Responsible business

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Responsible business | *Empowering sustainable growth*

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Foreword

The introduction of GDPR in 2018 put the responsible use of data front of mind for most businesses. Since then, the emergence of more widespread use of artificial intelligence, driven by data, has created a new landscape to navigate.

Data has always been valuable, but AI makes it more so, and the temptation is to commoditise information or use information gathered for one purpose for something else.

More recent technological advances and rapid adoption have left gaps for specific regulations and legislation to fill. And they will be filled.

In the meantime, it is imperative that businesses approach the use of AI responsibly and ethically. GDPR covers what can and can't be done with data, and aside from the risk of fines for getting it wrong, there is a risk of reputational damage.

The Autumn edition of Trowers & Hamlins responsible business newsletter focuses on the issue of data, AI and responsible business.

We look at some areas businesses can overlook when using data and what needs to be considered when using AI applications. We raise some ethical questions businesses need to consider and look at where some key governments are with drawing up specific legislation governing AI.

In a Q&A with our Commercial team, we compare different parts of the world and where they are on the journey with AI, plus which areas of AI development they see as most exciting.

And we talk to Jonathan Koslover, MD at Manchester Fertility, about how the clinic protects patient data, particularly when using AI tools.

We hope you enjoy this edition of our responsible business newsletter, and do get in touch if you would like any further information.

Adopting AI:
Responsibilities, regulations and where the road leads next

Data is integral to AI but how does data protection relate to AI and at what stage are new regulations? Trowers & Hamlins' Commercial team jumped on a Teams call to discuss the state of play in Europe and the Middle East, what businesses should look out for and why they love working in data and AI law.

How has the response to data and AI changed?

Victoria Robertson, Partner: The UK data privacy law is based on EU GDPR with minor differences. The UK Government is considering what to do about the regulation of AI. It's looking at regulatory sandboxes, but it's unlikely we'll go the way of the EU AI Act or the way of the very permissive US non-binding guidance.

Sapna Desai, Senior Associate: The UAE seeks to be a major hub for developing AI technology and legislation. It launched an AI strategy in 2017, and government departments are actively using it.

Benjamin O'Brien-McQueenie, Partner: Bahrain and Oman are a little behind the UAE. Bahrain has made a strong push into technology sectors, and that now includes AI. There are lots of sandboxes and incubators.

Oman has a longer-term vision, and the Government is investing in some AI projects. Generally, it is adopting a 'wait and see' approach, and the private sector is pushing AI.

What are the key changes in legislation/regulations to look out for?

Matt Whelan, Associate: In Europe, the AI Act will signal a change in the EU stance on AI and governance surrounding innovation. We'll have to watch how the UK responds to that, if and when the AI Act comes into force.

From the UK Government's perspective, you want individuality and flexibility to drive innovation but not so flexible and lenient to diverge too far from other regimes. One important reason for this is because of the use of data in AI.

SD: At the beginning of 2022, the UAE introduced the first comprehensive data protection law at the federal level. It is aligned with other leading global standards, such as the UK and EU GDPR and is a crucial development for the UAE.

But we are still waiting for the publication of the executive regulations, which will supplement the current law. Once published, the clock effectively starts ticking and businesses will only have a six-month window to comply with the new provisions.

BO: In Bahrain, the underlying regulations around data protection came into force late last year, but the regulator is in education and learning mode and hasn't yet started cracking down on businesses which aren't compliant.

Oman introduced some data protection rules about 18 months ago and is in the process of implementing them. Based on that, I think it will be some time before AI regulations come in.

What do businesses tend to overlook with data and AI?

Chris Doherty, Associate: Businesses find out what data they have and how they want to use it and put their policies in place. But sometimes they don't see data protection and AI as a journey and understand that if you send data to different locations, processes and policies must be constantly updated to ensure you are compliant.

With AI, a use case is found using existing data, but a business might not have informed the data subjects of what they are doing, which you need to do under data protection legislation.

SD: Businesses underestimate the importance of data quality and overlook underlying biases in the algorithm that the AI is trained on. They assume sophisticated algorithms will automatically resolve these biases.

Businesses also have a general lack of awareness of data protection laws and ethical considerations around the use of data.

What advance in AI is most exciting?

CD: The use of AI in healthcare. For example, detecting illnesses faster from scans and in fertility using AI to analyse historic data and personalise patients' treatment.

MW: I think a huge amount can be done with transport, for example, using AI to map people's journeys and redirect them to manage traffic flows.

VR: The likes of Chat GPT and Bard have made AI part of the conversation because people are using it in different ways, and simultaneously, it opens up different ways of using it.

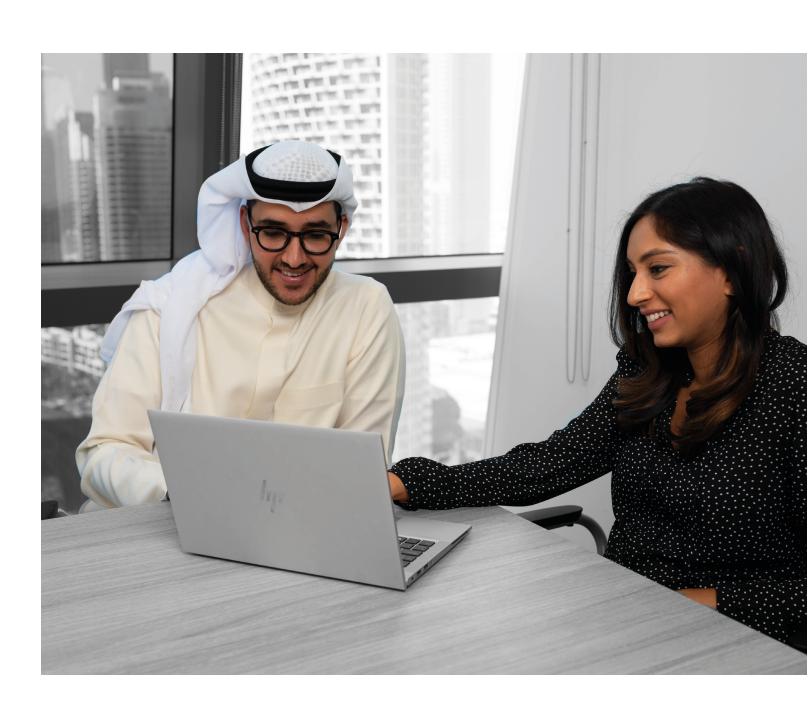## What drew you to working in the area of data and AI?

MW: I'm a self-professed technology nerd, so I find it interesting how it is used day to day. Data is the currency of the modern world, and AI will play a big part.

CD: It's an area that is constantly evolving. Answering client questions requires mapping data flows and understanding what they want and can do. It's never clear-cut.

VR: It's very analytical. It involves looking at really focused issues sometimes but also having a wider understanding of the legislation.

SD: I got involved in data in the lead-up to GDPR coming into force, which sparked my interest. Like Vicky, I enjoy the analytical element.

BO: A lot of my client base are banks, financial institutions, and fintech working across regions. Questions around data were coming up regularly, so it became an area of focus.

AI and data:
Navigating a new landscape for responsible business

Advances in artificial intelligence (AI) and its application generate a mixture of positive and negative headlines from which there are lessons for businesses using it and seeking to use it responsibly.

AI is trained on large data sets, and while businesses are increasingly clued up about the appropriate and safe use of personal data, AI is a new area to navigate. Getting it right is important not only to avoid ICO fines but also to mitigate the risk of reputational damage, particularly with an increasingly aware public.

" UK GDPR, which governs data use, is about ethics; it's about respecting the rights and freedoms of individuals, " says Victoria Robertson, Partner, Trowers & Hamlins.

That legislation predates the wider use of AI but highlights some challenges businesses face and how businesses will need to consider employee and client data usage.

Businesses tend to understand the rules around holding data, for example, but they also have specific responsibilities for data that is transferred to different countries or service providers.

For example, a business might collect gender identity and sexual orientation information from its employees and hold that data for diversity monitoring. However, there are high risks if that data is sent for processing to a country with different laws governing sexuality.

There can also be issues with how suppliers and service providers use the data they are given.

Some HR service providers may have contractual clauses which allow them to sell that data on or use it for marketing purposes. Employees won't expect their data to be harvested like that, and to be within the law, it has to be made clear to data subjects what their data is being used for.

It is similar for customers who have bought a product. There is an assumption they have opted in to marketing and advertising, which is allowed. "But that data can't be sold on or shared with another company; the 'soft opt-in' doesn't apply in those circumstances," says Robertson.

Businesses evolve and are responsible for ensuring their privacy agreements and contracts reflect how information is being used. Data mapping is an important process.

Matt Whelan, Commercial Associate, Trowers & Hamlins, explains: "Businesses need to think about where data is coming in and where it is going and how they want to use it. From that, they can work out what they can and can't do and what needs to go in the privacy notice."

If AI has become part of the equation, that needs to be part of the mapping exercise. There are other ethical considerations too, when using AI.

Businesses need to be aware of and eliminate biases. For example, is the algorithm trained on a data set of people from a similar group or background? Is it replicating those biases, and is that what decisions are based on?

There is also the question of disclosure when using AI tools for client work.

" If 75% of that work was done by AI and a member of staff just topped and tailed it, there's an ethical conversation around how you should then market your services if a big chunk of it can be done by AI, " says Whelan.

There are also questions about using AI to provide advice and who is responsible if that advice isn't correct and negatively impacts a business.

"To me, the answer is quite clear: if you have used an AI tool in creating something you sell and not carefully checked the results, you are liable to your customer if the AI has given an incorrect result which you have incorporated into your services or goods. There's normally no direct relationship between the AI software and the person to whom you sell your services or goods," says Robertson.

AI policies are increasingly being put in place by businesses. It's equally important to check terms and conditions when using AI, particularly around intellectual property. If you input information into open AI software and then use the output, who owns that? And is it yours to sell?

Businesses need to be clear on both how they are using AI and how the AI provider uses their data. And while there may not be legislation that covers specific uses yet (see below), what is the appetite for risk? What safeguards are in place?

"AI is here to stay and will become more widely used, but it comes back to general data ethics, and the usage of AI needs to be part of that," says Whelan.

How close are we to new legislation governing AI?

Existing regulations and laws that govern data and responsible business predate the growing use of AI.

"A lot of the ethical concepts in the current data protection legislation do apply, and that's what we are using at the moment," says Whelan.

The problem is that AI can be used for such a broad range of applications, from the innocuous to the very serious. And the challenge for governments is to have legislation that protects appropriately depending on use but equally doesn't stifle innovation.

"You have to consider the level of risk. If you've got AI software which assesses an individual who is diabetic and makes a decision about whether that person needs immediate treatment, that's quite different from AI which controls a traffic light system," says Robertson.

The EU is taking a prescriptive and tough stance, which has raised concerns that it may be hard for businesses to operate. As a result, the legislation has gone through many revisions and is yet to be passed into law.

In the US, it's the opposite approach. The AI Bill of Rights is a set of principles that businesses should think about, but it isn't enforceable. And it treats all AI, whether used in medicine or traffic controls, the same.

The UK Government is exploring the middle ground with sector-specific legislation.

This includes the potential for a regulatory sandbox. Whelan explains: "The sandbox would allow the flexibility to test and develop new AI models in a protected environment with more relaxed regulations before it is approved for wider use."

Exactly when regulations will be finalised is unclear, but they are coming.

Responsible business:
Technology and taking care of patient data

Jonathan Koslover

Managing Director and owner of Manchester Fertility

At Manchester Fertility, it's first names only for patients in public areas to protect patient's identities. But that is only the starting point for how the clinic handles highly sensitive and personal data in an increasingly technology-driven environment.

Jonathan Koslover, the clinic's joint MD and owner with Debbie Falconer, has to navigate protecting data, the safe exchange of information with patients and now the use of data-driven artificial intelligence (AI).

As well as being the largest private fertility clinic in the north of England, Manchester Fertility is one of only a very few clinics with its own large egg and sperm banks. It's more typical for clinics to import from abroad.

But it means data protection is critical for the information it holds.

" *Protecting patient data is paramount to us. The worst thing we could have is a data breach,* " *says Koslover.*

While conversations with patients are always carried out in private rooms, almost all the records are electronic and stored securely. Nothing is backed up in the cloud, instead it is saved securely on site and backed up in data centres which are security tested and reviewed regularly.

Data security is taken very seriously. Access to data is via two-factor authentication, and employees only have access to what their role requires.

Training and awareness are critical for all staff because of confidentiality. The HFEA (Human Fertilisation and Embryology Authority) sets strict guidelines, and all staff must sign the clinic's data management policy.

Manchester Fertility also uses Apps to share documents with patients and allow them to upload information.

With Apps, the set of IT applications such as integration, links and access points is more complex and requires a different set of security measures. There has to be a different range of security checks and agreements between parties.

"Using third-party Apps, we have to be very thorough in ensuring that those gateways are very well protected and tested for potential weaknesses," says Koslover.

" *Cyber security insurance doesn't really take into account the huge reputation risk if you had a problem with medical data.* "

And then there is AI. The use of AI for medical applications is increasing with a large number of AI applications starting to come to market in the fertility sector, and Koslover says that it is a very useful tool in the right environment and with the right quality of AI application.

For fertility, there are two emerging areas where it is being used: Imaging and data modelling.

AI is being used to assess images of eggs and embryos. It compares images against a large database assessing for quality and likelihood of pregnancy and a live birth.

For data modelling, AI programmes are used to assess huge volumes of demographic and treatment data from the clinic and other clinics in the UK and abroad to personalise treatment and give the maximum opportunity for pregnancy and live birth.

It's also used to analyse the number of IVF cycles to deliver a certain degree of probability of success. Fertility clinics are increasingly collaborating and sharing data (securely and subject to both data privacy legislation and HFEA guidance) to improve outcomes for all.

"*We've been piloting different AI applications, and some aren't sophisticated enough yet, but it's getting more sophisticated as a tool,*" *says Koslover.*

"It helps to provide incremental improvement to the patient outcome and is very good if used properly."

Proper use includes making sure data used by AI is safe and secure. Images, which have patient identifying details, are treated in the same secure way as patient data.

Part of the process is putting in place appropriate policies and contracts and setting up the consent process for patients.

Victoria Robertson, Partner, Trowers & Hamlins, says: "The contract covers the relationship between the clinic and the AI provider, making sure that the clinic knows where patient data is used and stored and that it will be treated with utmost secrecy and confidentiality and putting in place measures such as anonymisation and strict guidelines for data usage. Manchester Fertility is an innovative clinic but also very aware of the importance of acting ethically"

The clinicians and not the AI itself are ultimately responsible for the treatment plans and decisions made about patient care. The embryologists use AI as a tool and apply their professional judgement to the information it provides, and have their own checks and balances to make sure they are comfortable with the results.

"*Doctors and other medical professionals have their own professional standards to upkeep,*" *says Robertson.*

The more data that can be fed back into AI tools being used, the better because it increases the overall data set from which the AI can work. Cameras are also getting more sophisticated and taking better and better images.

"It's a continuously improving loop which should give more and more reliable results," says Koslover. "AI to us now is no longer an add-on. It's an integral part of the patient pathway."

Trust is growing in AI as a tool that supports clinicians, but he adds that running pilots is critical.

At Manchester Fertility, they set out clear measures against which clinicians can monitor progress and evaluate whether to continue or stop using a particular tool. The AI tools don't always deliver any better results than existing practices and professional judgement.

Regardless of the tools, the confidentiality of patient information is paramount. The clinic's priority is to ensure it and its suppliers continue to protect and secure that information and use it responsibly and ethically.

"*AI is an important part of our practice but it will not replace our highly skilled clinical team,*" *says Koslover.*

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