

# SELECT COMMITTEE ON THE IMPACT OF TECHNOLOGICAL AND OTHER CHANGE ON THE FUTURE OF WORK AND WORKERS IN NEW SOUTH WALES

## REPORT NO. 2 – WORKPLACE SURVEILLANCE AND AUTOMATION

### NSW GOVERNMENT RESPONSE

The Select Committee was established on 24 March 2020 to inquire into and report on the impact of technological and other change on the future of work and workers in New South Wales.

The Select Committee published its First Report on 6 April 2022.<sup>1</sup> The NSW Government responded to the First Report on 4 October 2022.<sup>2</sup>

The Select Committee published its Second Report on 8 November 2022.<sup>3</sup>

The NSW Government's response to each of the recommendations made in the Second Report is set out below.

#### **Recommendation 1 – Noted**

*That the NSW Government update the Workplace Surveillance Act 2005 to take account of contemporary workplace surveillance activities and advancements in technologies.*

The NSW Government acknowledges the issues raised by the Select Committee in its report. All portfolio agencies regularly consider the need for any amendments to or modernisation of legislation, including to account for advancements in technologies in their areas of responsibility as part of their functions.

No changes to relevant legislation are planned at this time.

#### **Recommendation 2 – Noted**

*That the NSW Government build into these laws clear privacy protections for workers, consultation and consent requirements and dispute resolution processes, and:*

- *clarify that the law applies to surveillance of all work done in New South Wales regardless of whether the surveillance occurs in New South Wales or another jurisdiction*
- *provide clear protection for freedom of association.*

See response to Recommendation 1.

It is also noted that the Information Privacy Commissioner (**IPC**) has published detailed guidance for public sector agencies on the issue of consent to promote compliance with existing NSW privacy protections.

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<sup>1</sup> <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2591/Report%20No%201%20-%20Select%20Committee%20-%20The%20gig%20economy%20-%20First%20report.pdf>

<sup>2</sup> <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2591/Government%20response%20-%20Report%20No.%201%20-%20Future%20of%20Work.pdf>

<sup>3</sup> <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2591/Report%20No.%202%20-%20Future%20of%20work%20and%20workers%20in%20New%20South%20Wales.pdf>

Further, the *Industrial Relations Act 1996* provides for freedom of association and the making of orders to enforce those provisions (IR Act Chapter 5 Part 1).

### **Recommendation 3 - Noted**

*That the NSW Government undertake extensive consultation with workers, unions, business groups and experts to inform the legislative amendment.*

The NSW Government supports a consultative approach to reform and consults with all relevant stakeholders as a matter of course during the process of making policy and legislation as and when necessary/appropriate.

See also response to Recommendation 1.

### **Recommendation 4 – Noted**

*That the NSW Government develop a best practice framework to guide the use of workplace surveillance measures in workplaces in New South Wales.*

See response to Recommendation 1.

### **Recommendation 5 – Noted**

*That the NSW Government consider amending workplace surveillance laws to require external approval prior to an employer undertaking or implementing workplace surveillance measures and for the magistrate to have conciliation powers. An application must detail:*

- *the surveillance to be carried out and the way in which it is to be done*
- *what data or information is to be collected*
- *how this is to be collected and stored*
- *where the information is to be stored and by whom*
- *how the data is to be accessed and by whom*
- *the purpose(s) to which the collected data may be put, including whether and how it is to be monetized by the employer (such as sale to third parties or use in automation) and*
- *who benefits from the data/information collected*
- *how this information is to be retained or destroyed.*

See response to Recommendation 1.

A distinction should also be made between surveillance and monitoring. The NSW Government through the Department of Customer Service already plays an important role in facilitating both privacy and cybersecurity. In order to identify threats, cybersecurity tools deeply inspect the data and actions of a network's users. Likening these vital monitoring tools to workplace surveillance measures and subjecting them to the same requirements (i.e. requiring external approval prior to implementation) may hinder the organisation's ability to protect customers, staff and operational work across the NSW Government.

### **Recommendation 6 – Noted**

*That the NSW Government amend workplace surveillance laws to enhance notification requirements such that employers must provide reasonable response timeframes and establish processes for employees to negotiate and oppose proposed surveillance activities.*

See responses to Recommendations 1 and 5.

## Recommendation 7 – Noted

*That the NSW Government consider amending work health and safety and other laws to address the growing concerns surrounding work intensification, expressly providing to workers:*

- *the right to refuse excessive or unreasonable workloads or intrusions into personal and family time.*
- *the right to rest in the form additional leave, commensurate with hours worked in excess of a determined reasonable limit*
- *the right to disconnect from work devices and the obligation to respond to work communications, for set periods of time outside of work hours*
- *a right for registered organisations to inspect software/platforms/code/algorithms/apps used to allocate work and set workloads*

See response to Recommendation 1.

In relation to WHS specifically, the *NSW Work Health and Safety Act 2011 (WHS Act)* provides a risk-based preventative framework for persons conducting a business or undertaking (PCBUs) to ensure, so far as reasonably practicable, the health and safety of workers and others who may be affected by the carrying out of work.

The NSW WHS Regulation was amended to address psychosocial risks in the workplace, adopting the national amendments from the Model WHS Regulations. The NSW Code of Practice *Managing Psychosocial Hazards at Work* provides guidance on how PCBUs can manage these risks. Section 84 of the WHS Act currently provides for a worker to cease or refuse to carry out work if the worker has a reasonable concern that to carry out the work would expose the worker to a serious risk to the worker's health or safety, emanating from an immediate or imminent exposure to a hazard.

It should also be noted that the specific measures proposed may not be feasible in all contexts. For example, the ability for cybersecurity staff to 'disconnect from work devices' and not respond outside of work hours is limited. The risk of an after-hours cyber incident may require staff to remain alert to work devices and notifications. Similarly, in the event of a cyber incident, staff would be required to attend to the issue as a matter of urgency. It should further be noted that referral of industrial relations powers to the Commonwealth in 2009<sup>4</sup> places significant limitations on the reach of NSW legislation. While it is true that State jurisdictions may still make laws about workplace surveillance as such<sup>5</sup>, laws regulating matters relating to working hours, leave and inspection rights are now outside the scope of State industrial legislation and industrial instruments.<sup>6</sup>

## Recommendation 8 – Noted

*That the NSW Government consider amending work health and safety laws to regulate the allocation of work by software/platforms/code/algorithms/apps, expressly providing that the allocation of work:*

- *must not be unsafe, excessive or create unreasonable workloads*
- *must comply with requirements of industrial instruments covering the work*
- *must comply with requirements of industrial instruments covering the work*
- *must not use discriminatory attributes in the distribution of work*

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<sup>4</sup> By means of the *Industrial Relations (Commonwealth Powers) Act 2009*

<sup>5</sup> See *Fair Work Act 2009* (Cth) at s27(2)(m)

<sup>6</sup> See *Fair Work Act 2009* (Cth) at s27

- *must promote a fair and equitable distribution of work, with systems promoting a right to disconnect through a fair rotational allocation of work system, rather than an always on fastest finger approach to work allocation*

See response to Recommendation 1.

The NSW WHS Act provides a risk-based preventative framework for PCBUs to ensure, so far as practicable, the health and safety of workers and others who may be affected by the carrying out of work. The NSW WHS Regulation was amended in 2022 to address psychosocial risks in the workplace, adopting the national amendments from the Model WHS Regulations. The NSW Code of Practice Managing Psychosocial Hazards at Work provides guidance on how PCBUs can manage these risks.

Further, it should be noted that the NSW Government has worked closely with gig economy platforms, especially in relation to food delivery riders to address work health and safety issues relevant to this type of work. This work is continuing and expanding to other cohorts within the gig economy industry, such as the disability care sector.

It should be noted that referral of industrial relations powers to the Commonwealth does place limitations on the reach of NSW legislation.

### **Recommendation 9 – Noted**

*That the NSW Government consider ways to increase funding for Technical and Further Education and Vocational Education and Training programs, including making them accessible and applicable to regional New South Wales*

Fee-free TAFE is a joint initiative of the Australian and NSW Governments, providing tuition-free training places for people wanting to train, retrain or upskill. Under this agreement, the Commonwealth will provide \$164 million for VET delivery and support. There will be 120,000 fee free places delivered in NSW in 2023 for priority qualifications. This is available for people who enrol after 1 December 2022 and commence their course between 1 January 2023 and 31 December 2023. TAFE NSW and other Smart and Skilled training providers will provide more than 300 qualifications from certificates to diplomas that align to the state's priority industry growth sectors, free of tuition fees for eligible students. This will be known as NSW Fee Free initiative.

The NSW government continues to make a significant funding investment across NSW for Vocational Education and Training and other programs for skills development and employment outcomes. This investment has supported over 400 public, private and community training providers to deliver free or subsidised courses for students in NSW, teaching important skills for all industry areas.

The Job Trainer program supported 225,000 fee-free training places for young people, job seekers and NSW citizens seeking to upskill in prioritised areas of skills shortage and TAFE NSW delivers training to more than 430,000 students and receives nearly three-quarters of the Skills Budget.

Regional access is supported, for example, through the support of extensive training by registered training organisations in regional NSW, through the broad number of regional TAFE NSW campuses, through TAFE NSW Connected Learning Centres and through government support for the Country University Centres. Regional schools are actively involved in the VET in school programs and the Regional Industry Engagement Program. NSW Government's investment in skills includes:

- establishment of Careers NSW
- fee-free Vocational Education Training courses targeting apprentices, trainees and young people accessing training in priority qualifications
- establishment of two Institutes of Applied Technology in digital and construction areas to provide stackable courses and micro-credentials in collaboration with TAFE NSW, industry and universities
- a wide range of equity programs aimed at improving outcomes for women, Indigenous and regional communities
- significant expansion of programs in and for school students, such as school-based apprenticeships and traineeships.

See also response to Recommendation 1.

### **Recommendation 10 – Noted**

*That the NSW Government facilitate a tripartite industry approach, including employers and registered organisations, to training and skills development.*

A tripartite approach of government working with industry/employers and registered training organisations is already core business for the Department of Education/Training Services NSW and other government agencies. There are extensive industry engagement processes that connect with industry at a place-based level, by industry, or for input for each program. Training Services NSW has nine regional offices across NSW and meets regularly with employers to meet their skill needs. Regional Office staff are members of local and regional workforce committees.

Training Services NSW has 16 skills brokers located across NSW who assist employers to locate new staff who are trained to fill skills shortages, find ways to upskill existing staff, or new staff who need training, make connections with the right organisations and people and find jobs seekers who have relevant skills or are in training to get the necessary skills.

The Training Services NSW Workforce Development team provides pro-active, future-focused, workforce development for emerging technologies and rapidly growing and niche industry sectors. Key initiatives include advanced manufacturing e.g., course development for the electric bus sector; ICT & Digital Creative e.g., customising recruitment and training solutions for the Animation & Visual Effects industry; and emerging industries e.g., developing workforce strategies for long term projects in renewable energy.

Industry Training Advisory Bodies (**ITABs**) are a key source of industry advice for the NSW Government. They advise on the training and skill needs of their respective NSW industry sectors which helps meet workforce development needs. Each ITAB covers specific industry groups.

The NSW Skills Board provided independent advice to the Minister and government on skill needs.

The NSW Government also works with the Commonwealth which is responsible for funding the development of nationally accredited qualifications in vocational education. The NSW Government facilitates broad NSW stakeholder input into national consultation processes e.g., recent Qualification Reform consultations. The new Commonwealth Job and Skills Councils and Job Skills Australia are intended to have a tripartite approach. The NSW Government is working with the Commonwealth to maximise opportunities for state and territory voice in these national processes.

The NSW Government also works with the Commonwealth which is responsible for

accredited training in vocational education. The new Commonwealth Job Skill Clusters and Job Skills Australia have a tripartite approach.

The Department of Education as a State Training Authority continues to work closely with ITABs to seek advice on the development, review and implementation of Training Packages and Training Products.

Also see responses to Recommendation 1 and Recommendation 3.

### **Recommendation 11 – Noted**

*That the NSW Government develop a strategy for managing technological advancement in NSW public sector agencies that addresses the issues canvassed in this report.*

Strategies for managing technological advancement in NSW public sector agencies are already in place.

The Public Service Commissioner has specific functions relating to strategic development and management of the workforce in relation to workforce planning and learning and development. The *Government Sector Employment Act 2013 (GSE Act)* and the PSC's various employment frameworks support employee mobility and learning and development.

The GSE Act supports workforce mobility by enabling the movement of senior executives and non-executive employees within the Public Service and within and between government sector agencies. The benefits of this type of mobility include:

- allowing the structure of the sector workforce to evolve in line with Government priorities
- providing opportunities for employees to develop new capabilities, experience and knowledge and be exposed to different work environments
- enabling the filling of roles quickly and efficiently.

The PSC also provides a range of resources to support the public sector to attract, recruit, develop and retain a responsive and capable workforce. The Capability Framework and the related occupational specific capability sets describe the capabilities and behaviours expected of employees across the public sector both generally and for specific technical or professional roles.

Recognising the emergence of technology in workplaces, the PSC has partnered with the sector to develop resources to increase digital capability. The Digital and Customer Capability Framework identifies the critical capabilities and skills that require immediate uplift across the NSW public sector. The PSC has partnered with the Department of Customer Service to create digital learning content and pathways to enable our employees to develop digital and customer skills. Developing digital capability is essential to creating a future-ready workforce and ensuring services evolve to continue to meet the needs of our customers.

The GSE Act and the PSC's employment frameworks and resources can be adapted to respond to workforce challenges, including automation.

### **Recommendation 12 – Noted**

*That NSW Government develop a best practice framework to guide the implementation of automation in other workplaces in New South Wales including by considering:*

- *funding by employers and government to support the training of employees in industries facing job displacement from automation*
- *modern termination, change and redundancy laws that focus on re-skilling and redeployment, with redundancy as a last resort*

It should be noted that the NSW Productivity Commission and the NSW Innovation and Productivity Council have published *Adaptive NSW: How embracing tech could recharge our prosperity* which offers a flexible framework of guiding principles for policymakers who are thinking about technology, automation, and the future of work.

See also Responses to Recommendation 1 and Recommendation 7.

### **Recommendation 13 – Noted**

*That the NSW Government, in consultation with workers, unions, business groups and experts, enhance the regulation of workplace automation activities, including to:*

- *provide notification and consultation requirements for employees*
- *establish dispute resolution processes*
- *set best practice guidance for the adoption of new automation technologies in workplaces*

*Further, that the NSW Government consider amending laws to require external approval prior to an employer undertaking or implementing automation measures, with the same regulatory framework as outlined for workplace surveillance in recommendation 5.*

See responses to Recommendation 1 and Recommendation 7.

WHS legislation contains provisions for consultation on and resolution of WHS issues. The Centre for WHS has undertaken research in this space that may inform and assist discussions in relation to best practice guidance for the adoption of new automation technologies in the workplace.

It should also be noted that the *Industrial Relations Act 1996* provides that awards may contain employment protection provisions (s24), and provisions relevant to technological change (s25). The application of these provisions is limited to the NSW public sector and local government.

Private sector workplaces in NSW are regulated by the Commonwealth Fair Work system. The *Fair Work Act 2009* provides minimum standards (See for example, Part 2-2 Division 11, Part 6-2), general protections (Part 3-1), and provisions for the making of industry awards and enterprise agreements (Parts 2-3 and 2-4) with the latter normally providing for specific regulation of workplace automation activities in the manner suggested in this recommendation.