



Law Center

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March 7, 2019

Edward Santow
Human Rights Commissioner
Australian Human Rights Commission

Nicholas Davis
Head of Society and Innovation
Member of the Executive Committee
World Economic Forum

Via Electronic Mail at tech@humanrights.gov.au

Re: Consultation – White Paper on Artificial Intelligence: Governance and Leadership

Dear Commissioner Santow and Mr. Davis:

Thank you for the opportunity to provide comments on this important topic. Set forth below please find a brief background about my work followed by recommendations in response to some of the questions raised by the above-referenced White Paper.

Background

I am a tenured Professor of Law at the University of Houston Law Center where I hold the Doherty Chair in Legal Ethics. The Australian-American Fulbright Association recently awarded me the Distinguished Chair in Entrepreneurship and Innovation at Royal Melbourne Institute of Technology University for 2019. I am an elected member of the American Law Institute and a fellow of the American Bar Foundation. A graduate of University of Chicago Law School, I practiced law in private firms and government settings before becoming an academic in 2006. For more than a decade, I have been involved in research, writing, teaching, speaking, professional service activities and consulting relating to ethics and the legal profession. I served as a delegate to the World Economic Forum Global Agenda Councils on Rule of Law and Justice from 2013-16, and as the Reporter for the American Bar Association Presidential Commission on the Future

of Legal Services from 2014-16. An author of four books and more than twenty scholarly articles—including the West Academic casebook *PROFESSIONAL RESPONSIBILITY: A CONTEMPORARY APPROACH* (3rd Edition 2017) and the Foundation Press casebook *LEGAL ETHICS FOR THE REAL WORLD: BUILDING SKILLS THROUGH CASE STUDY* (2018)—I have written extensively about the regulation of lawyers and judges, including topics related to entrepreneurship, data analytics and innovation.

I share this overview to provide context for the recommendations that follow. Please note this consultation is in my personal capacity as a legal ethics expert and not as a representative of the University of Houston or of any other current or prior affiliation.

Recommendations

Recognizing that your organizations have already engaged in extensive research and consideration of the human rights concerns surrounding the increasing use of artificial intelligence and related innovations, I will not restate those issues here. Rather, my purpose is to propose one concrete reform for protecting individuals from potential harms associated with technological advances and other transformative modernizations.

Law is historically slow to catch up with innovation. Although data analytics, artificial intelligence and other twenty-first century advancements are already in use by corporations, organizations, academic institutions, health care providers and government entities, there has been no commiserate attention to protections for individual privacy, autonomy, identity and security. Even as new laws address known threats, artificial intelligence and similar developments will present externalities that the legal community has yet to confront. The law must extrapolate.

Regulation of professions and occupational trades offers one tool to help bridge the gap between innovation and law. Most disciplines (*e.g.* law, medicine, engineering, social or physical sciences, trades, etc.) define what constitutes competence within the particular field via specialized education/training, certifications and licensing. The definition of competence should explicitly include an obligation to continually assess the intended, known, and *unintended* consequences of innovation.

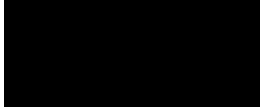
As just one example, in 2012 the American Bar Association House of Delegates amended the model rule governing competence to require that lawyers “keep abreast of *changes* in the law and its practice, *including the benefits and risks* associated with relevant technology.”¹ Thirty-five American states have adopted this amendment. At least one has disciplined a lawyer for failing to comply. While this proposal, alone, will not resolve all of the questions raised in the White Paper, it offers a pragmatic step forward by tasking those charged with duties related to their specialized knowledge and expertise to assess the positive and negative effects of artificial intelligence and future inventions. Moreover, should you decide at the end of your study to create a Responsible Innovation Organization (a proposal I support), I recommend that among its first tasks should be a fulsome

¹ ABA Model Rule 1.1, Comment 8 (emphasis added), full text available [here](#).

engagement with regulatory authorities and professional societies to develop standards defining competence within a particular discipline or field to evaluate the benefits and risks of artificial intelligence and other transformative innovations.

Thank you, again, for the opportunity to provide commentary on your efforts. Please let me know if I may be of assistance in your critical mission.

Best,



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