisticated regulatory response to the development of artificial intelligence (**AI**).

New technologies have a profound potential to transform lives and communities in both positive and negative ways. We share the AHRC’s goal of implementing appropriate measures to ensure that the benefits of these technologies are felt by vulnerable and historically disenfranchised groups rather than an erosion of their fundamental human rights.

Accordingly, Maurice Blackburn submits that the human rights of individual citizens must be at the forefront of any thinking and decision making in relation to new and emerging technologies.

Following our review of the Discussion Paper, Maurice Blackburn endorses all 29 proposals made by the AHRC and specifically the development of the proposed *Nation Strategy on New and Emerging Technologies*. In this submission, we respond to all questions posed by the AHRC, save for Question (F), and have identified 12 proposals for specific comment.

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<sup>1</sup> Human Rights and Technology Discussion Paper (*‘Discussion Paper’*) Retrieved from <[https://tech.humanrights.gov.au/sites/default/files/2019-12/TechRights\\_2019\\_DiscussionPaper.pdf](https://tech.humanrights.gov.au/sites/default/files/2019-12/TechRights_2019_DiscussionPaper.pdf)>.

Access to justice of vulnerable communities is inexorably linked to the work of our firm and our submissions seek to provide insight into the practical difficulties faced by individuals in seeking to vindicate their rights before Australian Courts.

We also note that Australia is the only developed country without a federally legislated charter or bill of human rights. In the absence of this, we must ensure that consideration is given to human rights implications on a topic by topic basis.

We applaud AHRC for taking on this initiative, and would welcome the opportunity to discuss our submissions directly with the Commission.

## Responses to Discussion Paper Questions

### Question A.

The Commission's proposed definition of 'AI-informed decision making' has the following two elements: there must be a decision that has a legal, or similarly significant, effect for an individual; and AI must have materially assisted in the process of making the decision. Is the Commission's definition of 'AI-informed decision making' appropriate for the purposes of regulation to protect human rights and other key goals?

Yes.

The Commission's definition of 'AI-informed decision making' is appropriate for the purposes of legal regulation to protect human rights provided this definition includes:

- i. decisions made by government as well as private or non-state actors. Decisions made by private actors, including large corporations such as Google and Facebook, have the capacity to significantly affect human rights and people's lives and are currently less regulated than government decisions.<sup>2</sup> Asymmetries of knowledge and the enormous financial power of these corporations make them a particular regulatory challenge; and
- ii. fully automated decisions. As the move towards automation in government and all sectors/industries increases, there is a corresponding need for legislative safeguards (see submissions below).

One area, however, that requires further research is how decision-makers understand and the extent to which they are influenced by AI aids to decision-making.

A phenomenon known as 'automation bias' has been documented. This occurs when decision-makers give undue weight to information or a recommendation coming from AI. Research indicates that despite the presence of a human decision maker with the authority and competence to change an AI decision, '*...it is unlikely that such human oversight will actually go beyond a mere plausibility check.*'<sup>3</sup>

### 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?

Please refer to our response to Proposal 10.

Yes. Maurice Blackburn supports the imposition of a rebuttable presumption in these circumstances.

The highly technical nature of AI-informed decision making systems presents a significant barrier to an individual readily understanding the reasoning used by that system and the

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<sup>2</sup> For example, government decision are regulated by the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

<sup>3</sup> Thomas Wischmeyer and Timo Rademacher: *Regulating Artificial Intelligence*. Springer Press 2020; p.193

degree to which it was relied upon by a decision maker. Understanding how a decision has been made is a necessary prerequisite to proving its unlawfulness.

This information asymmetry is compounded by the practice of AI developers refusing to disclose the algorithm used in the impugned decision making by claiming that it is proprietary.

Accordingly, by failing to provide a reasonable explanation for a decision, the person responsible is creating a significant evidentiary gap for an individual arguing that a decision was unlawful. It is wholly inappropriate that the decision maker should stand to benefit from an evidentiary gap that is entirely of their own making.

Further, this approach would better maintain the principle of legality and rule of law, two issues rightfully identified by the Commission as being of concern in relation to the regulation of AI.

The power asymmetry that exists between a decision maker and an individual together with the likelihood of a lack of technical understanding is a sound basis for the imposition of this presumption. It is important to ensure that a non-compliant decision maker is not aided by their failure to provide adequate reasons. Such an outcome would undermine the intent of the legislation.

### **Question C.**

Does Australian law need to be reformed to make it easier to assess the lawfulness of an AI-informed decision-making system, by providing better access to technical information used in AI-informed decision-making systems such as algorithms?

Yes.

Access to technical information is often restricted as commercially confidential or intellectual property when AI systems are designed by private companies or protected by public interest immunity when the algorithm serves a law enforcement purpose.

In Australia, a good example is provided by the NSW Police's Suspect Target Management Plan (STMP) risk assessment tool. In *DEZ v Commissioner of Police, NSW Police Force*,<sup>4</sup> the NSW Civil and Administrative Tribunal upheld a refusal by NSW Police to provide details to a STMP target of the algorithm and risk assessment model. The Senior Member found that this information was protected by public interest immunity and access to it was denied.

Internationally, this problem was also highlighted in the COMPAS case before the Supreme Court of Wisconsin. In that case, the Court upheld the use by a trial judge of a risk assessment algorithm in sentencing a defendant, even though the process through which the assessment was calculated was not transparent or open to challenge.<sup>5</sup> That algorithm had been developed by a private company, Northpointe Inc, and was protected as a trade secret.

Another example is provided in the context of automated vehicles. Currently, the only mechanism for a vulnerable injured person to access event data is through a direct request to the owner of the data, which could be refused, or through discovery processes as part of actual or anticipated legislation. This creates a significant disadvantage to the injured person

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<sup>4</sup> [2015] NSWCATAD 15.

<sup>5</sup> *Wisconsin v Loomi* 881 NW 2d 749 (Wis, 2016).

and affords an inequitably powerful position to the owners of the data (likely manufacturers) who, as the potential defendant in any litigation, have an interest in protecting the data.

Where there are security or proprietary concerns, Maurice Blackburn submits that one option is to appoint a trusted third party to act as a 'neutral data arbiter'.<sup>6</sup> This person could be the Commissioner proposed in Proposal 19 or, in litigated cases, an expert appointed by the court. They would be provided with full access to any technical information including the algorithmic model and code.

In addition, 'better access to technical information' should include:

- i. time requirements to ensure responses to requests for information by government and private actors are provided in a timely manner; and
- ii. in the case of governments, procurement guidelines should mandate the acquisition and deployment of only open-source AI systems.

#### Question D.

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

Maurice Blackburn endorses an approach to intervention by human-decision makers consistent with the Canadian Government Directive on Automated Decision Making.<sup>7</sup>

That is an approach where the severity of the impact of a given decision dictates the level of intervention required by a human decision maker. The impact assessment level utilised in this approach considers the impact of a decision on the following:

- the rights of individuals or communities,
- the health or well-being of individuals or communities,
- the economic interests of individuals, entities or communities; and
- the ongoing sustainability of an ecosystem.

The impact to each of these criteria is assessed on a scale of one to four with this assessment level correlating with a required human action designed to ameliorate that potential impact.

We also note the observation made in some of the literature explaining "that the right to human intervention, taken alone without the subject's right to express his point of view might appear ineffective."<sup>8</sup>

#### Question E.

In relation to the proposed human rights impact assessment tool in Proposal 14:  
(a) When and how should it be deployed?

<sup>6</sup> Kate Crawford and Jason Schultz, 'Big Data and Due Process: Towards a Framework to Redress Predictive Privacy Harms' (2014) 55 *Boston College Law Review*, 93, 127.

<sup>7</sup> Government of Canada, Treasury Board Secretariat, *Directive on Automated Decision-Making*, available online: <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32592>.

<sup>8</sup> Antoni Roig 'Safeguards for the Right Not to Be Subject to a Decision Based Solely on Automated Processing (Article 22 GDPR)', *European Journal of Law and Technology* 8, no. 3 (21 January 2018): 6, <http://ejlt.org/article/view/570>

(b) Should completion of a human rights impact assessment be mandatory, or incentivised in other ways?  
(c) What should the consequences be if the assessment indicates a high risk of human rights impact?  
(d) How should a human rights impact assessment be applied to AI-informed decision-making systems developed overseas

(a) Maurice Blackburn supports the utilisation of an impact assessment tool that is deployed prior to the development of an AI decision making system. This approach best places a human rights impact assessment to influence the choice of alternate policy options and adjustments. Consideration should also be given to its deployment at the point of any challenge to an AI-informed decision making system.

(b) It is our view that completion of a human rights impact assessment should be mandatory, in line with the obligations of parliamentarians tabling proposed legislation in the Commonwealth Parliament.<sup>9</sup> This approach is supported by the UN Guiding Principles on human rights impact assessments of economic reforms.<sup>10</sup>

(c) Decisions which impact liberty should be considered as posing a high risk of human rights abuse. Accordingly a higher degree of scrutiny should be exercised in relation to the proposed AI system and human intervention should be required in any resultant decision making. The greater the risk to the human rights of an individual, the more opportunities ought to be built in to review and potentially overturn the AI decision making.

As expressed in the response to Question (a), the rubber stamping of AI decisions by human decision makers is one that ought to be guarded against. It is imperative to ensure that any human intervention is of substance. Such human intervention ought to expressly address the human rights impact of the AI decision and data should be kept and made available to the public and could include the following:

- A public register of human rights impact statements;
- Specific reporting to parliament on these issues; and
- Raw data concerning the frequency and efficacy of human rights impact assessments.

(d) Maurice Blackburn proposes that AI systems developed overseas should undergo an Australian-specific human rights impact assessment.

## Question G.

What other measures could the private sector take to eliminate barriers to accessibility related to the affordability of Digital Technologies for people with disability?

<sup>9</sup> *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 8; Attorney- General's Department Statements of Compatibility <[https://www. ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/Statements-of-Compatibility.aspx](https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/Statements-of-Compatibility.aspx)>.

<sup>10</sup> Bohoslavsky, Juan Pablo, Guiding Principles on Human Rights Impact Assessments of Economic Reforms: report of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of Human Rights, Particularly Economic, Social and Cultural Rights, A/HRC/40/57, 19 December 2018.

Maurice Blackburn recognises the importance of accessibility and inclusivity for people with disability. We particularly recognise the extraordinary potential of technology to improve the lives of people with disability.

People with disability have been and continue to be subject to marginalisation and discrimination resulting in their systematic and structural exclusion from access to power, resources and opportunity. These same patterns of marginalisation are expressed in much of the data used in AI systems.<sup>11</sup>

The inclusion of leading organisations representing people with disability should be encouraged in both the development of AI and AI regulation. This would allow for inclusion and accessibility of this community to be present from the outset and give AI the best chance of bridging the disadvantages felt by this community rather than magnifying them.

We need to ensure that the benefits to technology and automated decision making to people with disability remain a driver of innovation in this space.

#### **Question H.**

What other tertiary or vocational courses, if any, should include instruction on ‘human rights by design’?

Maurice Blackburn endorses a multidisciplinary approach to addressing the human rights impact of artificial intelligence. As has hopefully been made clear in this submission, the current mechanisms to hold institutions accountable for upholding human rights is particularly unclear in the context of emerging technology.

A diversity of expertise and experience in the development of AI would greatly assist in ensuring the professionals involved in the implementation and deployment of AI are well versed in ‘human rights by design’.

Accordingly, we propose that the following tertiary and vocational courses be considered for instruction in addition to Engineers and Designers:

- (a) Commerce, banking, business, finance and economics;
- (b) The legal profession, including both lawyers and the Judiciary; and
- (c) The medical profession, including allied health professionals and the biotechnology industry.

#### **Question I.**

Should the Australian Government develop other types of Standards, for Digital Technologies, under the Disability Discrimination Act 1992 (Cth)? If so, what should they cover?

Maurice Blackburn endorses consultation with the relevant peak bodies and organisations that specifically represent the interests of people with disability in relation to this question.

<sup>11</sup> Rashida Richardson, Jason Schultz, and Kate Crawford, “Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice,” New York University Law Review Online (February 13, 2019), <https://ssrn.com/abstract=3333423>.

Accordingly we repeat our answer to Question (G).

## Comments on Proposals in the Discussion Paper

### Proposal 1.

The Australian Government should develop a National Strategy on New and Emerging Technologies. This National Strategy should:

- (a) set the national aim of promoting responsible innovation and protecting human rights
- (b) prioritise and resource national leadership on artificial intelligence (AI)
- (c) promote effective regulation— this includes law, co-regulation and self-regulation
- (d) resource education and training for government, industry and civil society.

The need to develop a National Strategy on New and Emerging Technologies that is adapted to achieve the above objectives is a proposal that Maurice Blackburn broadly supports.

It is our view however, that the development of this strategy would be better served by continuing as a process of the AHRC with a final draft National Strategy on New and Emerging Technologies then being presented to the Australian Government for consideration.

This bifurcation would allow for a draft strategy to be developed unencumbered by the external factors that may prevent a best practice strategy being developed.

### Proposal 2.

The Australian Government should commission an appropriate independent body to inquire into ethical frameworks for new and emerging technologies to:

- (a) assess the efficacy of existing ethical frameworks in protecting and promoting human rights
- (b) identify opportunities to improve the operation of ethical frameworks, such as through consolidation or harmonisation of similar frameworks, and by giving special legal status to ethical frameworks that meet certain criteria.

Maurice Blackburn supports this proposal.

### Proposal 3.

The Australian Government should engage the Australian Law Reform Commission (ALRC) to conduct an inquiry into the accountability of AI-informed decision making. The proposed inquiry should consider reform or other change needed to:

- (a) protect the principle of legality and the rule of law
- (b) promote human rights such as equality or non-discrimination.

Maurice Blackburn supports this proposal.

We believe the ALRC is well placed to undertake this work due to its technical expertise and role as the peak law reform body in Australia.

The rule of law requires that AI-informed decisions be lawful. It is therefore essential that an assessment be undertaken of the extent to which AI-informed decision making is regulated by existing laws and, perhaps more importantly, the extent to which there are any gaps in those laws.

However, there are two readily apparent gaps in our existing legal framework:

- i. Some human rights are not enforceable under Australian law in the absence of a Federal Bill of Rights. Maurice Blackburn is keenly aware of the need for a clear and unambiguous articulation of the human rights protections afforded to all Australians and strongly supports such a Bill of Rights.

In addition, Maurice Blackburn supports the inclusion of a provision which would require all AI-informed decisions made by government to have regard to human rights.

A good example of such a provision is section 38 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) which provides that it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. If such a provision had been in place, the Robo-Debt crisis may have been averted.

- ii. Data subjects in Australia do not have the same protections and safeguards as those in the European Union under the General Data Protection Regulation (GDPR). There is a clear intersection between data protections and anti-discrimination laws. It has been suggested that data protection rather than equality rights might provide an easier and better opportunity to regulate and obtain redress for harms caused by AI-Informed decisions.<sup>12</sup>

Maurice Blackburn suggests that the Terms of Reference for the ALRC might include consideration of the following issues:

- i. The development of clear cause of actions for algorithmic and data harms. Duty of care approaches provide a good starting point for consideration of these issues;
- ii. Liability for algorithmic harms;
- iii. The development of the standards and rules for proving algorithmic harm at law;
- iv. Provision of adequate remedies for those who suffer harm; and
- v. Access to justice for marginalised and vulnerable groups who are often targeted by AI algorithms yet cannot readily access pay-as-you-go legal services.

For example, in the case of the Robo-debt software we saw poorly designed technology implemented in a manner that had a disproportionate impact on individuals who were reliant on welfare services. Redress of harm was dependent predominantly on being able to access legal aid and community legal services which were already underfunded and stretched to capacity. Group-based proceedings would also increase access to justice as claims that are not financially viable to run individually become more viable when the loss is aggregated to a group.

Maurice Blackburn is also aware of the increasing body of research establishing the role of AI and algorithms in perpetuating inequality and further entrenching historical forms of

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<sup>12</sup> Manish Raghavan et al, 'Mitigating Bias in Algorithmic Hiring: Evaluating Claims and Practices', arXiv:1906.09208 (6 December 2019).

discrimination.<sup>13</sup> The firm has witnessed first-hand the effects of gender discrimination and inequality in workplace and employment settings. We are keen to ensure that this systemic discrimination is not further entrenched for future generations through AI.

However, it is not clear the extent to which and how existing anti-discrimination legislation applies to AI-informed decision making.

For example, some have suggested that a human decision-maker remains a key component of how anti-discrimination laws construct discrimination.<sup>14</sup> The recent decision in *Pintarich v Deputy Commissioner of Taxation*<sup>15</sup> would appear to support this reasoning. In that case, the Full Federal Court held that an automated letter sent to a taxpayer was 'not a decision' for the purposes of administrative law because it did not involve a human mental process.

In addition, challenges are posed by the fact that:

- machine learning algorithms may be programmed to differentiate between individuals or groups on the basis of attributes other than those protected in anti-discrimination legislation (such as race, gender or disability). And yet those attributes, such as postcode, may be proxies for protected ones.
- algorithms create intersectional concerns. That is, how do algorithms which may directly or indirectly target multiple protected attributes produce compounded harm to individuals?
- individuals may be unaware that algorithmic discrimination has even occurred. For example, in March 2019, Facebook agreed to pay \$5 million compensation to settle law suits alleging that its ad-building micro-targeting tool allowed advertisers to prevent older applicants, women and members of minority racial groups from receiving ads in relation to housing, employment and credit opportunities.<sup>16</sup>

There is therefore an urgent need for consideration of the extent to which AI and machine learning algorithms are regulated by current anti-discrimination frameworks.

#### **Proposal 4.**

The Australian Government should introduce a statutory cause of action for serious invasion of privacy.
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Maurice Blackburn supports the introduction of a statutory cause of action for invasions of privacy in addition to the multi-faceted regulatory approach proposed by the Commission.

A number of privacy and data security issues have emerged from our work including the following:

- i. The collection of information through the My Health Record system. This system potentially exposes Australians to having their data shared inappropriately, either through inadequate consent provisions, a lack of consumer vigilance, or through misconduct. We have sought reassurances about the sale/availability of data to, for

<sup>13</sup> See generally, Virginia Banks, *Automating Inequality: How High-Tech Tools Profile, Police and Punish the Poor* (St Martin's Press, 2018); O'Neil (n 2); Julia Angwin et al, 'Machine Bias', *ProPublica* (online, 24 February 2019)

<sup>14</sup> Mark Burdon and Paul Harpur, 'Re-conceptualising Privacy and Discrimination in the Age of Talent Analytics' (2014) 37(2) *University of New South Wales Law Journal* 679.

<sup>15</sup> [2018] FCAFC 79.

<sup>16</sup> Alexia Fernandez Campbell, 'Facebook Allowed Companies to Post Ads Only Men Could See. Now That's Changing', *Vox*, 16 September 2019.

example, insurance companies seeking additional information from which they might deny access to insurance products, or deny paying out a claim.<sup>17</sup>

- ii. The use of historical health data in making unrelated decisions about consumers. For example, a doctor conducting a pre-employment medical check may have access to a prior discussion of a mental health issue between the applicant and their GP. That this information might be used to achieve an unintended consequence may discourage consumers from having these discussions, for fear of who may access that information later.
- iii. Surveillance by employers and insurers. The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry has questioned the use of surveillance techniques by insurers.<sup>18</sup>

Further, we currently act for the lead plaintiff in a representative action concerning a data breach by Optus in late 2019. In that breach, 50,000 Optus customers had their mobile phones and addresses mistakenly published online in the White Pages.

It is our view that a statutory cause of action would address existing gaps in the law. Currently, the only remedy for a breach of privacy is to make a complaint to the OAIC. These complaints can take lengthy periods to resolve, damages awards have been low and it can be costly to enforce any decision.

However, in our submission, this cause of action should not be limited to 'serious' invasions of privacy. In our view, this introduces an extra threshold for plaintiffs which is unnecessary in the circumstances and may prevent individuals commencing proceedings to enforce this right.

For example, in our representative action against Optus, it could be argued that the invasion of privacy for each, or many, individuals was not 'serious', particularly where they have suffered no economic loss. Whereas, when viewed collectively, this is clearly a serious invasion of privacy.

Legislative guidance provided to courts as to the meaning of serious is unlikely to ameliorate this difficulty and is likely to lead to litigation concerning its meaning which would add to the complexity and cost of these actions.

It is our view that there already exist deterrents to trivial and non-serious actions for invasions of privacy: the costs of pursuing such actions would outweigh any damages awarded and further, it could be expected that there would be a costs award against any plaintiff who brings an unfounded or trivial action.

In addition, Maurice Blackburn submits that a statutory cause of action must address the following:

- The collection and disclosure of revealing information not currently considered to be 'personal information' for the purpose of the *Privacy Act 1988* (Cth) including meta-data<sup>19</sup> and data produced by Internet-of-Things devices such as watches;

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<sup>17</sup> See, for example, <https://www.apf.gov.au/DocumentStore.ashx?id=11372aad-3610-4edd-84c7-017fc23f65c1&subId=659972>

<sup>18</sup> Refer question 21, page 3: <https://financialservices.royalcommission.gov.au/public-hearings/Pages/round-6-hearings.aspx#pqafm6cs>

<sup>19</sup> *Privacy Commissioner v Telstra Corporation Limited* [2017] FCAFC 4.

- Any cause of action must be available for breaches of privacy by private actors as well as those of the government;
- Breaches of privacy must be actionable per se, that is, without the need to prove actual damage. A significant barrier that currently exists in Australia to individuals pursuing remedies for breaches of privacy and data rights is the need to prove economic loss. There is not always an economic loss, or a significant one, when a privacy right has been violated. Available remedies must therefore be broad enough to encompass emotional distress and, as in the GDPR, 'non-material losses';<sup>20</sup> and
- Current problems with the model of consent. Under the current model, large corporations including Facebook and Google are able to perpetrate serious invasions of our privacy via data harvesting and surveillance activities on the basis that consent has been provided to do so. However, it cannot be considered that informed consent has been given in the 'click-wrap' agreements (that is, online 'terms of service or terms of use agreements') that authorise these activities. These agreements are argued by many as a 'degradation of the rule of law, the institution of contract and the rights of users granted through the democratic process.'<sup>21</sup> The GDPR has sought to remedy this situation.<sup>22</sup>

### Proposal 5.

The Australian Government should introduce legislation to require that an individual is informed where AI is materially used in a decision that has a legal, or similarly significant, effect on the individual's rights.

Maurice Blackburn strongly supports this proposal.

Currently, this is not a requirement of Australian law and, as a result, individuals are not aware of the many ways in which AI and algorithms impact their lives. This must be an essential element of any AI-informed decision-making process and must apply equally to government and private actors.

In addition, further consideration needs to be given to the challenges posed by 'opaque' AI-informed decision making systems, for example, systems which prevent individuals or groups who do not fit desired profiles from being made aware of particular housing, credit or employment opportunities. These systems may be best regulated by oversight and auditing by a public agency or Commissioner as proposed in Proposal 19.

Moreover, Maurice Blackburn submits that 'accountability' by fully automated AI-informed decision making systems also requires that protections similar to those found in Article 22 of the GDPR must also be incorporated in any legislation.

This Article, which is one of the core principles in the GDPR, provides that:

- i. data subjects must expressly consent and
- ii. have the right to object to a decision based solely on automated processing if it has legal ramifications or significantly affects him or her. U

Under such a provision, data subjects can ask for a human reconsider or make the decision.

<sup>20</sup> Article 82 of the GDPR provides that any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation for the damage suffered.

<sup>21</sup> Shoshana Zuboff, *The Age of Surveillance Capitalism* (Profile Books, 2019) 49.

<sup>22</sup> See Article 7 of the GDPR.

This is an important safeguard against the inappropriate use of automated decision-making and, if applied to governments, would render an AI system such as Robo-debt unlawful.

### **Proposal 6.**

Where the Australian Government proposes to deploy an AI-informed decision-making system, it should:

- (a) undertake a cost-benefit analysis of the use of AI, with specific reference to the protection of human rights and ensuring accountability
- (b) engage in public consultation, focusing on those most likely to be affected
- (c) only proceed with deploying this system, if it is expressly provided for by law and there are adequate human rights protections in place.

Maurice Blackburn broadly supports this proposal.

In relation to point (a) above though, it is our view that a cost-benefit analysis with specific reference to the protection of human rights should not be considered an effective substitute for a Human Rights Impact Analysis as discussed in Proposal 14.

### **Proposal 7.**

The Australian Government should introduce legislation regarding the explainability of AI-informed decision making. This legislation should make clear that, if an individual would have been entitled to an explanation of the decision were it not made using AI, the individual should be able to demand:

- (a) a non-technical explanation of the AI-informed decision, which would be comprehensible by a lay person, and
- (b) a technical explanation of the AI-informed decision that can be assessed and validated by a person with relevant technical expertise.

In each case, the explanation should contain the reasons for the decision, such that it would enable an individual, or a person with relevant technical expertise, to understand the basis of the decision and any grounds on which it should be challenged.

Maurice Blackburn strongly supports this proposal.

There can be no compliance with the rule of law and the principle of legality without transparency and explainability of AI-informed decisions.

Maurice Blackburn submits that this should include:

- an explanation and transparency around the datasets that the AI was trained on as most cases of algorithmic discrimination involve bias in the training datasets;
- the evidence on which the decision is based, including the data inputs, the algorithmic model (including its purpose, its key priorities and the features and weighting which guide the decision) and its outputs. It is particularly important that the explanation provided by meaningful and comprehensible to the individuals subject to the algorithm;

- an audit trail setting out the facts and law supporting the decision and identifying the decision maker at each part of the process (that is, which part of the decision was made by an algorithm and which by a human); and
- that the explanation be provided in a timely manner to enable the affected party to exercise any legal rights of review of this decision.

### **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 liable for the use of the system.

Maurice Blackburn supports this proposal.

It is our view that there are several arguments that strongly support the implementation of this proposal in the context of tortious liability in particular.

Firstly, the highly technical subject matter presents a significant barrier to an individual readily understanding how a piece of AI operates and the manner in which it was implemented in a given decision.

This information asymmetry is compounded by the practice of AI developers refusing to disclose the algorithm used in the impugned decision making by claiming that it is proprietary.

In our experience, the establishment of a novel duty of care to a relationship not already recognised by law is an exceedingly difficult and resource intensive undertaking. The prospect of protracted and expensive litigation in order to establish liability will act as a significant deterrent to individuals seeking to access justice.

The implementation of the AI-informed decision making system is itself a choice made by the legal person who deploys the system.

In the above circumstances it is wholly appropriate that the question of liability should be clarified in this way by legislation.

### **Proposal 11.**

The Australian Government should introduce a legal moratorium on the use of facial recognition technology in decision making that has a legal, or similarly significant, effect for individuals, until an appropriate legal framework has been put in place. This legal framework should include robust protections for human rights and should be developed in consultation with expert bodies including the Australian Human Rights Commission and the Office of the Australian Information Commissioner.

Maurice Blackburn strongly supports this proposal.

Facial recognition can be a particularly intrusive form of digital surveillance and can have significant effects on the human rights of individuals, particularly when it is used in a law enforcement context.

The *Identity-Matching Services Bill 2019* (Cth) did not pass the Australian Parliament. In addition, the Australian Parliamentary Joint Committee on Intelligence and Security has recommended that this Bill be redrafted to strengthen legal protections. Without a legal framework provided by this Bill or other legislation and robust safeguards against breaches of human rights, there should be a moratorium on the use of this technology.

It is concerning that, despite the absence of a legal framework, this technology is being rolled out across Australia including the Australian Federal Police, and state police in Queensland, Victoria and South Australia. It is not clear that these government agencies have developed expertise in how these systems work nor has there been appropriate testing as to accuracy and fitness for purpose by standards bodies.<sup>23</sup>

Other jurisdictions are also moving to ban this technology. In May 2019, San Francisco banned the use of facial recognition software by the police and other agencies.

#### **Proposal 14.**

The Australian Government should develop a human rights impact assessment tool for AI-informed decision making, and associated guidance for its use, in consultation with regulatory, industry and civil society bodies. Any 'toolkit for ethical AI' endorsed by the Australian Government, and any legislative framework or guidance, should expressly include a human rights impact assessment.

Maurice Blackburn supports this proposal.

There is an urgent need for a human rights focussed tool of this nature to assess the potential impact of AI-informed decision-making system on human rights.

Maurice Blackburn endorses the adoption of a human rights impact assessment tool in line with Canada's Algorithmic Impact Assessment (**AIA**).<sup>24</sup> It is appropriate that the tool(s) be developed in consultation with the bodies identified in Proposal 14 (regulatory, industry and civil society bodies) ensuring that consumers are adequately represented.

#### **Proposal 16.**

The proposed National Strategy on New and Emerging Technologies (see Proposal 1) should incorporate education on AI and human rights. This should include education and training tailored to the particular skills and knowledge needs of different parts of the community, such as the general public and those requiring more specialised knowledge, including decision makers relying on AI datapoints and professionals designing and developing AI-informed decision-making systems.

Maurice Blackburn supports this proposal.

In particular, we refer to the aspects of our comment to Proposal 10 and answer to Question B in relation the information asymmetry that exists between an individual affected by an AI-informed decision making system and those that implement it.

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<sup>23</sup> <https://www.smartcompany.com.au/startupsmart/analysis/australian-police-clearview-ai-facial-recognition/>

<sup>24</sup> Government of Canada, Treasury Board Secretariat, *Directive on Automated Decision-Making*, available online: <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32592>. Clause 6.

A stated objective of the proposed strategy, articulated in Proposal 1, is to advance the rule of law and principle of legality. Both of these are undermined by an absence of education in relation to AI and technical explanation of its use and operation.

### **Proposal 17.**

The Australian Government should conduct a comprehensive review, overseen by a new or existing body, in order to:

- (a) identify the use of AI in decision making by the Australian Government
- (b) undertake a cost-benefit analysis of the use of AI, with specific reference to the protection of human rights and ensuring accountability
- (c) outline the process by which the Australian Government decides to adopt a decision-making system that uses AI, including any human rights impact assessments
- (d) identify whether and how those impacted by a decision are informed of the use of AI in that decision-making process, including by engaging in public consultation that focuses on those most likely to be affected
- (e) examine any monitoring and evaluation frameworks for the use of AI in decision-making.

Maurice Blackburn broadly agrees with this proposal. We add that the proposed comprehensive review would be assisted by the following features:

- (a) The review is conducted periodically;
- (b) There is public reporting of the review;
- (c) The establishment of a register of outcomes of the review; and
- (d) A Human Rights Impact assessment is conducted in concert with the cost-benefit analysis.

Further consideration is also required concerning whether such review is conducted by a new or an existing body. A new body may lack the authority of established institutions but can be created with appropriate specialisation. As a new function of an existing body, this role may be sidelined. Regardless both approaches require sufficient and targeted resourcing.