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Herbert Smith Freehills submission to the UN Human Rights Council Advisory Committee - New and emerging digital technologies and human rights

Introduction: About Herbert Smith Freehills

Herbert Smith Freehills is one of the world's leading commercial law firms, and is the largest integrated law firm in Asia Pacific. Worldwide, we have over 2,500 lawyers in 27 offices (including 2 associated offices), with our footprint spanning Africa, Asia, Australia, Europe, the Middle East and the United States. Herbert Smith Freehills recently launched the Digital Law Group, a team of lawyers with a focus on the impact of digitisation and technology disruption on the law. This includes the consideration of issues relating to law, governance, public policy and the ethics of fourth industrial revolution technology.

In this submission, we have sought to address a few key elements of the Questionnaire (in cases combining parts of the Questionnaire, as outlined below), using the Australian jurisdiction in particular to demonstrate how these elements might be examined from a local, as well as global, perspective.

What should be the role of the private sector in mitigating the risks of new and emerging digital technologies to human rights?

At Herbert Smith Freehills, we believe there is an important role for the private sector, and law firms in particular, to play in considering and implementing frameworks to address the legal, ethical and human rights concerns arising from new and emerging digital technologies (as these are defined in the Questionnaire issued by the Advisory Committee of the Human Rights Council). We see our role in this respect as a multi-faceted one:

- Firstly, as a private sector business, we recognise that we have a responsibility to respect internationally recognised human rights and we seek to conduct our activities in a manner that respects and supports the protection of human rights. As a signatory to the United Nations Global Compact, we explicitly commit to respect internationally recognised human rights, and to ensure that we are not complicit in human rights abuses through our business operations, supply chain and stakeholder relationships. Our commitment to human rights also informs and contributes to our firm culture, as we know that fostering a culture of respect, where diverse perspectives are valued, is crucial for any business and its employees to thrive.
- Secondly, we are committed to using our expertise, resources and leadership to promote human rights. This includes working to support equal access to justice through our pro bono practice and community programs which focus on the protection of human rights for vulnerable groups within society that may be at risk of marginalisation or systemic disadvantage.



- Thirdly, we are determined to help our clients similarly respect and promote human rights. Our global, multi-disciplinary team of business and human rights specialists work with our clients to anticipate and manage human rights risks, to ensure compliance with international standards, and to continually improve human rights performance. This team includes experts who have been at the forefront of developments in law and policy for the last decade, including working with the architects of the United Nations Guiding Principles for Business and Human Rights. More broadly, in our capacity as a trusted service provider to a large number and variety of clients across a wide range of industries and sectors, our specialist practice areas are also advising our clients on legal and regulatory issues arising in connection with new and emerging digital technologies, along with intersections of business and human rights.

These experiences mean that our exposure to the issues raised by new and emerging digital technologies, and their impact from a human rights perspective, is broad and not confined to a single sector, industry, focus area or viewpoint. As commercial lawyers, we are also trained to consider and analyse issues, and seek mutually acceptable solutions to often conflicting interests, in a manner that takes into account not just the legal perspective but also commercial, practical and policy concerns. We consider that this provides us with a multi-dimensional perspective on the issues raised by new and emerging digital technologies.

Could you please summarise what, in your opinion, makes today's new and emerging digital technologies different from earlier periods?

The current explosion of new and emerging digital technologies is notable not only for the variety, volume and complexity of the technologies involved, but also for the manner in which each new development builds upon what has come before it (and consequently feeds into the next). We are at a point where the convergence of these technologies could lead to a true 'step-change' in our interactions with technology.

By way of example, many would consider artificial intelligence to be one of today's most exciting new and emerging digital technologies. However, artificial intelligence has been enabled by a successive series of foundational technologies (which were each in their own time, and in some cases still are, the 'next big thing' in technology). First, cloud computing gave rise to a world where data storage cost less and was more widely and easily available than ever before. This in turn enabled 'big data', an umbrella term that refers to the creation, collection and analysis of vast volumes and varieties of data at an ever-increasing velocity. In combination, these two technologies allow the data generated by sensors and other devices to be cheaply and easily collected, stored and analysed, giving rise to a true 'Internet of Things'. It is only in this new networked, data-rich environment that artificial intelligence systems (and other new and emerging digital technologies) can obtain the inputs they need in order to — or advance to the point that they will — be truly embedded in all aspects of our daily lives.

This convergence of different technologies, and the pace at which they were — and are continuing to be — able to achieve commercial adoption and scale, has occurred in what is only very recent history. However, these new and emerging digital technologies are not only distinguished by their rapid growth, but by their increasing ubiquity and centrality to society.

In what ways do new and emerging digital technologies help to protect and promote human rights?

New and emerging digital technologies could lead to significant individual and societal benefits, including increased protection of human rights. For example:

- Blockchain and distributed ledger technologies have the capacity to improve transparency and verifiability of information and thereby mitigate negative impacts of disinformation (discussed further below);



- AI- and data-enhanced decisions can, where designed and applied appropriately, assist with the removal of bias and human error from important individual or administrative decision-making processes; and
- Widespread adoption of technology can break down barriers to participation, leading to enhanced accessibility for disadvantaged and marginalised groups.

What are some of the key human rights challenges arising from new and emerging digital technologies?

As these new and emerging digital technologies continue to develop, they also increasingly have the capacity to both amplify existing issues and concerns as well as create new challenges to the realisation of potential benefits. This submission will accordingly focus on identifying and moderating such actual or potential negative impacts. These include:

- **Data:** As noted above, the rise of new and emerging digital technologies has allowed for quantitatively and dimensionally larger sets of data to be gathered, processed and stored. This includes data that has not historically been as readily, cheaply or widely available, nor available in as much detail as is now possible. For example, detailed data collected from individuals' wearable devices as to their daily habits and patterns means that, in addition to an increase in quantitative volume, the qualitative value of data has also significantly increased. This development can lead to significant benefits both to individuals (who can receive hyper-personalised solutions, products and services) and society (due to the insights gained from these richer data sets). However, depending on how they are generated and implemented, this can also raise critical issues in relation to the rights to privacy and equality.
- **Outputs:** The growing ubiquity of new and emerging digital technologies, along with the wide variety and volume of decisions and outputs that may be generated or influenced by these, means that small issues in the design of digital technologies could have tremendous impacts at scale. New and emerging digital technologies, including AI systems, are fast proliferating in a wide range of industries and have an array of potential applications, from social interactions, to financial, administrative and legal decisions, to health care and diagnoses, to personal safety and security and more. There are numerous examples where poor data sets or poor design of automated systems or models have returned biased and discriminatory outputs that may significantly impact society and individuals. In Australia, for example, Aboriginal and Torres Strait Islander individuals and communities are disproportionately affected by the use of a number of potentially biased algorithms.¹ Conversely and despite these risks, adopting an ethical design approach to automated system models can provide an unprecedented opportunity to consistently and neutrally minimise key issues that often arise with human decision-makers, including direct and indirect bias, human error and opacity of decision-making processes.
- **Understanding:** Compounding the above concerns in relation to the outputs of these technologies is the fact that certain digital technologies operate independently of human supervision, and their operations may be too complex for a lay person to understand or interpret, or even for the user to be fully aware of their existence and influence. It may be that these technologies are truly 'black boxes', where their outputs are not able to be explained or tested, but more often it is the case that the growing complexity of algorithms are becoming unwieldy for even technical experts to interrogate, and near-impossible for a

¹ Toby Walsh et al., *The Effective and Ethical Development of Artificial Intelligence: An Opportunity to Improve Our Wellbeing* (Report for the Australian Council of Learned Academies) 113; Vicki Sentas and Camilla Pandolfini, *Policing Young People in NSW: A study of the Suspect Targeting Management Plan* (Report, 25 October 2017).



person without the relevant technical skills to do so. This often results in a degradation of public trust in these technologies and the actors that employ them. On the other hand, in some cases the complexity may have the opposite effect, whereby humans tend to perceive complex, technology-generated outputs to be inherently more objective and accurate than human-generated outputs (whether or not this perception is actually accurate). Both arise from a lack of understanding that not only exacerbates the issues noted above with respect to outputs, but also contribute to failures (on both the individual and societal level) of existing methodologies for assessing and regulating technology to ensure its trustworthiness and fitness-for-purpose.

- **Surveillance:** As both digital and physical places become increasingly monitored, influenced and shaped by these technologies, so too is the capacity for mass surveillance increasing. This arises from the fact that, as noted above, the ability to connect and consolidate devices, data, systems and networks is core to many forms and types of new and emerging technologies. While core freedoms, such as the freedom of expression, may not necessarily be directly extinguished by such mass surveillance, there is significant potential for their infringement. For example, the knowledge that actions, expressions or even conduct may be monitored, analysed and stored may shift a population's assessment of whether and how to exercise such rights. Further, where state or private actors obtain access to surveillance data or other outputs obtained from digital technologies, there is potential for that information to be used in ways that directly impact an individual with personal consequences. Regardless of whether or not these potential outcomes are realised, some of these impacts arise from individuals' *perception* of how digital technologies operate (and are operated) rather than the practical reality. Therefore, the potential risk remains present and is exacerbated by issues of overly high or overly low trust, as outlined above.
- **Proliferation:** The increased capacity to generate, promote and spread disinformation through social media networks and other online forums generates a lack of public trust in what is 'real' or 'fake'. As noted above, this lack of trust is not dependent on whether this capacity is realised, but rather the perception that this *could* be the case. This in turn may cause people to disengage from public discourse, political engagement or other socio-political activities that underpin democratic structures.
- **Industry:** In contrast to the early days of the Internet, the technology sector that designs and disseminates new and emerging digital technology is increasingly dominated by a small number of large technology providers. Market consolidation has contributed to the current 'techlash' against these providers and growing calls for specific regulatory interventions, driven by the specific issues noted above as well as an overall view that the centrality and criticality of technology in an increasing number of citizens' (and businesses') daily lives requires a heightened focus on consumer and societal welfare. For example, regulatory engagement in Australia has focused on examining these issues through initiatives such as the Australian Competition and Consumer Commission's recently completed *Digital Platforms Inquiry*.²
- **Accessibility:** The technical expertise needed for the design of new and emerging digital technologies is often scarce and highly concentrated. Such expertise may tend to become overly concentrated within groups that do not reflect the broader diversity and composition of our society. There is a consequential risk that the assumptions that are built into the design of technological tools by their designers may exclude key demographics (often

² Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019).



those most in need of technological tools for economic development and societal benefits), reinforce bias or inequalities, or lead to unexpected uses or harms. Of course, the inverse is also true. With ethical, intentional and well-understood design of new and emerging digital technologies, there is significant potential to overcome the bias and inequalities that may be deeply entrenched in certain areas and build greater trust in these systems.

The above-outlined potential or actual impacts of these technologies are often subtly drawn and multi-dimensional, arising from a nexus of factors including intersections with other technologies and systems. The complexity, inter-connectedness and convergence of new digital technologies has resulted in a destabilisation of the ability to directly identify, interrogate and understand their harms and benefits, and to moderate them accordingly.

What does this mean for safeguarding human rights?

As opposed to focusing on a selected few technologies, do you think holistic and inclusive approach will help reduce any gaps in the existing system for addressing human rights challenges from new and emerging digital technology?

We are now at a point where the forward march of technological advancement necessitates a careful and considered assessment of the impacts of new and emerging digital technologies.

We consider it is critical for these technologies to be designed, implemented and disseminated in ways that garner broad-based trustworthiness and the accompanying social licence to operate. In particular, harms should be minimised and societal benefits pursued. In this respect, ensuring that any assessment considers these technologies from a human rights perspective will provide a clear framework for understanding and giving meaning to what these potential harms and optimal benefits may be.

The question is how to take appropriate action to achieve these ends. The rapidly changing nature of new and emerging digital technologies (including their types, capabilities and design) are such that an holistic, inclusive and interdisciplinary approach is required to enable societies to properly interrogate the potential impacts and outputs of these technologies' design and use. We consider the below three elements may assist with such an approach:

- (a) **Taxonomy of Forms and Functions:** Establish a taxonomy for new and emerging technologies, one which investigates and breaks down the complexity and inter-connectedness of those technologies in order to enable a consistent, interpretable understanding of how new and emerging technologies are identified and categorised, how they function, and which actors are responsible for the nature and manner of the technologies' design and dissemination.
- (b) **Principles-based Framework:** Develop a framework that enables identification and assessment of the nature and extent of actual or potential harms and benefits of new and emerging technologies. Employing the human rights perspective in this framework can and will add an important dimension to this assessment process. Human rights provide a clear, universally recognised set of norms. Therefore, their incorporation into the framework will:
 - (1) assist in providing the clarity needed to identify even complex or subtle impacts, harms and benefits; and
 - (2) have the effect of safeguarding human rights norms by ensuring that they inform how harms and benefits will be understood and assessed.
- (c) **Prioritisation Matrix:** identify on a matrix of factors by which to prioritise and determine what actions to take to moderate the technologies based on the above assessment. This determination should take into consideration (non-exhaustively):



- (1) the extent to which the impact enhances or infringes human rights;
- (2) the broader legal framework (including domestic law, other state and international laws, regulations, treaties and agreements);
- (3) ethics, culture, and individual, stakeholder and societal preferences; and
- (4) the feasibility and expected effectiveness of available international or domestic governance and/or regulatory approaches (including enforcement).

This step in particular requires a careful analysis of the given context, which may or may not differ based on the nature, impact and reach of the technology. For example, local action alone may be insufficient to address a harm caused by a new digital technology that is inherently designed to function globally.

These types of approaches are arguably underway, with numerous bodies and initiatives already considering the impact of new and emerging digital technologies.³

Is the existing international human rights framework adequate to safeguard human rights in an era of rapid technological innovation? Are there any gaps or overlaps in existing efforts to respond to the issue of new and emerging digital technologies?

The above-outlined holistic approach should neither assume the sufficiency of the current human rights framework and regulatory environment, nor its inadequacy. The manner of the global application and implementation of human rights also illustrates that they are only one piece of the overall puzzle. For example, while human rights — much like many of the digital technologies that are the subject of this submission — are inherently global, it is generally state-based regulation that empowers regulators with both preventative and corrective mandates, so it is important to consider the interplay and alignment between state-based regulation and human rights considerations.

These will differ based on the jurisdictions under consideration, including the overall approach to the creation and application of binding law in that jurisdiction (e.g. whether it is a common law or civil law jurisdiction).

In Australia, for example, there are numerous, and at times a complex web of, national and state level laws and regulations already in place to deal with the protection of recognised human rights, including information privacy laws, surveillance legislation and anti-discrimination laws. There is also an extensive body of common law (court-made laws) which deal with issues such as responsibility and accountability. Overseeing, implementing and advising on these legal frameworks are numerous government and private sector organisations, both independently and collectively, involved in projects relating to governance, standards and ethics of new and emerging digital technologies such as artificial intelligence and machine learning. This existing environment should be carefully considered and the potential consequences (both intentional and inadvertent) of changes to it, such as adaptation or amendments of international human rights frameworks, should not be discounted.

This web of laws and regulations is quite different again in relation to civil law jurisdictions such as France that may create and protect rights using differing mechanisms, and jurisdictions with regional governance mechanisms or forums such as the European Court of Human Rights.

³ See, eg, European Commission High-Level Expert Group on Artificial Intelligence, *Ethical Guidelines for Trustworthy AI* (Report, 8 April 2019); European Commission High-Level Expert Group on Artificial Intelligence, *Policy and Investment Recommendations for Trustworthy Artificial Intelligence* (Report, 26 June 2019); Committee on Digital Economy Policy, *Recommendation of the Council on Artificial Intelligence*, OECD/LEGAL/0449 (adopted 22 May 2019); Select Committee on Communications, *Regulating in a Digital World* (House of Lords Report, Session 2017—19); Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019).



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Further, any analysis of new and emerging digital technologies' impact on harms and benefits will likely need to consider each jurisdiction's discrete approach to determining responsibilities from the legal perspective. For example, jurisdictions may differ in procedures for whether and how causation and contribution to outcomes are identified and measured, as well as how remedies and recourse are to be applied. These factors will significantly influence how moderating actions might be effectively designed and scoped to legally bind or apply to relevant actors, shape relevant outcomes, or ameliorate relevant harms.

Conclusion

New and emerging digital technologies are complex and their potential impact goes beyond the capability of any one normative or legal framework to fully assess or moderate. These technologies have brought, and are likely to continue to bring about, genuine change in the way in which we act, work, communicate, and make decisions. It is clear that identifying and implementing appropriate governance frameworks for changes so profound is inherently difficult and cannot occur in a narrow or siloed manner, but must involve cooperative and comprehensive efforts.

We are pleased to provide this submission to the Human Rights Council Advisory Committee and would welcome the opportunity to discuss our comments further.

Yours sincerely

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