



Law Council
OF AUSTRALIA

Human Rights and Technology

Australian Human Rights Commission

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful to the Law Institute of Victoria, the Law Society of New South Wales and the Law Society of South Australia for their assistance with the preparation of this submission, as well as input from its National Human Rights Committee, Business and Human Rights Committee, Indigenous Legal Issues Committee and the Privacy Law Committee of the Business Law Section.

Executive Summary

1. The Law Council of Australia is grateful for the opportunity to provide a submission to the Australian Human Rights Commission (**AHRC**) in response to its 'Human Rights and Technology Issues Paper', released in July 2018 (**Issues Paper**).
2. New technologies such as Artificial Intelligence (**AI**), robotics, the Internet of Things, and virtual reality have the potential both to promote and threaten the protection of human rights. For example, AI may improve human rights by making access to justice more affordable and may remove human bias in decision making. However, it may also introduce the risk of design biases being built into systems, a lack of transparency and the loss of discretion in decision making.
3. The Issues Paper identifies a suite of human rights that new technologies might affect, from the right to education, to the right to a fair trial, to the right to benefit from scientific progress. Key points raised by the Law Council in responding to the matters set out in the Issues Paper include:
 - the digital divide has the potential to result in already-marginalised groups missing out on new opportunities or facing further systemic disadvantage;
 - new technologies have the potential to assist in access to justice, however a nuanced, evidence-based and people-centred approach is needed to avoid leaving digitally excluded groups behind;
 - decision making informed by AI may improve human rights by improving access to justice and may remove human bias in decision making. However, it may also introduce the risk of design biases being built into a system and a lack of transparency in decision making;
 - laws protecting individuals against breach of privacy have not kept pace with technological developments, and there is a need for such protections to be reviewed and reformed; and
 - the Law Council considers that the best approach to the development of legislation to respond to new technologies is for principle-based laws that allow for flexibility and adaptability.
4. The Law Council welcomes the opportunity to provide this submission to the AHRC, and would be happy to elaborate further on any of the below points to inform the final report.

Digital exclusion

5. The Issues Paper observes that 'specific groups will feel both the positive and negative impacts of new technologies differently to other Australians'.¹ At the level of access, this trend can be seen in the digital divide affecting many groups across Australia. The 2017 Australian Digital Inclusion Index found that several groups are particularly digitally excluded: people in low income households, people aged 65 and over (the most digitally excluded group in the survey), people with a disability, people who did not complete secondary school, Aboriginal and Torres Strait Islander peoples, and people not in paid employment. Women in Australia are also less likely to be online than men, particularly those in the 65 and over age bracket.² While geographic differences are slightly narrowing, digital inclusion remains substantially higher in urban areas than country areas.³ These group-specific barriers were canvassed in the Law Council's Justice Project, which also highlighted that recent arrivals and asylum seekers faced critical digital exclusion barriers, having regard to compounding factors including lack of language and literacy.⁴
6. With an increasing number of jobs, social services and communications tools requiring internet connectivity and digital literacy, there is a real risk that this digital divide will contribute to already-marginalised groups missing out on new opportunities, or facing further systemic disadvantage. To address this trend, policymakers, businesses, and the education sector should place a focus on improving the digital ability of people in marginalised groups, as well as addressing the affordability and accessibility of digital tools.
7. Unequal access to new technologies can exacerbate inequalities, especially where access is affected by factors such as socio-economic status, geographical location and cultural or linguistic diversity. The Issues Paper notes that technological innovations can affect societal inequality and that equality may be considered across several domains, including access to technology, processes embedded in technology, outcomes for individuals arising from technology, and the social, economic and physical distribution of beneficial and detrimental outcomes for communities resulting from technological advances. Accordingly, the adoption of new technologies should be preceded by careful consideration of its appropriateness with respect to the intended audience of users and consumers, its implications for fairness and accessibility and options for mitigating any adverse impact on marginalised groups. A key concern identified by Justice Project stakeholders was that policymakers frequently overlook the realities of target groups' digital exclusion (and underlying language and literacy barriers), in their overreliance on online solutions at the expense of more effective and targeted strategies.
8. With respect to internet access, the AHRC has previously noted that:

In order to ensure that information is truly accessible to all people in Australia, government departments and/or private companies should audit online materials to ensure they are user-friendly for new Internet users; institute educative initiatives on the secure use of the Internet and increase opportunities for meaningful access to the Internet of marginalised groups. Only when these

¹ Australian Human Rights Commission, *Human Rights and Technology Issues Paper* (2018) 20.

² Julian Thomas et al, *Measuring Australia's Digital Divide: The Australian Digital Inclusion Index 2017* (RMIT University, 2017) 5.

³ Ibid 6.

⁴ Law Council of Australia, *Justice Project: Final Report, Recent Arrivals and Asylum Seekers Chapters* (Part 1) < <https://www.lawcouncil.asn.au/justice-project/final-report>>.

*measures are in place can structural vulnerability be identified, 'full inclusion' be achieved and any notion of the 'right' to access the Internet be truly realised.*⁵

9. Accordingly, a number of countries have, in varying forms, formally recognised the right to access the Internet. It has been argued at the international level that such access is critical, particularly in terms of the right to freedom of expression, and in the redressing of structural disadvantage.⁶ The United Nations has recommended that specific attention is given to vulnerable groups to facilitate access to technology, in particular the internet.⁷

Digital exclusion and Aboriginal and Torres Strait Islander communities

10. As noted above, the issue of equality of access to technology and innovation is raised in the Issues Paper, including availability and affordability. This issue is of particular importance to Aboriginal and Torres Strait Islander peoples, who compared to the wider community experience low rates of digital inclusion.⁸
11. Access to mobile phones and the internet in remote Aboriginal communities plays an integral role in facilitating communication over long distances, including with relatives needing to live in towns for medical reasons or education. In addition, mobile phones are often the only means for individuals to access online services such as banking and government websites.
12. However, remoteness and a lack of accessible services, combined with digital exclusion, can result in the denial of important services for Aboriginal and Torres Strait Islander peoples, compounding existing disadvantage. Recently, evidence to the Banking Royal Commission taken in Darwin included the example of an Aboriginal woman from a remote community 100 kilometres outside of Katherine, with one ATM machine. She had been charged significant fees through use of the ATM, along with dishonour and overdrawn fees, and was being assisted by a financial counsellor to switch to a fee-free basic bank account. After several months of interaction with the ANZ Bank, she still did not have a basic bank account, even with devoted assistance from the financial counsellor. This was largely due to complex technological systems utilised by the bank, and a lack of flexibility in terms of service delivery, including oversights regarding consideration of cultural factors and the technological capability of customers.⁹
13. It is submitted that measures that address access to technology in remote Aboriginal communities are needed. This is not limited to internet and mobile phone technology, but also includes access to medical technology. For example, the Law Council is informed by the Law Society of South Australia that a number of Anangu people are forced to move to Alice Springs or Port Augusta to receive dialysis. This can be traumatising for Aboriginal people, not just with respect to dealing with their illness, but having to relocate vast distances from their community and land for long periods of time to receive treatment. The below discussion on access to justice outlines further technological barriers and challenges associated with remoteness.

⁵ Australian Human Rights Commission *Background paper: Human rights in cyberspace* (2013), at: <www.humanrights.gov.au/our-work/rights-and-freedoms/publications/background-paper-human-rights-cyberspace>.

⁶ Ibid.

⁷ United Nations, *World Summit on the Information Society: Plan of Action* (2003) note 166, para 10(c).

⁸ Julian Thomas et al, *Measuring Australia's Digital Divide: The Australian Digital Inclusion Index 2017* (RMIT University, 2017) 6.

⁹ Commonwealth, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, Transcript of Proceedings, Darwin, 5 July 2018, 3986- 4007.

14. New technologies, especially those relating to health, education and related fields, can improve access to services and improve outcomes on a range of socio-economic indicators. However, they must be designed with accessibility and cultural factors in mind, and delivered alongside people-centred services, to avoid further disenfranchisement and exclusion. This demonstrates how human rights and new technology intersect, particularly with respect to the right to equality and non-discrimination.

New Technologies and Access to Justice

15. The Law Council's Justice Project Final Report explored the impact of new technologies upon access to justice outcomes for groups experiencing significant disadvantage and made a number of key findings and recommendations in this regard.

16. Information gleaned through the Justice Project suggests that technology can assist many marginalised people to better access legal assistance and courts - provided that they have sufficient technological and legal capability, including reasonable literacy and education levels to process the information received, and access to high quality technology.¹⁰ Others will continue to have a strong need for personal, face-to-face services and processes. For example, the Victorian Multicultural Commission highlighted that an over-reliance on presenting legal and related government information in online formats was particularly problematic, given poorer English and literacy, or technological literacy and access amongst many recent arrivals.¹¹ WEstjustice similarly characterised providing important legal information purely online and in English as an 'almost useless.'¹²

17. In the context of legal service delivery, face-to-face advice is often critical to service effectiveness. This important point should not be overlooked as policymakers engage with technological options for legal service delivery. In addition to barriers related to capability, mistrust of the justice system is a primary barrier for many people experiencing disadvantage, necessitating face-to-face relationships with legal advisers to build trust and a willingness to engage.¹³

18. Concerns were expressed by Justice Project stakeholders that an undue emphasis on expediency in legal service delivery does not accommodate many disadvantaged clients' needs, and may jeopardise their longer-term outcomes as critical issues remain unidentified or unresolved.¹⁴ Efficiency should not be the only, or main, driver of decisions to implement technology-based justice solutions.

19. Caution also needs to be taken not to apply technological solutions indiscriminately, given that a 'one-size fits all' approach will not suit many people experiencing disadvantage. Careful consideration is needed of possible technological responses: of why and for whom they may be effective, in what circumstances, and the likely costs, risks and benefits.

¹⁰ Law Council of Australia, *Justice Project Final Report: Legal Services* (2018) 33.

¹¹ Law Council of Australia, *Justice Project Final Report: Recent Arrivals to Australia* (2018) 18 citing Victorian Multicultural Commission, *Submission No 104*.

¹² Law Council of Australia, *Justice Project Final Report: Recent Arrivals to Australia* (2018) 18 citing Consultation, 18/08/2017, Melbourne (WEstjustice) .

¹³ Law Council of Australia, *Justice Project Final Report: Legal Services* (2018) 26 citing eg Liz Curran, *Draft Working Paper for a Research and Evaluation Report for the Bendigo Health-Justice Partnership: A Partnership between ARC Justice Ltd and Bendigo Community Health Services* (2016) 146- 171.

¹⁴ Law Council of Australia, *Justice Project Final Report: Legal Services* (2018) 32.

20. However, when used appropriately technology can effectively underpin legal services to enhance access to justice in a range of contexts. The Justice Project noted the following illustrative examples:

- Technology can reach certain groups who may not otherwise access legal assistance. The National Children's and Youth Law Centre submitted to the Justice Project the example of its national *Lawmail* email-based service. The model enabled young people to bypass their parents' intervention, removing their physical obstacles, and overcoming their embarrassment about seeking help.¹⁵ Demand for the service increased 30 per cent between 2012 and 2014.¹⁶ Other examples include technology that enables access to lawyers and legal information to people in forced marriages, who have little freedom but retain access to a smartphone,¹⁷ and resources that assist LGBTI+ persons who are not 'out' and wish to access legal information in the safety and privacy of their home.¹⁸
- Technology can support 'missing middle' service approaches – the 'missing middle' refers to those who cannot afford private legal assistance, but are not eligible to obtain free legal assistance. This group is best suited to utilising 'self-help' options made viable through various technologies. For example, the Consumer Action Law Centre's online self-help tool, which combats unfair insurance contracts by automatically generating letters demanding termination of the contract and return of paid premiums, has generated \$700 000 in claims against insurers.¹⁹ Justice Connect also directs capable users to online self-help resources prior to accessing its self-representation service.²⁰
- Technology can also provide 'backroom technology' to assist lawyers to deliver frontline face-to-face services effectively, including through sophisticated phone and computer systems which can handle multiple users, and search engine optimisation to triage clients and prioritise vulnerable consumers.²¹

21. With respect to courts and tribunals, new technologies have the capacity to generate significant time and cost savings for court systems, as well as for court users. In certain circumstances and with respect to specific groups, reforms, such as electronic filing of court documents and electronic allocation of court dates, have the potential to reduce litigation costs, eliminate unnecessary and expensive formal correspondence, save time, simplify procedures and improve the safety of court proceedings.²²

22. Nonetheless, it is important that technology complements, not replaces, face to face court and tribunal proceedings. For example, the overreliance on audio-visual link (AVL) for prisoners can exacerbate communication, comprehension and geographical

¹⁵ Law Council of Australia, *Justice Project Final Report: Legal Services* (2018) 35, citing National Children and Young People's Law Centre, *Submission No 100*.

¹⁶ *Ibid.*

¹⁷ Law Council of Australia, *Justice Project Final Report: Legal Services* (2018) 35, citing Consultation, 21/08/2017, Sydney (Anti-Slavery Australia); Australian Lawyers for Human Rights, *Submission No 57*.

¹⁸ Law Council of Australia, *Justice Project Final Report: Legal Services* (2018) 35, citing Consultation, 23/08/2017, Brisbane (LGBTI Legal Service).

¹⁹ Law Council of Australia, *Justice Project Final Report: Legal Services* (2018) 35, citing Consultation, 17/08/2017, Melbourne (Consumer Action Law Centre).

²⁰ Law Council of Australia, *Justice Project Final Report: Legal Services* (2018) 35, citing Justice Connect, *Submission No 125*.

²¹ Law Council of Australia, *Justice Project Final Report: Legal Services* (2018) 35, citing Consultation, 17/08/2017, Melbourne (Consumer Action Law Centre); Consultation, 14/08/2017, Melbourne (LIV and Victorian Bar).

²² See, eg, Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) 19.

barriers. However, when it is used appropriately, AVL can enable prisoners to avoid long journeys to and from courts and the associated strip-searches and other hardships of extenuated travel.²³ Over-reliance on online court processes been criticised as depersonalising the claimant, hindering the credibility of the case, and undermining due process. One comprehensive statistical analysis of immigration decisions in the United States found that asylum applicants who had in-person hearings were granted asylum at double the rate of those who had video-conference hearings.²⁴

23. The effectiveness of technology in the justice system context also relies on the existence of reliable infrastructure to support online processes and proceedings, compatible technology between parties, and a willingness and capacity of court users, lawyers and judicial officers to use technology. Justice Project stakeholders often reinforced that technological solutions are an important part of the mix in addressing access to justice in regional, rural and remote (RRR) areas, and called for greater technological solutions to be made more accessible. However, they also cautioned that it is essential to consider more digitally excluded RRR residents – for example, Regional Alliance West submitted the following:

*Technology is often seen as the solution to access to justice issues in RRR areas however it cannot be relied upon in isolation. It is certainly a useful tool but good, reliable phone and internet services are not always available in rural and remote communities (and sometimes not at all). A reliance on technology fails to address the needs of people experiencing additional indicators of disadvantage. For example, we were involved in a partnership with Legal Aid WA to develop three online self-help guides for clients with corresponding online training modules for legal workers. We think these are an excellent resource but they will be of limited benefit to clients without appropriate literacy and computer literacy, those who are particularly stressed and overwhelmed, and those that just don't have access to the technology.*²⁵

24. Research suggests that poor quality internet connections and limited telephone coverage continue to pose real problems in certain RRR areas, particularly more remote communities.²⁶ Investment in technology is particularly necessary in these areas. Hart's review of the use of technology in RRR Queensland indicated that metropolitan policy-makers tend to wrongly assume that the necessary infrastructure – including, for example, National Broadband Network – exists to enable full take-up of initiatives.²⁷ The

²³ Law Council of Australia, *Justice Project Final Report: Prisoners and Detainees* (2018), 35 citing Anne Grunseit et al, Law and Justice Foundation of New South Wales, *Taking Justice into Custody: The Legal Need of Prisoners* (2008).

²⁴ Susan Banki and Ilan Katz, 'Resolving Immigration Status: Part 1: Review of the International Literature, Report prepared for the Department of Immigration and Citizenship' (Social Policy Research Centre, University of New South Wales, 2009) 35

²⁵ Law Council of Australia, *Justice Project Final Report: Rural Regional and Remote Australians* (2018) 21 citing Regional Alliance West, *Submission No 94*.

²⁶ See, eg, Mary Dracup and Richard Coverdale, 'E-Learning opportunities and challenges for legal education in Rural Victoria' (2015) 40:2 *Alternative Law Journal* 127, 129; Law Institute of Victoria, *Department of Justice and Regulation Access to Justice Review: Submission to the Department of Justice and Regulation*, (1 March 2016) 33 <<https://www.liv.asn.au/Staying-Informed/Submissions/submissions/March-2016/Department-of-Justice-and-Regulation-Access-to-Jus>>.

²⁷ Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014), 20; Caroline Hart, "Better justice?" Or "Shambolic justice?" Governments' use of information technology for access to law and justice, and the impact on regional and rural legal practitioners' (2017) 1 *International Journal of Rural Law and Policy*.

Justice Project chapter on RRR Australians includes further discussion, along with helpful data on technological access in RRR areas.²⁸

Technology and access to justice for prisoners and detainees

25. An increasingly common way for prisoners and detainees to access legal services (including both access to legal advice and access to court systems) is the use of technology and, in particular, AVL technology such as videoconferencing.²⁹ While technology is now widely used to facilitate the provision of legal assistance to those in prison, there have been very few formal evaluations of this approach.³⁰
26. On its face, technology can improve how often (and how long) advice is given to prisoners. However, it is important to note that access to information or services, does not necessarily mean access to justice. Dr Carolyn McKay has noted that, for prisoners, in addition to the ability to obtain legal advice and representation, access to justice also includes the ability to 'participate in and comprehend legal proceedings'.³¹ Over-reliance on technology for lawyer-client interaction, legal education and court proceedings can severely impact on prisoners' ability to 'participate in and comprehend' their legal issues.³²
27. Capability of prisoners to use technology can be limited by two compounding factors. Firstly, prisons have commonly been acknowledged as 'technological dead zones' and that many prisoners, particularly older and long term prisoners, may be 'technically illiterate'.³³ Second, many prisoners suffer from issues such as low education, poor literacy or mental health conditions and often are highly distrustful of the legal system. These issues can make it highly difficult for many prisoners to interpret information provided or openly provide information to a lawyer other than in a face-to-face format.³⁴ In particular, self-help tools using technology (such as access to legal information over the internet or on DVD), if not supported by face-to-face support is highly unlikely to be effective.³⁵
28. The physical and systemic barriers of prison, including limited access to computers, the structure of the prison day, lockdowns, time intrusive security operations and reliance on prison staff, can exacerbate these technological barriers.³⁶ Physical distraction from court proceedings when technological solutions are engaged can also significantly impact on how prisoners interact in those proceedings. Issues with AVL systems, including difficulty confidentially communicating with a lawyer, appearing in prison

²⁸ Law Council of Australia, *Justice Project Final Report: Rural Regional and Remote Australians* (2018) <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Rural%20Regional%20and%20Remote%20%28RRR%29%20Australians%20%28Part%201%29.pdf>>.

²⁹ Carolyn McKay, 'Face-to-interface Communication: Accessing Justice by Video Link from Prison' in Asher Flynn and Jacqueline Hodgson, *Access to Justice & Legal Aid: Comparative Perspectives on Unmet Legal Need* (Bloomsbury, 2017) 103.

³⁰ Ibid 116-7. See also, Suzie Forell, Meg Laufer and Erol Digiusto, Law and Justice Foundation of New South Wales, *Legal assistance by video conferencing: what is known?* (2011) 9.

³¹ Carolyn McKay, 'Face-to-interface Communication: Accessing Justice by Video Link from Prison' in Asher Flynn and Jacqueline Hodgson, *Access to Justice & Legal Aid: Comparative Perspectives on Unmet Legal Need* (Bloomsbury, 2017) 103, 107.

³² Ibid.

³³ Ibid 103, 112.

³⁴ Anne Grunseit et al, Law and Justice Foundation of New South Wales, *Taking Justice into Custody: The Legal Need of Prisoners* (2008) 130-1.

³⁵ Pascoe Pleasence et al, *Reshaping legal assistance services: building on the evidence base* (Law and Justice Foundation of New South Wales, April 2014) 142-4.

³⁶ Law Council of Australia, *Justice Project Final Report: Prisoners and Detainees* (2018) 37 citing Brett Stuart Williams, *Submission No 71*.

uniform and difficulty understanding the proceedings have been noted as detracting from the sense of fairness or justice that is felt by many prisoners.³⁷ McKay argued that such issues 'subtly and incrementally erode the rights of prisoners and common law principles that structure prisoners' legal engagement and access to justice'.³⁸

29. On the other hand, during Justice Project consultations, stakeholders emphasised the importance of ensuring access to technology for individual prisoners as key to ensuring access to justice. The Prisoners Legal Service (Queensland) identified that lack of access to technology and reliance on communication systems such as mail and telephone is often a significant barrier to access to justice for prisoners.³⁹ These issues make it difficult for lawyers to collect information from their clients, impacting on the completeness of legal advice that can be offered. Lack of access to technology can also impede the way prisoners can access information to work on their own case. For example, Prisoners Legal Service (Queensland) estimated that 50 per cent of the mail it has received is from prisoners asking them print information that they had been unable to access themselves.⁴⁰ Additionally, reliance on postal mail as the primary form of communication (in order to protect privilege) creates significant difficulties for illiterate prisoners.⁴¹ There is a further argument to be made that exposure to technology is vital to prisoners' rehabilitation and re-entry, as it allows them to keep pace with changes in the world outside of prison.⁴² This calls for an evidence-based approach to determine how access to technology can be improved for those within the prison system.
30. While it can be argued that for every advantage technology can create for prisoners and detainees in accessing services, there may be an associated disadvantage which the use of technology is only likely to further increase.⁴³ The existence of these disadvantages, does not necessarily mean that technology should not be used to provide legal services to prisoners or juvenile detainees. Anecdotal evidence suggests that use of technology is likely to be most effective and efficient where those tasked with providing legal support are able to establish an initial trust and rapport through face-to-face interaction⁴⁴ and where prisoners have sufficient legal and technical capability engage with it. The Justice Project therefore advised that governments prioritise expanding access to legal assistance and information to prisoners through the use of technology (including video conferencing) that complements rather than replaces face-to-face legal services and court processes.

Justice Project recommendations

31. The Justice Project Final Report made the following two overarching recommendations with respect to technology and access to justice outcomes:

³⁷ Anne Grunseit et al, *Taking Justice into Custody: The Legal Need of Prisoners* (Law and Justice Foundation of New South Wales, 2008) 107.

³⁸ Law Council of Australia, *Justice Project Final Report: Prisoners and Detainees* (2018) 37 citing Carolyn McKay, *Submission No 58*.

³⁹ Law Council of Australia, *Justice Project Final Report: Prisoners and Detainees* (2018) 37 citing consultation, 23/08/2017, Brisbane (Prisoners Legal Service).

⁴⁰ *Ibid*.

⁴¹ *Ibid*.

⁴² See, eg, Mirko Bagaric and Dan Hunter, 'Give prisoners internet access for a safer and more humane community' (16 November 2016) *The Conversation* <<http://theconversation.com/give-prisoners-internet-access-for-a-safer-and-more-humane-community-68543>>.

⁴³ Law Council of Australia, *Justice Project Final Report: Prisoners and Detainees* (2018) 37 citing Carolyn McKay, *Submission No 58*.

⁴⁴ Carolyn McKay, 'Face-to-interface Communication: Accessing Justice by Video Link from Prison' in Asher Flynn and Jacqueline Hodgson, *Access to Justice & Legal Aid: Comparative Perspectives on Unmet Legal Need* (Bloomsbury, 2017) 103, 110-2.

Technological innovation should be pursued in the delivery of legal services to clients experiencing disadvantage, including through dedicated funding streams. At the same time, a nuanced, evidence-based and people-centred approach is needed to avoid leaving digitally excluded groups behind.

Further research should be undertaken to build the evidence base for the effectiveness of online courts, tribunals and dispute resolution forums in Australia in assisting people experiencing disadvantage. In particular, governments should prioritise research and policy development regarding:

- *the forums in which online courts and tribunals are most appropriate;*
- *the availability of sufficient technology to support their effective uptake, particularly in RRR areas;*
- *the relative benefits and disadvantages of online courts and tribunals, and to which parties these apply;*
- *their likely impact upon disadvantaged online court and tribunal users, having regard to their technological and legal capability; and*
- *the necessary safeguards which are needed to support disadvantaged users.*

Artificial intelligence

32. The Issues Paper notes that AI is increasingly being used in a broad spectrum of decision making that engages people's human rights. AI can be used to provide an input that a human decision maker can weigh up among other considerations and, at the other end of the decision-making spectrum, there can be little or no human involvement in the decision, beyond acting on the AI-generated input.

33. The Law Council considers that AI-informed decision making may both promote and threaten the protection of human rights. AI may improve human rights by making access to justice cheaper and may remove human bias in decision making. However, it may also introduce the risk of design biases being built into a system and a lack of transparency in decision making. The Law Council acknowledges that there is a need to proceed with caution, in this space, to ensure the benefits of AI can be enjoyed without undue limitations or encroachments on human rights.

Discrimination and bias

34. The Law Council submits that the continued rise of AI across many systems in everyday life has the potential to effectively institutionalise discrimination, diminishing accountability in relation to the making of AI informed decisions. As the Issues Paper notes, instances of unjust consequences arising from AI informed decision-making have already occurred internationally in areas including recruitment, performance management and issuance of bail.

35. In 2018, the EU Fundamental Rights Agency stated in a report that, if AI informed decision making models are informed by biased data or algorithms, 'discrimination will be replicated, perpetuated and potentially even reinforced'.⁴⁵ It is further noted that, in a report published in April 2018, the UK House of Lords Select Committee on Artificial

⁴⁵ European Union Agency for Fundamental Rights, *#BigData: Discrimination in data-supported decision-making* (FRA Focus, 2018) 10.

Intelligence stated that ‘the prejudices of the past must not be unwittingly built into automated systems, and such systems must be carefully designed from the beginning’.⁴⁶

36. Outcomes may be skewed by how a question is asked or how a proposition is framed, and AI systems have the potential to be manipulated through algorithmic bias if the limitations and possibilities of computers and robot machines are poorly applied or understood. The lack of diversity and inclusion in the design of AI systems is a key concern, as such systems may reinforce discrimination and prejudices while having an appearance of objectivity.⁴⁷
37. In a UK Spectator article published in 2014 and based on the work of the German academic, Gerd Gigerenzer, Rory Sutherland explains that the formulation of a question and the ‘presentation of the data affects our judgment by a factor of thousands: from 0.04 percent to 90 percent’.¹ Sutherland warns that we need to be alert to this kind of error as computers and big data (including AI and analytics) make it easy to generate spurious, but plausible, statistics on almost any subject.² The Law Council suggests that a 90 percent variant can negatively impact on human rights, demanding checks and balances aimed to rectify injustice.
38. When data-based decision making reflects societal prejudices it reproduces, and can reinforce the biases of that society, both explicit and implicit. The Law Council considers that there is scope for data-based decisions to be made transparent and be reviewable in the design stage. It is important that data-based decisions are not susceptible to implicit or unconscious bias. Similarly, decisions made without questioning the results of a flawed algorithm can have serious repercussions for our human rights not to be discriminated against for characteristics such as age, gender, disability, sexual orientation and race.
39. However, the Law Council suggests that there are circumstances where risk assessment algorithms can be used effectively and appropriately. An example, provided by the Law Institute of Victoria, is the Arnold Foundation Public Safety Assessment (**AFPSA**) risk assessment algorithm being used at the pre-trial hearing (or bail hearing) stage to determine the likelihood of a defendant failing to appear and the likelihood of a defendant re-offending while on release.⁴⁸
40. Unlike many other risk assessment algorithms, the AFPSA factors and weighting are publicly available. In addition, the Law Council understands that the Arnold Foundation submits itself to evaluation by independent research organisations to ensure that the algorithm operates without predictive bias.⁴⁹
41. It is relevant here that Australia is party to seven of nine core international human rights treaties, including the International Covenant on Civil and Political Rights (**ICCPR**). Articles 9 and 14 of the ICCPR respectively provide for the right to freedom from arbitrary detention and the right to a fair hearing and fair trial. The Law Council suggests

⁴⁶ House of Lords of the United Kingdom Select Committee on Artificial Intelligence, *AI in the UK: ready, willing and able?* (2018) 5.

⁴⁷ See, eg, Jackie Snow, ‘“we’re in a diversity crisis”: co-founder of Black in AI on what’s poisoning algorithms in our lives’, *MIT Technology Review* (online) 14 February 2018 <<https://www.technologyreview.com/s/610192/were-in-a-diversity-crisis-black-in-ais-founder-on-whats-poisoning-the-algorithms-in-our/>>; Danny Guilory, ‘Why Adding Diversity in Artificial Intelligence is Non-negotiable’ *Redshift* 14 September 2017 <<https://www.autodesk.com/redshift/diversity-in-artificial-intelligence/>>.

⁴⁸ Public Safety Assessment, *Frequently Asked Questions* <<https://www.psapretrial.org/about/faqs/>>.

⁴⁹ *Ibid.*

that the absence of clear explanations of the factors considered by the algorithm used to determine an individual's right to freedom and the weighting given to each factor may result in outcomes amounting to arbitrary detention, procedural unfairness, inequality, and impact upon the requirement that courts remain independent and impartial.⁵⁰

42. The Law Council submits that such risk assessment algorithms used in judicial proceedings should be open for public scrutiny. Secrecy of an algorithm that results in potentially harsher sentencing for criminal defendants arguably violates their right to due process, right to appeal, and right to a fair hearing. It has also been widely established that there is greater risk that those who are sentenced are less likely to comply with sentencing orders if they perceive the process is unfair and lacks transparency.⁵¹

Bias and Aboriginal and Torres Strait Islander communities

43. As noted above, and highlighted in the Issues Paper, there is the potential for racial bias to be reinforced through AI decision making tools. The Law Council considers that there are particular challenges that AI presents to Aboriginal and Torres Strait Islander people. For example, much conversation in Aboriginal and Torres Strait Islander societies may not follow the Western question and answer method. Differences in communication styles are further canvassed in the Aboriginal and Torres Strait Islander chapter of the Justice Project Final Report.⁵² An Aboriginal person may therefore feel uncomfortable answering direct questions within AI technology.
44. The Law Society of South Australia (**LSSA**) has pointed to the Lawyers' Protocols for Dealing with Aboriginal Clients in South Australia. The document provides a set of six protocols, which provide discussion and tips for legal practice that is culturally attuned to Aboriginal peoples' requirements, one of which notes the need to ensure that plain English is used to the greatest extent possible. This guidance acknowledges that much conversation in Aboriginal societies does not follow the Western question and answer method. Furthermore, it is suggested to avoid, as far as possible, leading questions as they may cause confusion and be likely to result in the Aboriginal person giving the answer they think you want to hear. Open ended questions allow more detail to be ascertained.
45. In addition, silence is an important and positively valued aspect in some Aboriginal cultures. Therefore, an Aboriginal person may take longer to answer questions. The LSSA has suggested that they should be allowed this time and not be interrupted. For example, 30 seconds should not be considered a long time to wait.
46. The LSSA also notes the use of iris identification technologies, which now occurs in South Australian prisons for visitors. This technology may be culturally challenging for some Aboriginal people who, for cultural reasons, avoid eye contact. This is a further example of the challenges of new technologies for Aboriginal people.
47. It is submitted that new technology which incorporates AI communication would benefit from an understanding of these issues, and subsequent regulation of AI technology

⁵⁰ Attorney-General's Department, *Fair trial and fair hearing rights*, <www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Fairtrialandfairhearingrights.aspx>.

⁵¹ Tom R Tyler, 'What Is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22 *Law & Society Review* 103, 103–134; Tom R Tyler, 'Why People Obey the Law' (2006) *Princeton University Press*; Tom R Tyler, 'Legitimacy and Compliance: The Virtues of Self-regulation' in A Crawford and A Hucklesby (eds), *Legitimacy and Compliance in Criminal Justice* (Routledge, 2012) 8, 8–28; Mirko Bagaric, Dan Hunter and Nigel Stobbs, 'Can Sentencing Be Enhanced by the Use of Artificial Intelligence?' (2017) 41 *Criminal Law Journal* 261, 266.

⁵² See Law Council of Australia, *Justice Project Final Report: Aboriginal and Torres Strait Islander Peoples* (2018) 31.

should be sensitive to these issues to address potential racial bias, particularly with respect to Aboriginal and Torres Strait Islander people. Consideration should also be given to the appropriateness of broad adoption of AI with respect to this group, noting that there may be instances where face to face, culturally competent service delivery remains critical those who already face significant disadvantage in the justice system. Similar concerns apply to other culturally and linguistically diverse groups as noted above. An overreliance on new technologies and AI may not always be suitable in these contexts, and may serve to add a further barrier to access to justice and equality before the law.

Example: Centrelink Robodebt

48. The use of AI in administrative processes may entrench exclusion and undermine procedural fairness for vulnerable members of the community. An example of this in the Australian context is the Centrelink online data matching system (referred to as 'Robodebt'). The program used an online compliance intervention system to raise and recover debts. It used data matching technology to match 'the earnings recorded on a customer's Centrelink record with historical employer-reported income data from the Australian Taxation Office'.⁵³
49. The data-matching program had previously been completed manually and the new program allowed the Department of Human Services (**DHS**) to investigate past discrepancies where it would not otherwise have had the resources to do so.⁵⁴ Under the online data matching system, where a discrepancy and debt were found, an automated letter was sent to the customer raising the debt. Debts were calculated depending on how the income was entered into the system by the customer.
50. If the income data had not been entered fortnightly by the customer, the program would average out the income and the debt was at risk of being overstated.⁵⁵ Centrelink required customers to respond to debt notices to prove that they did not owe the debt. The Law Council previously highlighted that this process inappropriately shifted the burden and may constitute a jurisdictional error, particularly where the initial debt identification methods were flawed and the decision-maker had made a finding of fact unsupported by evidence.⁵⁶
51. An investigation by the Commonwealth Ombudsman revealed that the initial contact by DHS to customers pursuing a debt was unclear, excluded crucial information about the program, and provided no information to customers about how they could contact DHS about the debt after they had been automatically notified of its existence. The lack of transparency about the automated process used by Centrelink compounded these issues.⁵⁷

⁵³ Commonwealth Ombudsman, 'Centrelink Automated Debt Raising and Recovery System: A report about the department of human services' online compliance intervention system for debt raising and recovery' (2017) < https://www.ombudsman.gov.au/__data/assets/pdf_file/0022/43528/Report-Centrelinks-automated-debt-raising-and-recovery-system-April-2017.pdf>.

⁵⁴ Ibid, 5.

⁵⁵ Ibid, 2.

⁵⁶ Law Council of Australia, Submission No 155 to Senate Standing Committee on Community Affairs, *Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative*, 24 April 2017.

⁵⁷ Commonwealth Ombudsman, 'Centrelink Automated Debt Raising and Recovery System: A report about the department of human services' online compliance intervention system for debt raising and recovery' (2017) 2 < https://www.ombudsman.gov.au/__data/assets/pdf_file/0022/43528/Report-Centrelinks-automated-debt-raising-and-recovery-system-April-2017.pdf>.

52. There was an apparent failure to consider the capabilities and needs of the intended user-base of welfare-recipients at the planning stage. In this context, the National Social Security Rights Network's submission to the Justice Project contended that the technological based process was inappropriate for many people experiencing significant disadvantage.⁵⁸ For example, no systems were in place for vulnerable welfare recipients receiving letters raising debts, such as those with cognitive impairment or mental health conditions.⁵⁹ Earlier and closer consideration of the capabilities and circumstances of many Centrelink recipients, which include people with disability, older persons, people from non-English-speaking backgrounds or lacking literacy skills, may have prevented many subsequent problems and complaints arising from the initiative.⁶⁰
53. The Centrelink system caused enormous concern amongst vulnerable recipients, who were faced with an inaccessible system and inadequate complaint processes.⁶¹ It also placed extraordinary pressure on community legal centres and legal aid commissions, noting that only small proportions are funded to deal with income support issues. Some centres reported that they experienced a three-fold increase in demand in early 2017. The Welfare Rights Centre reported that it turned away 20 to 30 per cent of people seeking assistance.⁶²
54. Drawing from this example, it is apparent that oversight of decision-making systems should occur at the policymaking and design-stage, and that processes should be in place to consider legal and human rights concerns, along with the downstream effects of these systems on vulnerable groups and the appropriateness of the system design for the population in question.

Privacy and new technology

55. Privacy is a fundamental human right that is essential in order to live with dignity and security. It is increasingly common for personal data to be collected with or without our knowledge through the internet, apps, and social media platforms which harness AI technology. Data collection is often used to track, profile, and predict the behaviour of the population. Data collection is often a compulsory precondition to the provision of services, many of which in turn provide more data about an individual.
56. The Law Council is concerned that laws protecting individuals against breach of privacy have not kept pace with technological developments, and there is a need for such protections to be reviewed and reformed. New technologies, such as those that enable corporations and governments to build up detailed profiles of individuals based on their personal data and browsing history, present an unprecedented scope for serious invasions of privacy. The right to privacy is recognised as a fundamental human right in the Universal Declaration of Human Rights, the International Covenant on Civil and

⁵⁸ Law Council of Australia, *Justice Project Final Report: Broader Justice System Players* (2018) 18, citing National Social Security Rights Network, *Submission No 81*.

⁵⁹ Christopher Knaus 'Centrelink's new robodebt trial bypassed previous safeguard for mentally ill' *The Guardian* (Online) 15 August 2018.

⁶⁰ Law Council of Australia, *Justice Project Final Report: Broader Justice System Players* (2018) 18.

⁶¹ See generally Law Council of Australia, *Justice Project Final Report: People Experiencing Economic Disadvantage* (2018); Law Council of Australia, *Justice Project Final Report: People with Disability* (2018).

⁶² Christopher Knaus, 'Legal aid services join up to deal with high volume of Centrelink debt cases', *The Guardian* (online), 1 April 2017 <<https://www.theguardian.com/australia-news/2017/apr/01/legal-aid-services-join-up-to-deal-with-high-volume-of-centrelink-debt-cases>>.

Political Rights (**ICCPR**), the Convention on the Rights of the Child (**CRC**) and other instruments and treaties.⁶³

57. Article 17 of the ICCPR states:

(1) *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*

(2) *Everyone has the right to the protection of the law against such interference or attacks.*⁶⁴

58. Article 16 of the CRC uses similar terms in relation to children.⁶⁵

59. Australia's obligations under the ICCPR and CRC require consideration of how incursions of privacy enabled by new technologies can best be protected. The 2014 Australian Law Reform Commission (**ALRC**) inquiry into Serious Invasions of Privacy in the Digital Era canvassed these issues in detail, including options for reform.⁶⁶

60. As the ALRC recommended in 2014, the design of legal privacy protection should be 'sufficiently flexible to adapt to rapidly changing technologies and capabilities, without needing constant amendments'.⁶⁷ This recommendation is particularly salient in light of the exponential pace at which new technologies such as AI and blockchain are developing, and the evolving scope of their application.

61. Many new technologies also rely on biometric data building up sizable data bases about unique physical or biological qualities of individuals that are not capable of being updated changed or updated yet are increasingly used as a form of identification. At a legal and regulatory level privacy and data protection are focused on information rights only. As noted below, 'personal information' in Australia is narrowly defined to focus solely on information and specifically on information that does or can reasonably identify an individual or is 'about' the individual. The definition does not address other factors, such as physical factors, involved in the data collection process provided the collection process is of itself fair and lawful. Technologies such as biometric technologies, by necessity call into question the other components of privacy such as physical privacy and requires the law to develop in a way that reflects the fact that new technologies traverse the physical and the digital domains.

62. The Law Council recommends that serious consideration be given to the creation of a new role, the Commissioner for Biometric data similar to the model applied in the UK or as an extension under current framework as administered by the Australian Information Commissioner the under the Privacy Act 1988 and related legislative instruments.

⁶³ See *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948) art 12. *International Covenant on Civil and Political Rights* opened for signature 16 December 1976 (entered into force 23 March 1976) 999 UNTS 171 and 1057 UNTS 407 art 17; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 16.

⁶⁴ *International Covenant on Civil and Political Rights* opened for signature 16 December 1976 (entered into force 23 March 1976) 999 UNTS 171 and 1057 UNTS 407 art 17

⁶⁵ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 16.

⁶⁶ Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (ALRC Report 123), at Recommendation 5-1 and 5-2

⁶⁷ *Ibid* [2.30].

63. As noted above, technological developments can be privacy enhancing and support related rights. Sometimes the challenge presented is that the technological novelty presents uncertainty from a regulatory perspective and in extreme cases existing laws and regulatory structures are (or are perceived) as barriers to innovation. Noting that new technologies can present opportunities and at the same time test existing regulatory frameworks, the Law Council notes that various testing environments have been considered by regulators. For example, the UK Information Commissioner's Office has worked closely with the UK Financial Conduct Authority and has recently completed the early stages of considering a 'sandbox' initiative⁶⁸. Regulators in Australia, such as the Australian Securities and Investments Commission (**ASIC**) have conducted a similar sandbox initiative for the testing of some products that typically require a license as part of the ASIC Innovation Hub⁶⁹. The regulatory testing environment can provide additional transparency and much needed facts about impacts of emerging technologies while providing an opportunity to set some human rights, including privacy, minimum standards and protections.
64. The Law Council recommends that serious consideration be given to the creation of a 'regulatory sandbox' or sandboxes that expressly address human rights as key criteria for assessment of the given technology. Consideration should also be given to adding human rights and privacy as additional references for existing sandboxes.
65. In relation to the regulatory approach to privacy concerns and new technologies, the Law Institute of Victoria (**LIV**) has suggested that any consideration of 'privacy' in the Australian legal context must be qualified in relation to telecommunications (circuit switched networks) and broadcasting laws (packet switched networks), because different rules apply in relation to human rights and enforcement. Similarly, it is suggested that a distinction should be drawn between 'privacy' and 'personal information'. The LIV considers that the term 'privacy' in the *Privacy Act 1988* (Cth) is a confusing term, in that its emphasis is on personal information and the ability to identify an individual.⁷⁰
66. The LIV has pointed out that 'privacy' in the more traditional sense of not wanting others to know about oneself, or the right to be left alone, does have a part to play in human rights protection, profiling, and AI. Particularly with respect to communications travelling over telecommunication networks where behaviours are susceptible to eavesdropping, it is telecommunications law, not privacy law, that regulates this aspect of privacy, and any consideration of human rights in the digital age must consider the full body of law. Privacy law and protection of personal information do not stand alone.
67. The right to privacy is a limited right under international law. The LIV has suggested that this is particularly so in relation to the social contract and democratic government.⁷¹ Social contract is a theory that addresses the questions of the origin of society and the legitimacy of the authority of the state over an individual. Social contract arguments typically hold that individuals have consented to surrender some of their freedoms and submit to the authority of the ruler, in this case, the government acting for the state, in exchange for protection of their remaining rights.⁷² While social contract theory dates

⁶⁸ The call for evidence was completed on 12 October 2018.

⁶⁹ <https://asic.gov.au>regulatory-sandbox>

⁷⁰ Section 6, *Privacy Act 1988*

⁷¹ See, eg, Simon Chesterman, 'Privacy and Surveillance in the Age of Terror' (2010) 52(5) *Survival: Global Politics and Strategy* 31, 32-33.

⁷² *Ibid.* See also Fiona de Londres, 'Privatized Counter-terrorist Surveillance: Constitutionalism Undermined' in Fergal Davis, Nicola McGarrity, George Williams (eds), *Surveillance, Counter-Terrorism and Comparative Constitutionalism* (Taylor and Francis, 2014) 59, 65-67 citing Simon Chesterman, *One Nation Under*

back as far as the 15th century, it continues to be relevant today. This is particularly so given the Australian government's digital agenda and the plethora of data related laws recently passed and under consideration.⁷³

68. While individuals have (limited) rights to privacy, governments have an obligation and a duty to ensure the safety and security of the state and its subjects. In seeking to achieve a balance, it is acknowledged that some level of surveillance is necessary because of the increased threat of terrorism and cybercrime. However, as surveillance has increased and, with it, the collection of private information and personal information for sharing, analysis, and AI processing, there is also a need to avoid possible human rights violations.
69. In practice, data retention has expanded for purposes well beyond security concerns and cannot always be justified by the threat of terrorism or cybercrime. Increasingly, data is collected and shared for a variety of purposes including, for example, advertising or administrative convenience, by both government and corporations, without an appropriate analysis of human rights implications. Moreover, individuals are often unaware that their data is being collected in different contexts, which raises serious concerns about the extent to which they can practically consent.
70. Recently, the Australian government has proposed and implemented data sharing legislation such as the Medicare data sharing system for health providers, and proposed reforms to the national data system to optimise data sharing across government. While the aims of these reforms are worthwhile and showcase the benefits of AI and big data in improving public health and research, the Law Council suggests that these reforms must have safeguards in place that uphold human rights, such as the right to privacy and protecting personal information from unauthorised collection and misuse. Further, there should be rigorous analysis at the policy development stage prior to implementation, including an analysis of whether the benefits of the systems are worth the potential infringement of rights, including privacy, together with the risk of breaches in the future.

Privacy and Aboriginal and Torres Strait Islander communities

71. Issues of privacy and new technology have presented particular challenges in Aboriginal and Torres Strait Islander remote communities. The Law Council notes recent research carried out in central Australia and Cape York, which revealed unique problems in remote areas, many of which are caused by the sharing of devices.⁷⁴ For example, some young Aboriginal and Torres Strait Islanders are using others' social media

Surveillance: A New Social Contract to Defend Freedom Without Sacrificing Liberty (Oxford University Press, 2011).

⁷³ See eg the following Law Council submissions: Law Council of Australia, Submission to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018*, 18 October 2018 <<https://www.lawcouncil.asn.au/resources/submissions/telecommunications-and-other-legislation-amendment-assistance-and-access-bill-2018>>; Law Council of Australia, Submission to Commonwealth Treasury Department, *Exposure Draft of the Treasury Laws Amendment (Consumer Data Right) Bill 2018*, 7 September 2018 <<https://www.lawcouncil.asn.au/resources/submissions/exposure-draft-treasury-laws-amendment-consumer-data-right-bill-2018>>; Law Council of Australia, Submission to the Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry on the impact of new and emerging information and communications technology on Australia law enforcement agencies*, 6 February 2018 <<https://www.lawcouncil.asn.au/resources/submissions/inquiry-on-the-impact-of-new-and-emerging-information-and-communications-technology-on-australia-law-enforcement-agencies>>;

⁷⁴ Ellie Rennie and Tyson Yunkaporta, 'Aboriginal communities embrace technology, but they have unique cyber safety challenges'. *The Conversation* (2016) at <<https://theconversation.com/aboriginal-communities-embrace-technology-but-they-have-unique-cyber-safety-challenges-69344>>.

accounts to deliberately overstep cultural authority. It was also found that borrowing or taking someone's phone and transferring credit to another phone without permission is causing financial hardship, particularly for older people.

72. Further, sharing of devices can lead to insecure banking, causing some to avoid online banking and Centrelink accounts altogether. It can also lead to text messages being received by people for whom they were not intended, leading some people to smash phones or destroy SIM cards. There have also been instances where cyber bullying incidents threaten to escalate into community violence.⁷⁵
73. Protective measures against device theft and account hacking, such as concealing devices in clothing, may ensure cyber safety on one level, but can also be damaging to kinship relationships as traditional routines of exchange and sharing practices are disrupted.⁷⁶
74. It has been suggested that the issue of cyber safety needs to be addressed in remote Aboriginal communities.⁷⁷ This can include simple measures such as providing assistance on how to set up passwords, block people on social media and avoid scams. However, the concept of cyber safety is not necessarily recognised in Aboriginal communities and therefore measures to address this issue must be culturally appropriate and tailored to the needs of the particular community.

Privacy and the employment relationship

75. Many new technologies are deployed in the workforce. The Law Council notes that under the *Privacy Act 1988* (Cth) (**Privacy Act**) private sectors employers are exempt from compliance with the Privacy Act where the personal information is an employee record (as defined⁷⁸) and the act or practice in question is directly related to the current or former employment relationship.⁷⁹ The Law Council recommends that consideration be given to the removal of the employee records exemption.

Freedom of expression

76. Freedom of expression is another right protected under international human rights law and a democratic ideal that encourages informed decision making.⁸⁰ Indeed, Australia has an implied constitutional freedom of political communication.⁸¹
77. The Law Council submits, however, that the right to freedom of expression in a digital world where information can be rapidly and easily disseminated is complex. For example, tensions exist between ensuring public access to information and preventing hate speech or inciting violence.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ See section 6 of the Privacy Act 1988

⁷⁹ See section 7 B(4) of the Privacy Act 1988

⁸⁰ See eg *International Covenant on Civil and Political Rights* opened for signature 16 December 1976 (entered into force 23 March 1976) 999 UNTS 171 and 1057 UNTS 407 art 19.

⁸¹ See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104.

Social media censorship

78. The use of AI in detecting and removing content across social media platforms raises challenging questions. A recent Council of Europe publication on Algorithms and Human Rights noted that Facebook and YouTube have adopted a filtering mechanism to detect violent extremist content.⁸² The study noted that no information is available about the process or criteria adopted to establish which videos show extremist or clearly illegal content, creating the risk that other videos will be taken down.⁸³
79. Facebook currently uses human content moderators to review objectionable content and is reportedly investing in AI to proactively detect abusive posts and take them down.⁸⁴
80. Following the Cambridge Analytica scandal and, in an effort to be more transparent, Facebook discussed its use of AI at the F8 Conference in San Jose in May 2018.⁸⁵ Facebook also released updated Community Standard Guidelines to provide more transparency about what rules it uses to handle objectionable material.⁸⁶ Facebook's AI program will use concepts such as 'computer vision' technology to flag content that contains certain elements in an image. However, the founder of Facebook, Mark Zuckerberg, has noted that it will be more difficult to detect linguistic abuses like hate speech.⁸⁷
81. Given the role that technology giants such as Facebook and YouTube have in disseminating information, the Law Council considers that it is important that there be transparency about the use of AI in taking down content. In the absence of such transparency, there is a risk of censorship without adequate justification.

Regulating new technologies

Protection of human rights in the context of AI informed decision-making

82. In an article published in *Science* in August 2018, Mariarosaria Taddeo and Luciano Floridi of the University of Oxford described AI as 'a powerful force that is reshaping daily practices, personal and professional interactions, and environments'.⁸⁸ As AI systems become more tightly woven into everyday life, from the household to the government level, the risk of AI informed decision-making having a negative impact on human rights grows.
83. The Law Council submits that fairness, transparency, non-discrimination and accountability should be the central focus of regulation in the area of AI so as to prevent inequality from becoming further entrenched within social, governmental and economic systems. The Law Council supports the establishment of appropriately regulated AI-

⁸² Council of Europe, *Algorithms and Human Rights: Study on the Human* (March 2018) <<https://rm.coe.int/algorithms-and-human-rights-en-rev/16807956b5>>, 19.

⁸³ Ibid 19; Joseph Menn, Dustin Volz *Exclusive: Google, Facebook quietly move towards automatic blocking of extremist videos* Reuters (Online) 225 June 2016 <<https://www.reuters.com/article/us-internet-extremism-video-exclusive-idUSKCN0ZB00M>>.

⁸⁴ Richard Nieva, *How Facebook uses artificial intelligence to take down abusive posts*, CNet (online) 2 May 2018.

⁸⁵ Mark Zuckerberg at the F8 Facebook Developer Conference, Youtube Video <<https://www.youtube.com/watch?v=ZHC5BnKnThI>> at 6:00.

⁸⁶ Facebook, *Community Standards* <www.facebook.com/communitystandards/credible_violence>.

⁸⁷ Ibid.

⁸⁸ Mariarosaria Taddeo and Luciano Floridi, 'How AI can be a force for good' (2018) 361(6404) *Science* 751.

informed decision-making processes which will allow for the benefits of AI to be provided to society while protecting fundamental rights, including the rights to privacy⁸⁹ and non-discrimination.⁹⁰

84. The Law Council agrees with the position in the Issues Paper that robust and transparent procedures and guidelines are necessary regulatory steps to maximise the benefits and minimise the risks of AI in Australia. In particular, we note the importance of increased transparency as a guiding principle, which will work to equip the public with necessary information to prevent harm, as well as empower individuals to better comprehend, assess and query decisions made by AI systems. In this regard, the Law Council is of the view that members of the public should be aware of how and when AI systems are being used to make decisions about them, the implications this will have, together with options to review or challenge such processes.

International human rights law and other countries

85. States and regional bodies across the world are grappling with similar problems of how to apply existing legislation to new technologies, and how to develop new regulations to address the gaps that emerge. In the European Union, Article 22 of the General Data Protection Regulation (**GDPR**) contains rules to protect individuals in the context of automated decision-making with a legal or otherwise significant impact on them.⁹¹ The Law Council is of the view that provisions in the GDPR protecting individual rights in the face of AI-informed decision making, as well as regulating the type of data that can be used, are a benchmark for how these issues should be approached.
86. The Law Council encourages the AHRC, along with government at the state and federal level in Australia, to continue to learn from international best practice in the regulation of new technologies. It therefore supports the ongoing partnership between the AHRC and the World Economic Forum, and await the White Paper that will result in early 2019.

Principles underpinning future regulation

87. Recent issues relating to the adoption of AI around the globe highlight the potential for the utilisation of AI to create a complex web of legal, ethical and societal problems. The current legal framework for AI may have difficulties in protecting basic human rights, and consideration of a robust legal and regulatory framework may be required. This framework could:
- regulate how AI algorithms are developed;
 - regulate the areas where AI can be utilised in conjunction or in substitution for human expertise and labour; and
 - establish effective monitoring and accountability measures to better identify, control and respond to AI issues.
88. The Law Council notes that the significant pace of change in this area will create challenges for the appropriate, timely and adequate development of robust measures. However, it submits that it is essential for such measures to be developed noting the major changes that new technologies such as AI will have on the legal and economic landscape.

⁸⁹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17.

⁹⁰ *Ibid* art 24.

⁹¹ *General Data Protection Regulation (EU) No 2016/679* [2016] OJ L 119, 1, art 22.

89. The Law Council considers that the best approach to the development of legislation in this area is for principle-based laws that allow for flexibility and adaptability. As noted above, the Law Council submits that principles guiding legislation should include fairness, transparency, non-discrimination, and accountability. In practice, these principles would require that, for example:

- *Fairness.* Organisations must only collect data on a person for a legitimate purpose, and consider reasonable community expectations relating to the collection of this data.
- *Transparency.* An organisation must act with transparency when collecting, using and disclosing personal information, and disclose any use of data in an intelligible format. This should include the opportunity for individuals to correct records and to withdraw information. Furthermore, when AI informed decision-making has the potential to impinge on human rights, the source code that is the basis of these decisions should be open for public scrutiny.
- *Non-discrimination.* All algorithms that are used to make decisions about individuals must be evaluated for discriminatory effects, preferably prior to roll-out and on a periodic basis.
- *Accountability.* There must always be a line of responsibility for business and government actions to establish who is accountable for consequences arising from the use of new technologies.

90. The Law Council understands that a number of government processes are currently on foot to deal with emerging issues regarding technology. However, these processes, such as the National Data System, Australian Technology and Science Growth Plan, and the Digital Economy Strategy, are focused on growth and optimising a growing digital economy in the public interest. The Law Council submits that the frameworks developed as a result of these processes should not only focus on the economic benefit of the digital economy, but also focus on ensuring that human rights are protected, having regard to Australia's obligations at international law.

The role and responsibilities of technology companies in respecting human rights

91. In addition to the role of government in regulating new technologies, companies that are creating and operating new technologies have their own responsibility to respect human rights. These responsibilities are articulated by the UN Guiding Principles for Business and Human Rights (**UNGPs**), which were endorsed by the UN Human Rights Council in 2011.⁹² Under the UNGPs, companies are expected to respect human rights and avoid causing adverse human rights impacts through their activities. The UNGPs recommend that companies ensure compliance with this responsibility to respect human rights through:

- expressing their commitment through a statement of policy;
- implementing effective human rights due diligence to identify, prevent and address actual or potential human rights impacts;
- mainstreaming human rights consideration across business operations and activities based on that due diligence; and
- enabling access to effective grievance mechanisms by affected groups and individuals.⁹³

⁹² United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (2011) HR/PUB/11/04.

⁹³ *Ibid.*

92. To maximise the potential benefits that new technologies hold for human rights, while minimising the risks, the Law Council recommends that technology companies operating in Australia follow the UNGP steps outlined above. To spur action within the private sector, it recommends that the Commonwealth Government develop guidance for businesses on conducting effective human rights due diligence in accordance with the UNGPs. The Law Council also recommends that the Government continue reform of the National Contact Point for the OECD Guidelines on Multinational Enterprises to ensure additional resources for joint fact-finding, improved mediation services and determination of grievances where relevant.
93. In recognition of the important role that companies have to play in this area, The Law Council recommends that the AHRC build a focus on the human rights responsibilities of companies as it implements its project on human rights and technology. The AHRC is also encouraged to consult with experts on business and human rights, both within Australia and internationally, to inform their consideration of these important issues.