31 July 2023

Law Council
OF AUSTRALIA

Office of the President

Mr Chris Fechner
Chief Executive Officer
Digital Transformation Agency
PO Box 457
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By email: digitalstrategy@dta.gov.au

Dear Mr Fechner

Initial Data and Digital Government Strategy

1. The Law Council appreciates the opportunity to provide a submission to the Digital Transformation Agency in relation to the Australian Government's Initial Data and Digital Government **Strategy**.

2. The Law Council is grateful to the Privacy Law Committee of the Law Council's Business Law Section, the Law Society of New South Wales, and the Law Society of Western Australia for their respective contributions to this submission.

General comments

3. As a general observation, the Law Council supports the harmonisation of Australia's privacy, data and cyber security regimes, and emphasises the need to mitigate the regulatory burden on affected entities caused by overlapping and inconsistent state and federal laws and regulation. In implementing the Strategy, it is necessary to have regard to these laws, and to consider how the human-centric objectives can be met.

Recommendations of the Royal Commission into the Robodebt Scheme

4. The Law Council notes that the Strategy was released prior to the release of the Final Report of the Royal Commission into the Robodebt Scheme on 7 July 2023.[1]

5. The Royal Commission Report provides a number of recommendations relevant to the use of digital technology and data by the Australian Government, particularly in relation to automation and data matching.[2] Due consideration must be given to the Report's recommendations in further developing the Strategy, and more broadly when implementing the Strategy across Government. This is important in ensuring that Australian citizens have confidence that the Australian Governments and its agencies are trustworthy in their data practices and that these practices are demonstrably—and not just ostensibly—consistent with achieving the objective of social beneficence without compromising legality, rights, and the legitimate expectations of Australians.

[1] *Royal Commission into the Robodebt Scheme* (Final Report, 7 July 2023).
[2] Ibid. See, in particular, recommendations 16.1 and 16.2 in relation to data-matching and exchanges and recommendations 17.1 and 17.2 in relation to automated decision making.

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Date-enabled differentiated treatment

6. Questions of whether data-enabled differentiated treatment of individuals and groups in Australian society was lawful, or otherwise reasonable, appropriately transparent and justified, were central in the Report of the Royal Commission into the Robodebt Scheme.[3] There is much discussion in the Strategy about data and data sets. In many cases, data points reveal information about an individual person's characteristics, interests, attributes and movements, and activities in both public and private spaces. This information may reveal the identity of that person, and would therefore be regulated personal information. However, both identifying and non-identifying data points may be combined or otherwise used to affect how an individual is treated, either favourably or unfavourably, on an individual basis, or as a member of a particular group. For example, persons inferred to be children based on relevant data points are excluded from the promotion of gambling services.

7. Accordingly, both regulated personal information, and other non-identifying information, may be used in ways that are beneficial to society and the affected persons, or in ways that cause harms to those persons or otherwise impact their human rights. It may also impact their legitimate expectations to be informed when and why they are being singled out for differentiated treatment. The Strategy should reflect the need for the Australian Government and its agencies to ensure that data-enabled differentiated treatment of individuals and groups in Australian society is reasonable, appropriately transparent and justified, as well as (and not only) consistent with each Australian's privacy rights and other human rights.

Australian privacy laws

8. In considering the further development of Australia's privacy laws, compared to that of the European General Data Protection Regulation (**GDPR**), it is important to note that Australia does not have a federal Bill of Rights to support the jurisprudence that underlies how the GDPR is interpreted and applied in European courts. The GDPR is given a more extensive and protective application than Australia's privacy laws because European courts give effect to human rights jurisprudence when interpreting the GDPR. Without similar rights-based jurisprudence in Australia, it is particularly important that Australian governments and their agencies are demonstrably data trustworthy, and that they remain accountable for the data they collect, use, disclose and otherwise process.

9. The Law Council notes that, under the GDPR, accountability is an express legal requirement.[4] If accountability is not made a legal requirement in Australia, relevant enabling legislation and applicable data governance frameworks will need to expressly address the accountability of Australian governments and their agencies. Demonstrable data trustworthiness requires that each Australian government agency acts with careful deliberation in its sharing and uses of data points, including by taking active steps to demonstrate that differentiated treatment of Australians is reasonable, appropriately transparent and justified (as set out above).

[3] Ibid.

[4] See *Regulation (EU) No 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)* [2016] OJ L 119/1, art 5(2).

Technological neutrality and review mechanisms

10. The Strategy is being developed in a period of significant technological change. In the last year, advances in artificial intelligence and machine learning have caused changes that were not previously possible.

11. Without ensuring technological neutrality, the Strategy risks becoming outmoded, and possibly even obsolete and counter-productive, within historically short periods of time, due to rapid and unpredictable technological changes and the myriad of tasks for which data-enabled AI is being deployed. Accordingly, the Law Council recommends that the Strategy must include appropriate review mechanisms.

12. Figure 1 on page 23 of the Strategy sets out the policy landscape but does not provide in any explicit way any independent oversight or review mechanism in the development of the Strategy. While the Law Council notes the role of the Digital Investment Oversight Framework, it should be further considered whether this oversight at the Australian Public Service Reform level is sufficient.

Sensitive Data

13. At page 9, the Strategy states that the Australian Government commits to 'making non-sensitive data open by default and having formal controls for sharing of more sensitive data under agreements to ensure privacy, security and ethical use'. In this context, the Law Council emphasises that biometric data (involving the collection of data about—for example—people's faces, height and weight, and iris recognition) and location data should not be categorised as 'non-sensitive data'.

Action Mission 1: Delivering for all People and Business

The Law Council supports the Australian Government's commitment in the Strategy to 'omni-channel service delivery to ensure all services that are delivered digitally can also be accessed over the phone or face-to-face such that no-one is excluded'.[5]

14. To deliver well for all people and all businesses, the Strategy should bring the Australian population along with it, by including significant educational proposals. The Law Council notes the analogy with the Attorney-General's Department's Privacy Act Review Report, where a number of proposals included significant education and information roles for the privacy regulator, the Office of the Australian Information Commissioner.[6] The Law Council considers that there is an important role for the Government in educating individuals and businesses to be able to better access digital services.

Action Mission 2: Simple and Seamless Services

15. The Law Council supports, in principle, the 'digital by design' and 'tell us once' approach which promotes information sharing between various agencies. However, as stated above, Australian Government agencies must demonstrate data trustworthiness—that they only share and use data points where that sharing and use is lawful, reasonable and justified, appropriately transparent and open, and where robust data security is in place.

[5] Digital Transformation Agency, *Data and Digital Government Strategy* (June 2023) 10.
[6] Attorney General's Department, *Privacy Act Review Report 2022* (February 2023).

16. The Law Council draws attention to the 'privacy by design' principles, which have been successfully implemented by organisations and governments since their development in 1995, and suggests that equivalent architecture be built into the 'digital by design' phase of the Strategy.[7] There is additional crossover with the need for cyber risk to be managed effectively.

Action Mission 3: Government for the Future

17. The Law Council is broadly supportive of the proactive adoption of emerging data and digital technologies to provide tools and techniques to benefit the Australian population. However, the implementation of new technologies should be subject to a robust scheme of independent oversight, under which relevant technologies are regularly tested to monitor for the emergence and mitigation of unforeseen risks. This oversight could be established as part of the Digital Investment Framework.

Foundation Mission 4: Trusted and Secure

18. The building of trust relies on transparency and engagement with the public and all stakeholders. On this basis, the Law Council suggests a phased introduction of changes with a lead time that allows for sufficient consultation, information and education to occur, so that the public is 'brought on the journey' to a digital regime. Some previous digital initiatives appear to have been unsuccessful in their take up due to a perceived lack of benefit to individuals and a lack of information and lead time. This contrasts with initiatives that have had successful take up, such as the digital driver's licence in New South Wales, where there was a perceived benefit and also testing and education prior to the introduction of the technology.

19. As noted above, the Law Council supports the harmonisation of Australia's privacy, data and cyber security regimes where possible. It considers that many existing laws could cover developing digital activities by the amendment of existing regulation and/or guidelines to extend their operation. And, as noted above, technological neutrality should be an underlying principle in the development of new legislation.

Foundation Mission 5: Data and Digital Foundations

20. In relation to Foundation Mission 5, the Law Council again notes the need to educate the Australian Public Service and the general population to ensure that the benefits of the Strategy are realised.

Strategy Enablers

21. In relation to the Governance 'enabler', the Law Council emphasises the importance of regular review and incorporating feedback from persons not involved in the design or implementation, so that periodic independent review will ensure that the Strategy remains fit for purpose.

[7] See, eg, Office of the Australian Information Commissioner, Privacy by design (Web Page) <https://www.oaic.gov.au/privacy/privacy-guidance-for-organisations-and-government-agencies/privacy-impact-assessments/privacy-by-design>.

Contact

22. Please contact Mr John Farrell, Senior Policy Lawyer on (02) 6246 3714 or at john.farrell@lawcouncil.au in the first instance, if you require further information or clarification.

Yours sincerely



Luke Murphy
President