


**Submission by Professor Dan Jerker B. Svantesson to the
Australian Human Rights Commission's Issues Paper regarding:**

Human Rights and Technology

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Summary of major points

- The Issues Paper is timely and raises a range of important questions.
- The future work on human rights and technology may usefully highlight recent developments in the discussions of 'traditional' human rights concerns even if a decision is made to focus primarily on AI.
- It would be useful for the Australian Human Rights Commission's future work on human rights and technology to engage more broadly with the relationship between AI development on the one hand and data privacy regulation on the other.
- While alluded to throughout the Issues Paper, the Paper does not sufficiently engage with the relevant cross-border issues that inevitably impact the matters discussed in the Paper.
- The Australian Human Rights Commission's future work on human rights and technology represents a valuable opportunity to explore Australia's position on jurisdictional issues associated with the protection of human rights online.

1. General remarks

1. I welcome the initiative taken by the Australian Human Rights Commission to seek input via the Issues Paper on Human Rights and Technology.
2. These submissions are intended to be made public.
3. While acknowledging the great importance of all the issues raised in the Paper, such as those relating to accessibility of technology, these submissions deal only with some specific issues.

2. The relevant 'traditional' concerns

4. The Issues Paper is largely focused on human rights in the context of Artificial Intelligence (AI). The issues dealt with are timely and important. Yet, it is worth emphasising that many of the 'traditional' human rights concerns that arise in the technology context – in particularly the information technology context – remain unresolved.
5. One example of such 'traditional' human rights concerns relate to the exercise of freedom of expression online.
6. While much has already been written about the exercise of freedom of expression online, it is by no means an area that is 'standing still'. New angles of the debates emerge constantly. For example, there is an emerging discussion of so-called 'must-carry orders'; that is, orders that require Internet intermediaries to display particular user postings or user accounts even where the intermediary in question – for one reason or another – is reluctant to do so.¹
7. The future work on human rights and technology may usefully briefly highlight this type of developments even if a decision is made to focus primarily on AI.

3. The broader relationship between AI and data privacy regulation

8. The Issues Paper engages with all the concerns one typically comes across when engaging with literature on the regulation of AI; such as liability issues, transparency issues and discrimination issues.

¹ For an interesting discussion of 'must-carry' issues, see: Daphne Keller, Why D.C. Pundits' Must-Carry Claims Are Relevant to Global Censorship (September 13, 2018) <https://cyberlaw.stanford.edu/blog/2018/09/why-dc-pundits-must-carry-claims-are-relevant-global-censorship>.

9. As noted, for example, by the EU Commission, data is the raw material for AI.² Thus, it would be useful for the Australian Human Rights Commission's future work on human rights and technology to engage more broadly with the relationship between AI development on the one hand and data privacy regulation on the other. In the fewest of words, how do we ensure availability of adequate data volumes without sacrificing data privacy rights in the process?

4. The cross-border dimension of human rights and technology

10. While alluded to throughout the Issues Paper, the Paper does not sufficiently engage with the relevant cross-border issues that inevitably impact the matters discussed.

11. There are several reasons why the Australian Human Rights Commission's future work on human rights and technology must engage with cross-border issues. Most obviously, Internet intermediaries play a central role in the exercise of human rights online, and as is well-known, the majority of technology companies with which Australians interact are based outside Australia.

12. The fact that the technology companies with which Australians interact are based outside Australia raises questions around the extent to which Australia effectively can regulate this interaction. Matters of jurisdiction and applicable law must be considered, and it may be that Australian courts – not least given the remarkable attitude displayed in a 2017 matter before the Supreme Court of New South Wales³ – may benefit from the type of guidance that could be provided through a detailed discussion under the auspices of the Australian Human Rights Commission.

13. Furthermore, the fact that the technology companies with which Australians interact are based outside Australia also raises questions around the extent to which the actual exercise of Australians' human rights is controlled by decisions – such as foreign court orders – made outside Australia. For example, on 11 September 2018, the Court of Justice of the European Union heard a matter relating to whether the EU's so-called 'right to be forgotten' will impact the availability of content worldwide.⁴

² COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Artificial Intelligence for Europe (COM/2018/237 final) <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018DC0237&from=EN>.

³ Dan Svantesson, Sydney to become the Internet content blocking capital of the world? (November 14, 2017) <https://www.linkedin.com/pulse/sydney-become-internet-content-blocking-capital-world-svantesson/>.

⁴ Dan Svantesson, In 2018, the CJEU will determine the future of the Internet (5 March, 2018) <https://blog.oup.com/2018/03/2018-cjeu-determine-future-internet/>.

5. Developing international law notions of jurisdiction

14. Traditional thinking on jurisdiction has largely been focused on the territoriality principle; a state has jurisdiction over its territory, but not beyond. However, it has long been recognised that the traditional focus on territoriality is a poor fit with the online environment, not least in the context of protecting human rights. In fact, the protection of human rights cannot be restricted by a strict territoriality thinking ‘offline’ either.

15. The Australian Human Rights Commission’s future work on human rights and technology represents a valuable opportunity to explore Australia’s position on this matter.

16. An alternative to territoriality can be found in the three principles that I elsewhere have suggested as the core principles for jurisdiction (under both public, and private, international law). Under that framework:

In the absence of an obligation under international law to exercise jurisdiction, a State may only exercise jurisdiction where:

- (1) there is a substantial connection between the matter and the State seeking to exercise jurisdiction;
- (2) the State seeking to exercise jurisdiction has a legitimate interest in the matter; and
- (3) the exercise of jurisdiction is reasonable given the balance between the State’s legitimate interests and other interests.⁵

17. Much work lies ahead in defining, as precisely as we can, what we mean by “legitimate interest” and “substantial connection”; and the challenge of reaching consensus on the interests to be balanced as part of the third principle should not be underestimated. Nevertheless, there are precedents to draw upon and if we can agree that it is the challenges associated with fleshing out the framework canvassed above that we should focus on, we have already made tremendous progress towards a framework for tackling the issue of adequate cross-border protection of human rights.

⁵ The framework was first presented in Dan Svantesson, A New Jurisprudential Framework for Jurisdiction: Beyond the Harvard Draft, 109 *American Journal of International Law Unbound* 69 (2015) <https://www.asil.org/blogs/new-jurisprudential-framework-jurisdiction-beyond-harvard-draft> and is explored in more detail in: Svantesson, D.J.B., *Solving the Internet Jurisdiction Puzzle* (Oxford University Press, 2017), pp. 57-90; Polcak, R. and Svantesson, D.J.B., *Information Sovereignty – Data Privacy, Sovereign Powers and the Rule of Law* (Edward Elgar Publishing, 2017), pp. 188-206.

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Professor Svantesson held an ARC Future Fellowship 2012-2016, has written extensively on Internet jurisdiction matters and has won several research prizes and awards including the 2016 Vice-Chancellor's Research Excellence Award.

The views expressed herein are those of the author and are not necessarily those of any organisation Professor Svantesson is associated with.