

SUBMISSION

Consultation questions

1. What types of technology raise particular human rights concerns? Which human rights are particularly implicated?
2. Noting that particular groups within the Australian community can experience new technology differently, what are the key issues regarding new technologies for these groups of people (such as children and young people; older people; women and girls; LGBTI people; people of culturally and linguistically diverse backgrounds; Aboriginal and Torres Strait Islander peoples)?

I do not think any Australian Government at State, Federal or local level (or the private sector for that matter) are terribly concerned about human rights in the digital age. Every argument can be reduced to efficiency, expediency, deliverables and “serving the customer”. Neither governments, nor corporations seem to believe in anything but customers, unless you are a shareholder. The notion of a citizen or subject who hold rights in exchange for allegiance and fealty to a Commonwealth,¹ or Sovereign would be a foreign concept to most people. As a lawyer, I’ve only ever heard such references spoken of by other lawyers.

It does not exist in our public debate and when we talk of human rights today, we are generally talking of documents penned by diplomats in Geneva or New York. That does not make these documents bad but, they are entered into by State Parties and, their level of real enforceability comes down to domestic legislators’ willingness to give them practical consequences in local law. I have followed privacy debates,² and health privacy debates in particular,³ to know that while much reform will be asked for, little will be received.

Consultation questions

3. How should Australian law protect human rights in the development, use and application of new technologies? In particular:
 - (a) What gaps, if any, are there in this area of Australian law?
 - (b) What can we learn about the need for regulating new technologies, and the options for doing so, from international human rights law and the experiences of other countries?
 - (c) What principles should guide regulation in this area?
4. In addition to legislation, how should the Australian Government, the private sector and others protect and promote human rights in the development of new technology?

Principles that should guide reform, are things I have already raised in attachment provided. These are thing like:

¹ Commonwealth - what is shared and beneficial for members of a given community -

<https://en.wikipedia.org/wiki/Commonwealth> as at 1 October 2018

² See attached submission to Serious Invasions of Privacy Inquiry (Submission 9: A Johnston) conducted by the Australian Law Reform Commission.

³ See generally, Submission 3 regarding health care identifiers, attached

1. Giving people a tangible property right in data about them;
2. Making organisations and individuals who hold data about a third party, legal trustees of the data;
3. Making organisations liable for data breaches, not just in terms of violation of Privacy Principles, but by using legal constructions like theft and assault, to lift data privacy, management and security from the civil jurisdiction to the criminal jurisdiction. Therefore, directors and management of companies, public and private (as well as State run services) would begin to factor-in goal time for breaches of data policy/privacy. This would hopefully improve their due diligence. Additionally, as I told the Healthcare Identifiers Inquiry, lodging a complaint under then existing privacy arrangements (which one doubts have changed that much) seemed unnecessarily difficult.⁴ This needs to be addressed, if privacy and human rights are to be seen as more than politically correct window dressing and soothing words.

Consultation questions

5. How well are human rights protected and promoted in AI-informed decision making? In particular, what are some practical examples of how AI-informed decision making can protect or threaten human rights?
6. How should Australian law protect human rights in respect of AI-informed decision making? In particular:
 - (a) What should be the overarching objectives of regulation in this area?
 - (b) What principles should be applied to achieve these objectives?
 - (c) Are there any gaps in how Australian law deals with this area? If so, what are they?
 - (d) What can we learn from how other countries are seeking to protect human rights in this area?
7. In addition to legislation, how should Australia protect human rights in AI-informed decision making? What role, if any, is there for:
 - (a) An organisation that takes a central role in promoting responsible innovation in AI-informed decision making?
 - (b) Self-regulatory or co-regulatory approaches?
 - (c) A 'regulation by design' approach?

Before criticising AI for having biased decision-making algorithms and, there being weighting against some minority groups in big data sets, we should look honestly at the failings of human-based decision making. If AI can be discriminatory, so can humans. In my own experience of social welfare measures, allegedly designed to support those with disabilities and their families, I found rude, oppressive and demanding people. They would insist because of their interpretation of their (or our) behaviour (even as they reduced my mother to tears on one occasion) that their generous services were doing us good.⁵ This has had a strong influence on the development of my opposition to the

⁴ See *ibid.*, p.3 of 14

⁵ See generally, my first submission to the Productivity Commission's inquiry into Disability Care at <https://www.pc.gov.au/inquiries/completed/disability-support/submissions/sub0055.pdf> and also see generally, my submission to the NSW Parliament's Public Account's Committee inquiry into the *Efficiency And Effectiveness of The Audit Office of NSW* <https://www.parliament.nsw.gov.au/ladocs/submissions/48395/Submission%20No%207.pdf> as at 1 October 2018. Both documents relate my disgust and frustration at the conduct of a charitable service provider.

National Disability Insurance Scheme,⁶ riddled as it is with many of the same charitable organisations. These bodies, who already operate in concert with government to impose otherwise unenforceable operational guidelines on the disabled, the elderly and the ill (amongst others) and should have this behaviour scrutinised. I have been campaigning against the use of guidelines (not tabled in Parliament as Regulations) for years⁷ and continue to do so, particularly where churches and charities are the unjustified recipient of State funds and by extension become the de-facto source of State power.⁸ In this light, perhaps AI algorithm-based decision making is fairer, more rational and reasonable than human based decision making.

The only place where this does not clearly apply is *Centrelink* and that agency's Robo-debt system for recovering overpayments. However, here an argument can be made that the Federal Government and its bureaucrats were actively behind the roll-out and operation of that system. After all, it is administratively easier to deliver efficiency dividends from the sick, elderly and unemployed, rather than expect the political class to under the tax reform that would make such schemes unnecessary.⁹ As I note in my most recent pre-Budget submission:

⁶ See generally Submission 440 – principal submission at <http://www.aph.gov.au/DocumentStore.ashx?id=dc64c892-b41d-48b5-9916-7f4b90e71ee3> and supplementary submission at <http://www.aph.gov.au/DocumentStore.ashx?id=c59725d8-263e-48d8-8fb4-60303c4280a8> as at 1 October 2018

⁷ See Submission 60, attached, where I note that firstly:

The Government's apparent preference for Memorandums of Understanding (MoU's) over legally binding arrangements should make us question the real motives behind the stated policy aim of seeing disabled people employed. Again, these words, contained in the Ministerial response I received, are telling:

It is important that employers are not discouraged from seeking to employ people with disability by requiring them to be penalized if their fluctuating business concerns cause them to cease a planned recruitment process. (Letter from Alison Durbin (Assistant Secretary, Disability Employment Services Branch), to Adam Johnston, dated 24 November 2006) p.2 and 57 of 68

Meanwhile my second point comes courtesy of Rob Hulls, former Victorian Attorney General. He told the Centenary Sitting of the High Court that:

In our defence of the rule of the law, we must also be alert to, and alarmed by, attempts to bypass judicial scrutiny, whether it be via privative clauses or the more insidious trend towards unenforceable guidelines. In my view, any suggestion that an Executive's "non-binding guidelines" be accepted as authoritative is dangerous terrain. Yet it is increasingly the case that we are asked to accept the legitimacy of such guidelines, whether it be in Industrial Relations, decisions concerning grants of Legal Aid, or more poignantly in the immigration area. (The Hon. Rob Hulls MP, Ceremonial - *Special Sitting at Melbourne - Centenary of High Court of Australia* [2003] HCATrans 406 (6 October 2003) Last Updated: 25 November 2003, [2003] HCATrans 406, <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/HCATrans/2003/406.html?stem=0&synonyms=0&query=%20high%20court%20centenary> as at 20 June 2010) p.13 and 57

⁸ See generally, my submission to the review of the Australian Charities Commission at <https://static.treasury.gov.au/uploads/sites/1/2018/07/Adam-Johnston-310865.pdf> as at 1 October 2018.

⁹ See generally, my submission to the 2018-19 Pre-Budget Review at https://consult.treasury.gov.au/budget-policy-division/2018-19-pre-budget-submissions/consultation/view_respondent?sort=excerpt&order=ascending&b_index=0&uuld=519819481 as

Whether it is employment services to allegedly help one find work, vocational education, or supported employment schemes (that is, allegedly work), the employee/trainee (whether they are disabled or not) always seems to end up poorer and to have a bigger HECS-style training debt; and that is if we are “lucky enough” to be paid anything at all. Too many employers are using traineeships, scholarships, and internships as unpaid labour, which I would regard as arguably equivalent to slave labour. Meanwhile, Centrelink can often be accused of something similar, as it insists the unemployed, disabled, and other people report relatively meagre earnings from ad-hoc, part-time and casual work. Given my own experience with the tax and transfer system, I wrote to the Senate’s Robo-Debt inquiry and was insulted myself by the Government’s rejection of the Senate Report. The Report and what it chronicled were many people’s maddening frustrations with the Government and its oppressive welfare policies; and they were dismissed out of hand. And, the Government wonders why everyone from its political leaders to front-line staff are abused, berated, and belittled by the public?¹⁰

As such, in my experience, governments, their bureaucrats and third-rate third sector entities (cashed up with taxpayer funds) have done far more to aggrieve me than AI is ever likely to do. Indeed, the fact that Government feels it can roll-out Robo-debt like schemes, while others can offer work or “internships” for no consideration with impunity, it shows me how human rights and other Conventions can be ‘toothless paper tigers.’

Consultation questions

8. What opportunities and challenges currently exist for people with disability accessing technology?
9. What should be the Australian Government’s strategy in promoting accessible and innovative technology for people with disability? In particular:
 - (a) What, if any, changes to Australian law are needed to ensure new technology is accessible?
 - (b) What, if any, policy and other changes are needed in Australia to promote accessibility for new technology?
10. How can the private sector be encouraged or incentivised to develop and use accessible and inclusive technology, for example, through the use of universal design?

AI has allowed everybody great flexibility and the ability to shop, bank, and research (nationally and internationally), from the comfort of our living room, at a time convenient to us. However, it has also seen a marked decline in shop-front, personal service and, many jobs are disappearing. It is said that others will replace them, but not everybody can be a university educated computer scientist or engineer. However, I do not believe these people should necessarily be moved to the services sector and, by implication, the disability support sector.

Rather, I think machines could and should deliver more care in both aged and disability services. It potentially addresses staff shortages and may add to safety, as the machine will not have any

at 2 October 2018. This document outlines my frustration at the lack of coordinated tax and welfare reform over many years.

¹⁰ Ibid., pp. 6-7

ulterior or nefarious motives.¹¹ It is also important to attempt to use AI to ameliorate or cure many forms of disability. Many in the church and charitable sector have done their level best to restrict the access of people with disabilities to technology like stem cells,¹² clothing their objections in questions of morality and safety. However, it has always been my suspicion that the third sector does not really want people to be cured of our chronic illnesses or disabilities; the sector loses money, power and influence if less people are needy and dependant.

Universal health and ability are the things that AI should be expected to bring, as I have outlined elsewhere.¹³ For my part, I have also worked on the possibility of robotic exo-skeletons assisting my

¹¹ See for example, Sparrow, R., and Sparrow, L. 2006. *In the hands of machines? The future of aged care.* *Minds and Machines* 16: 141-161, May, http://profiles.arts.monash.edu.au/rob-sparrow/download/InTheHandsOfMachines_ForWeb.pdf; Heather Kelly, *Robots: The future of elder care?* CNN, July 19th, 2013, 03:42 PM ET, <http://whatsnext.blogs.cnn.com/2013/07/19/robots-the-future-of-elder-care/>; Maureen Dowd, *Silicon Valley Sharknado*, *The Opinion Pages | Op-Ed Columnist*, July 8, 2014, http://www.nytimes.com/2014/07/09/opinion/maureen-dowd-silicon-valley-sharknado.html?_r=0 as at 19 July 2014. From Ms Dowd's article I note, in particular: "Vinod Khosla, the Sun Microsystems co-founder, has predicted that algorithms and machines will replace 80 percent of doctors in years to come, making medicine more data driven and less like "witchcraft."

In a rare joint interview last week with Khosla at his Silicon Valley summit, Google founders Sergey Brin and Larry Page talked about their A.I. (Artificial Intelligence) hopes. "You should presume that someday," Brin said, "we will be able to make machines that can reason, think and do things better than we can." They have always been interested in robots — they named their operating system Android — and are running "the brain project," described by Brin as "really machine-learning focused." In January, they acquired the British A.I. developer DeepMind, founded by Demis Hassabis, a game designer, neuroscientist and former child chess prodigy."

¹² See for example, my submission to the recent Religious Freedom Inquiry at <https://pmc.gov.au/domestic-policy/religious-freedom-review/submissions/adam-johnston> as at 2 October 2018

¹³ See Neuroscience and Society Ethics, Law, and Technology — 24-25 August 2018, Sydney, Australia https://neuroethicsconference.org.au/?page_id=166 as at 2 October 2018. I provided a poster with the commentary below.

From Citizen to Charity Case: Has Contracted Welfare Breached the Sovereign's Duty to Her Subjects? ▸

Adam Johnston — Macquarie University Law School

My thesis considers several parallel but related processes in Australia's legal and social history. The main one is the establishment of the National Disability Insurance Scheme (NDIS) which is aimed to bring certainty of service and support to all eligible people with permanent impairments. Many in the disability sector have campaigned for such a reform over many decades; but did they get what they expected?

The NDIS was introduced to solve the issue of inequitable funding and support. Its funding is based on meeting individual assessed need. This means that clients are funded directly and they can choose the services they need to access and enjoy an ordinary life, in line with in the Convention on the Rights of People with Disabilities.

But what does it mean to enjoy an ordinary life? An implicit but curiously unchallenged element of the NDIS is the assumption that disability will continue to be lifelong, with

own circumstances for many years¹⁴ and continue to do so, though the technology cannot meet my needs yet.¹⁵ I would decry any restriction on AI on the alleged basis of the safety, welfare or “human rights” of people with disability. Here, in similar vein to stem cells, we have a technology that could lift us out of pain and incapacity for all time. Yet, if the NDIS is any guide our unimaginative policy makers settle for the known (and supposedly safe) charity and dependence model we know only too well.

services delivered by charities and funded by government. From a human rights perspective, why should people with disabilities not expect their living standards and expectations for life to rise with those of all other Australians? The scheme’s administrators have already been criticised for their interpretation of what is reasonably necessary for an ordinary life.

With the development of medical technology like stem cells, exoskeletons and brain implants, genetics and cellular technology, the public expectation of what is reasonably necessary for an ordinary life will change. However, as currently understood, the NDIS assumes disability and then assesses the need for equipment and support services based on reasonable necessity.

People with disabilities and their families may become discontent with the charitable dependence norm, as they witness the advancement of science and technology. Could an ordinary life come to have with it, as a condition precedent, the absence of permanent disability?

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¹⁴ See Hybrid Assisted Limb HAL.zip file, attached

¹⁵ See my email exchange with Victoria University academic Kurt Mudie, entitled “Re: Rex exo” attached

