

Advancing together

RULE OF LAW UPDATES AND PERSPECTIVES



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LexisNexis® Capital Monitor's editorial team prepares the Advancing Together, Rule of Law Updates and Perspectives from the Asia Pacific bulletin. The team is located in the Press Gallery of Parliament House, Canberra.

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SIMON WILKINS
MANAGING DIRECTOR

LexisNexis Australia

A message from Simon

Hello and welcome to the June 2020 edition of Advancing Together.

The LexisNexis leadership team are immensely appreciative of what we have achieved and how we have supported our customers during the COVID-19 pandemic in the first half of this year. We have shown remarkable resilience throughout these challenging times which we are also justifiably proud of. As we thoughtfully prepare for office reopens, the safety and wellbeing of our people of course remains our top priority.

We have pursued a number of innovative ways to better support our customers. We have developed a dedicated COVID-19 Information Hub for the legal community to keep them on top of the pandemic crisis, providing insights on legal and emerging legislative issues, news, relevant articles, business continuity updates and more. This COVID-19 Information Hub can be found at <https://www.lexisnexis.com.au/en/COVID19>.

We have also developed and made available complimentary practical resources to help legal professionals through the evolving pandemic crisis. There are over 120 high-value items added to the Australian COVID-19 Practical Guidance Toolkit which contains a curated collection of guidance materials and infographics related to the current pandemic.

For our customers who purchased print content, while physical access to print libraries has been difficult we have provisioned free digital versions of their print products until 30th June 2020.

Given the continued restrictions and work from home conditions that remain in place for the majority of our Australian customers, we have decided to extend the format shift digital access to the **31st July 2020**.

As one of four major partners working with the Australian Human Rights Commission, we are also excited to move into the final stages of the Human Rights and Technology project, with submissions to the final discussion paper now closed. As part of the Expert Reference Group, LexisNexis continues to work with industry leaders, civil society, government and the academic community to find a way to advance human rights protection in the context of unprecedented technological change. It considers how law, policy, incentives and other measures can promote and protect human rights in respect of new and emerging technologies.

Following a very successful visit to the Cook Islands in January, we are well underway in preparing a report on not only consolidating an official set of legislation but also ensuring that a methodology is put in place to keep laws up to date for the future. We thank the Crown Solicitor's office for their partnership in this.

We continue to work with the Ministry of Justice and Border Control to consolidate the laws of the Republic of Nauru, and look forward to finalising the project with them towards the end of the year.

We were fortunate enough to work on the Fiji Law Reports in the last six years, and are sad to hear of the recent passing of the Honourable Justice Suresh Chandra, chair of the Law Reporting Committee in Fiji. Justice Chandra was instrumental in ensuring that authoritative case law was available to the legal profession and judiciary in Fiji, and his leadership and support will be missed.

During these unprecedented and uncertain times, we thank you for your continued support and partnership. We trust that you have remained safe and well throughout.

We hope you enjoy this new edition of Advancing Together and look forward to bringing you more updates in the future about our initiatives, as well as how we continue to advance the rule of law around the globe.

The AHRC Human Rights Awards is the pinnacle of human rights recognition in Australia. In this edition of Advancing Together LexisNexis is proud to feature reflections from Emeritus Professor Rosalind Croucher AM, Australian Human Rights Commission President, as well as two of the 2019 Award Finalists, on pages 4-9.



The Rule of Law

In its simplest form, the rule of law means that "no one is above the law". It is the foundation for the development of peaceful, equitable and prosperous societies.

Rule of Law Equation

The rule of law is the foundation for the development of peaceful, equitable and prosperous societies. We believe there are four key areas that form the umbrella protection of the rule of law.

Equality Under the Law + Transparency of Law + Independent Judiciary + Accessible Legal Remedy

= The Rule of Law



Rethinking the way human rights laws reflect our changing society



Rosalind Croucher AM

President, Australian
Human Rights Commission

*Reflections from Emeritus Professor, Rosalind Croucher AM - President,
Australian Human Rights Commission.*

In late 2018, the Australian Human Rights Commission ('the Commission') embarked on a national conversation on human rights. The purpose was to engage the public in answering big

questions, such as 'what kind of Australia do we want to live in?' Not just for ourselves, but for our children and our children's children. What makes an effective system of human rights protection for 21st century Australia?

Today, we are living through an extraordinary challenge for our society and our community – a public health crisis the world has not seen since the Spanish Flu pandemic in 1918–1920. These remarkable times have seen our governments take unprecedented measures to contain the spread of the COVID-19 pandemic to save lives. This means human rights are now as important as they ever were, and the questions posed by the national conversation are equally as pertinent.

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In launching the project at the Human Rights Awards in December 2018, I explained why it was needed: because we seem to have lost sight of the overall purpose of protecting the human rights of the whole community. Our human rights system in Australia was seen as innovative in the 1980s. However, since then we have been surpassed by developments in other countries – and indeed in some states and territories in Australia.

Our federal legislation is not comprehensive in its protection, as our fundamental rights and freedoms have not been enshrined in the Constitution, or in a statutory Bill of Rights as is the case in many other Western democracies. Our body of discrimination law is complex and does not protect everyone in the community. Despite this, these laws are important: they reflect our international commitments and can achieve many positive systemic outcomes. However, such laws are also framed in the negative – in terms of what you cannot do – and they rely on an aggrieved person to lodge a dispute before offering a solution of any kind.

What this means in practical terms is that human rights considerations are not properly embedded into our national system of law, policy and programs. After all, human rights are not absolute, immutable propositions, apart from a few—like the right to life, freedom from torture and freedom from slavery.

The actions taken by our leaders in relation to the pandemic have been necessary, but they have had a significant impact on all our lives, and on the rights and freedoms many of us have come to take for granted. While we have seen positive signs that these measures are working to keep as many people as possible safe and well, we have also been reminded by health experts that it is still ‘early days’ in responding to the pandemic. The restrictions, in various forms and to varying degrees, may continue for some time.

When viewed through the lens of human rights, these restrictions raise some questions and concerns. International human rights conventions have always recognised the right of government to limit some of our rights and freedoms—including the freedom of movement—under certain circumstances. These include responding to a public health crisis or for reasons of national security.

However, measures that limit our rights and freedoms on these grounds must always be necessary and proportionate to the evaluated risk. They must also respect people’s dignity, human rights and fundamental freedoms. These measures should be in place for the shortest time possible consistent with the emergency. Ultimately, this means achieving a balance between our rights and the restrictions that have been put in place to safeguard all of us. That balance is not always easy to achieve. This is what the national conversation aims to address.

We have sought input from government, civil society, academia and the public, on what measures are needed to truly realise and fully protect human rights in Australia—to embed human rights thinking in the national psyche.

Our objective is to recommend an agenda for federal law reform to protect human rights and freedoms fully. Human rights law, properly applied, provides a set of tools to guide decision-making on issues impacting on our human rights – whether in times of crisis or not.

The Commission will be releasing a draft reform agenda and will be seeking further input through consultations, submissions and a series of symposia—all around the exigencies of the COVID-19 pandemic. We have our eyes firmly on the horizon: to ensure that the ‘after’ reflects the kind of Australia we do want to live in in the 21st century. 🌐





AHRC Human Rights Awards Finalists' Q&A



Dr Kate Barrelle

Chief Impact Officer & Co-Founder,
STREAT

Q: What comes to mind when you think about the Rule of Law concept? How do you see the concept impacting/influencing your work?

A: STREAT works with some of the most marginalised young people in Victoria. While they might not understand the term Rule of Law, some of them have devastating lived experience of what happens when the rule of law is not strong, or they are unable to access it because of various barriers.

In our work readiness training and employment program at STREAT we know it's necessary, but not enough, just to teach skills, provide housing, counselling or employment. We also strive to empower young people to know the law, be able to access justice, speak their truth, know their rights as both victims and perpetrators, and have the confidence/ trust to stand as an equal to all others in front of the law.

At its heart, STREAT provides connection, kindness, fairness and opportunities to our trainees. This is only possible in a country with strong rule of law. In turn, STREAT's programs assist young people who have been locked up by, or locked out of the system to participate in and contribute to the social norms underpinning rule of law in our society.

Q: How would you describe the role that organisations like the Australian Human Rights Commission (AHRC) play in upholding and promoting the rule of law? What about the role of the public and the private sectors?

A: The work of the AHRC is pivotal in upholding the rights of all people. The many activities that are carried out to protect and promote the rights of children and young people are critical.

The public and private sectors have moral and, in some cases, legislative or regulatory obligations to respect and support rule of law. However, there are so many competing demands and temptations to go off course. Which is why the work the AHRC does - acting as a conscience - in these sectors is so important.

Thank you AHRC for all the work that you do.

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Q: What drives your passion to progress human rights in Australia?

A: As an Anglo-Australian cis-gendered, able-bodied woman who grew up in a family where there was no violence, poverty or mental illness, and where education and ambition were encouraged, I've been incredibly lucky.

I know that my privilege was random and unearned. This fuels my fundamental belief that where we are born, what skin colour we have or social tribe we belong to should not determine our destiny. We are all connected and interdependent, and this extends beyond humans to other species and the planet as well. It sounds corny, but I honestly believe that every person has an obligation to do what they can to help make things better for all of us however big or small that capacity is.

Q: Who or what has influenced you the most?

A: The values lived every day by my parents shaped me – working hard, putting people and animals first, helping others while looking after yourself, making a difference, seeking to understand why people do things, learning from different people, challenging unfairness, not being a bystander, holding yourself and others to high standards, having fun and being silly, having integrity, having compassion, being curious, and taking pleasure in simple things like kids, gardening, food and books. I was also secretly quite influenced by the comic character known as the Phantom. I liked that he fought all forms of injustice with bare hands, wits and no superpowers. I used to imagine I was his daughter and would take over his work.

Some 25 years ago I met my (now) wife, Bec Scott. We are quite different to each other but share fundamental values. I honestly think she is one of the most extraordinary and inspirational human beings I've ever met.

I am inspired every day by the young trainees we work with at STREAT.

My personal motto is to give my best every day at STREAT but to also bring the best of myself home each night for my wife and our son.

Q: How would friends and acquaintances describe you?

A: I hate this question. Maybe they would say I'm kind, loyal and trustworthy, hardworking and fun.

Q: What's been the greatest struggle in your life?

A: Coming out as gay gave me an insight into the fear and

hatred of difference, being judged and spat on by others, being discriminated against under the law at the time, and of feeling relegated to a second tier in society. I didn't stand up for myself at the time when I was young, but now I stand strong beside anyone experiencing any form of discrimination.

Q: What are you most proud of accomplishing?

A: I've done some good work in crime and violence prevention, including developing a model to help people walk away from violent extremism. This model is holistic and focuses on building protective factors, while also giving people the chance to fully participate in society and have their say in an effective but non-violent way. This is not dissimilar to what is built into the DNA of STREAT's programs. The most meaningful award we've won at STREAT is the AHRC award in December last year.

My family is the cornerstone of everything. From that strong base comes the capacity to do everything else – including STREAT – which I co-founded with Bec. STREAT is ten years old now, and we've helped more than 500 young people in our intensive programs. I'm incredibly proud of what Bec, the whole of the team at STREAT and I have built over the last decade. I'm even more proud of what our trainees have gone on to do in their lives after our programs.

I don't think we have accomplished everything possible from STREAT; the best is yet to come.

Q: What will you be working on in 2020?

A: At the ground level, I'll be working on expanding opportunities for young people to go into 'green collar jobs'. STREAT remains utterly dedicated to working with marginalised young people, but we need to create training and employment opportunities for environmentally sustainable jobs within and adjacent to hospitality. We can no longer separate people from the planet in our thinking.

We have most of the knowledge and technology we need, so at the system/ societal level it's about changing our behaviour and attitudes.

Q: What's your vision for the future?

A socially just and environmentally safe world for all our children to grow up in. This means re-distributing power and resources so that previously marginalised people have agency. This is not always a popular idea among people who hold power and resources, so we're going to need a strong rule of law that supports human rights to prevail. 🌍



AHRC Human Rights Awards Finalists' Q&A



Kate Eastman SC

Sydney based barrister with a practice in human rights, employment and discrimination law

Q: What comes to mind when you think about the Rule of Law concept? How do you see the concept impacting/influencing your work?

A: As a lawyer, the Rule of Law is at the core of what we do. The Rule of Law means that Australia has laws and there is an expectation that governments, institutions and individuals will behave consistently with those laws. The Rule of Law means no one is above the law, and the laws apply equally in our society. It means governments do not have unlimited powers. In Australia, the Rule of Law operates through the separation of powers. This means there are checks and balances in how laws are made and applied.

Our laws must be accessible (i.e. people know what the law is or can find out what the laws are) and enforceable by proper policing (in the case of criminal laws) or by other agencies. Ultimately, the Rule of Law requires an independent, transparent and effective judicial system.

Lawyers have a role in ensuring that the Rule of Law works in practice all day, every day. We are the mechanics, in the sense that we can advise and represent governments, institutions

and individuals about their rights and obligations. We can also contribute to the process of making laws, particularly where proposed laws might strip individuals of basic human rights and freedoms.

Q: How would you describe the role that organisations like the Australian Human Rights Commission plays in upholding and promoting the rule of law? What about the role of the public and the private sectors?

A: One of my first law related jobs was at the Australian Human Rights Commission. I was a research assistant to Australia's first Privacy Commissioner, the late Hon. Kevin O'Connor AM. Some years later, I returned to the work as a Senior Legal Officer with the Commission for three years. My history means that I have had the advantage of seeing the work of the Commission from both the inside and outside. The Commission has existed in a number of forms since 1981. It was first set up when Australia agreed to take on obligations under the *International Covenant on Civil and Political Rights* (August 1981). It has played an important role in promoting, educating, investigating and advocating for human rights.

One of the significant functions of the Commission is to receive complaints from people who have experienced discrimination in their schools, workplaces, accommodation and receiving services. The Commission investigates these complaints and assists the parties to resolve their disputes through conciliation. The majority of claims are resolved by private conciliation. Much of this work is

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confidential and hidden from the public but has made a difference to the lives of thousands of Australians.

Q: What drives your passion to progress human rights in Australia?

A: My passion for human rights started at school. My school had a strong focus on social justice. However, I did not know anything about law or lawyers until I did some schoolwork experience with a barrister. After that, I was hooked and wanted to be a lawyer. I found all areas of the law interesting but eventually focused on international law after completing my undergraduate law. I studied international human rights law as a postgraduate student in London in 1990. Since then, I have worked in the areas and taught human rights law at several of universities.

I remain driven by the belief that the law can protect and provide remedies for breaches of human rights. I know not everyone will agree with me - but all day, every day the law and the decisions of judges protect human rights.

Q: Who or what has influenced you the most? While growing up/currently?

A: Like many people, my parents, my family and my teachers influenced me by shaping my values and sense of justice. At the present time, my husband and my daughter influence me. They give me perspective on the world. Likewise, I have been influenced by the wise older women lawyers/judges who have been my mentors and friends.

I would also say that I have been profoundly influenced by the clients who I have represented in a wide range of matters. In some cases, I have been influenced by the courage of individuals to speak up and bring court cases to seek remedies that might make a difference for themselves and others in similar situations. In other cases, being able to work with government agencies and corporations behind the scenes in order to change practices and policies. I have been influenced by the way people have worked to fix an injustice and change their minds to achieve fairer and better outcomes.

Taking time to listen, learn and understand another person's perspective is important.

Q: How would friends and acquaintances describe you?

A: It is hard to answer this question. I think they might describe me as hardworking, intelligent, caring, determined, loyal and efficient.

Q: What's been the greatest struggle in your life?

A: I have had a fortunate and privileged life. I have not experienced violence in my family, homelessness or chronic illness. However, I am aware that the absence of personal struggle should never be taken for granted. It also means we must be prepared to provide assistance to those in the community who face struggles and adversity.

Q: What are you most proud of accomplishing?

A: Personally, my family. I am proud of my daughter who is a funny, intelligent and an empathetic young woman with integrity and purpose.

I am also proud of the little things. Particularly, if I have been able to create a change that made a big difference to others. I am also proud of my students; watching them become strong advocates for human rights and have the courage to take on cases that promote human rights.

Finally, in April 2018, I completed a trek in Nepal to raise funds and awareness about UN Women and the rights of women and girls. It was a physical challenge, but I did it!

Q: What will you be working on in 2020?

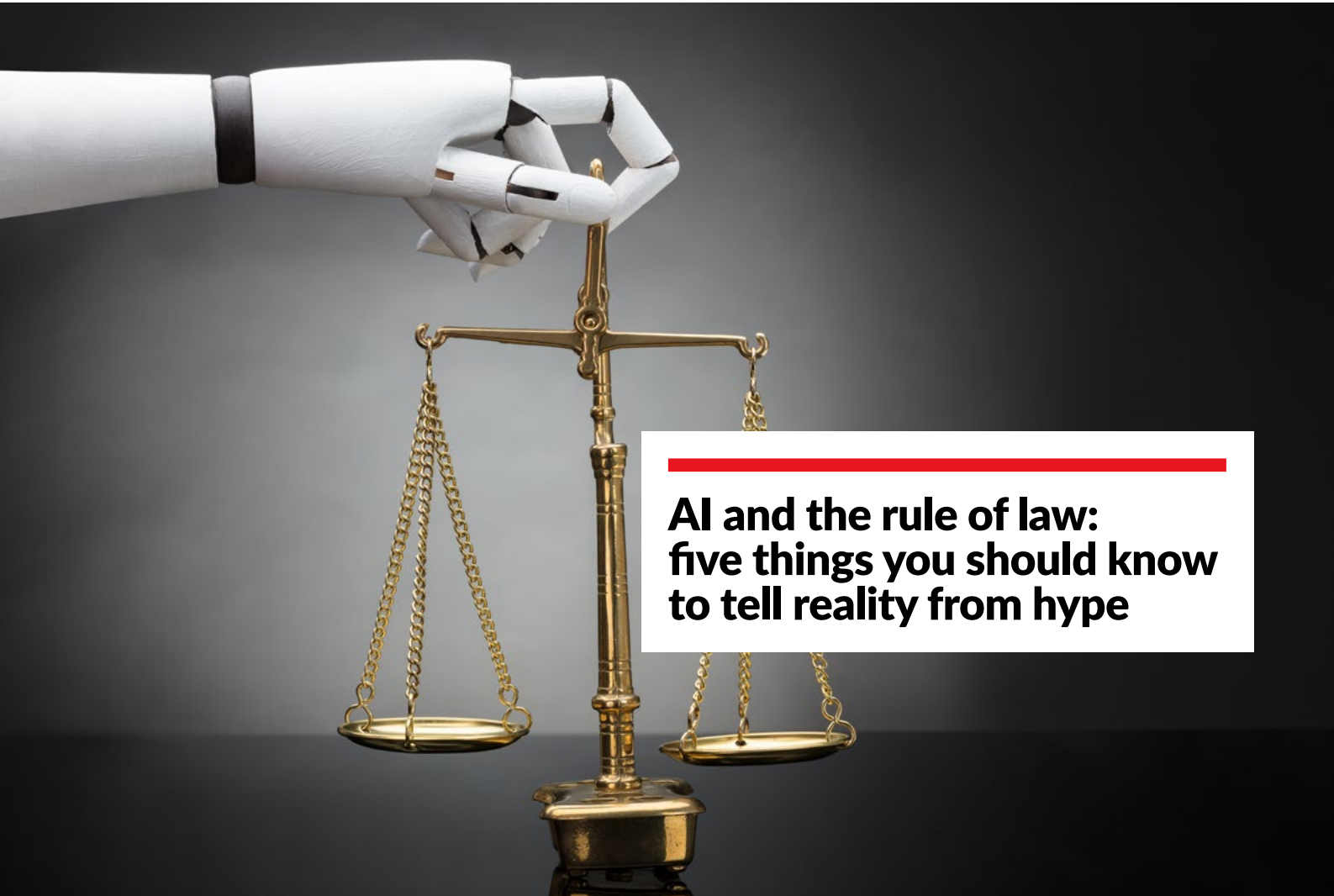
A: My focus in 2020 will be my work as Senior Counsel assisting the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability.

The Royal Commission's terms of reference are broad and focus on many areas where violence and abuse can occur. In particular, my work will focus on the public hearings examining some difficult and disturbing treatment of people with disability. To date, the Royal Commission has held public hearings covering education, the experience of people with disability living in group homes, and why people with intellectual disability have a significantly lower life expectancy compared to the rest of the community. Access to health care, particularly during the COVID-19 pandemic raises issues for people with disability.

Q: What's your vision for the future?

A: My vision is for a fair and compassionate society.

In particular, I would like to see girls and young women experience gender equality, receive equal pay and receive certainty that they will not be sexually harassed. I would like them to be leaders and to have real choice in their lives. 🌍



AI and the rule of law: five things you should know to tell reality from hype



Shan Mukerjee

LexisNexis Executive Manager,
Core Product

Artificial Intelligence's impact on access to justice, as well as the nature and distribution of legal work, was a cause of much concern and debate even before the havoc wrought by COVID-19. To understand how the reality differs from the hype, here are five things you ought to know about AI and what it means for the rule of law.

1. **General vs Narrow AI, the ability to run an obstacle course starts with tying a shoelace**

It's a little predictable, but let's start with a definition.

What is AI? You already know AI stands for artificial intelligence and denotes the science, as well as science fiction surrounding the ability to make a machine think, behave or perform like an intelligent being.

Since humans don't seem able to decide the best way to behave like intelligent beings themselves, the result is a vague definition with a lot of philosophical wiggle room, fuelled by a whole host of scary movies. As a nascent scientific field, AI looms larger in the popular imagination than its real-world impact warrants (for now).

So, the question when you talk to someone about AI is not 'what is AI?', but rather 'what does your interlocutor *think* they mean when they talk about AI'?

A key distinction to draw is between General and Narrow AI. General AI (also known as strong AI) is the ability

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to navigate the world the way humans do: absorbing a bewildering array of data, prioritising what to examine and making decisions about where to go. All while negotiating an invisible obstacle course of complex and conflicting socio-political rules. Yes, General AI is currently science fiction.

By contrast, Narrow AI (also known as weak AI) is about training a machine to do a single task involving limited input, scope and discretion. Narrow AI is the only AI you have experienced, but it is all around you and easy to take for granted.

When we talk about governance for AI to curtail its potential impact on society, let's first clearly define what we are hoping to govern and why. We shouldn't be lulled into a false sense of security by our Netflix list, nor should we reflexively react to our fear of HAL 9000. Running an obstacle course may start with tying a shoelace, but it's not the same thing.

2. Supervised and unsupervised machine learning: either way you need training data

You may have noticed the term AI is a little out-of-vogue, and that the term machine learning is seen more often right now. It refers to a subset of the AI field related to a method for training machines to behave intelligently, namely by providing sets of training data to the machine so that it can uncover relationships within it.

Supervised machine learning is where we feed the machine training data in which the input is already matched to the output, then give it fresh data and ask it to predict the output (or input) from the rules it has surmised from the training data. In other words, give a machine enough ways that Blue + Yellow = Green and the machine will give you the right way to mix any shade

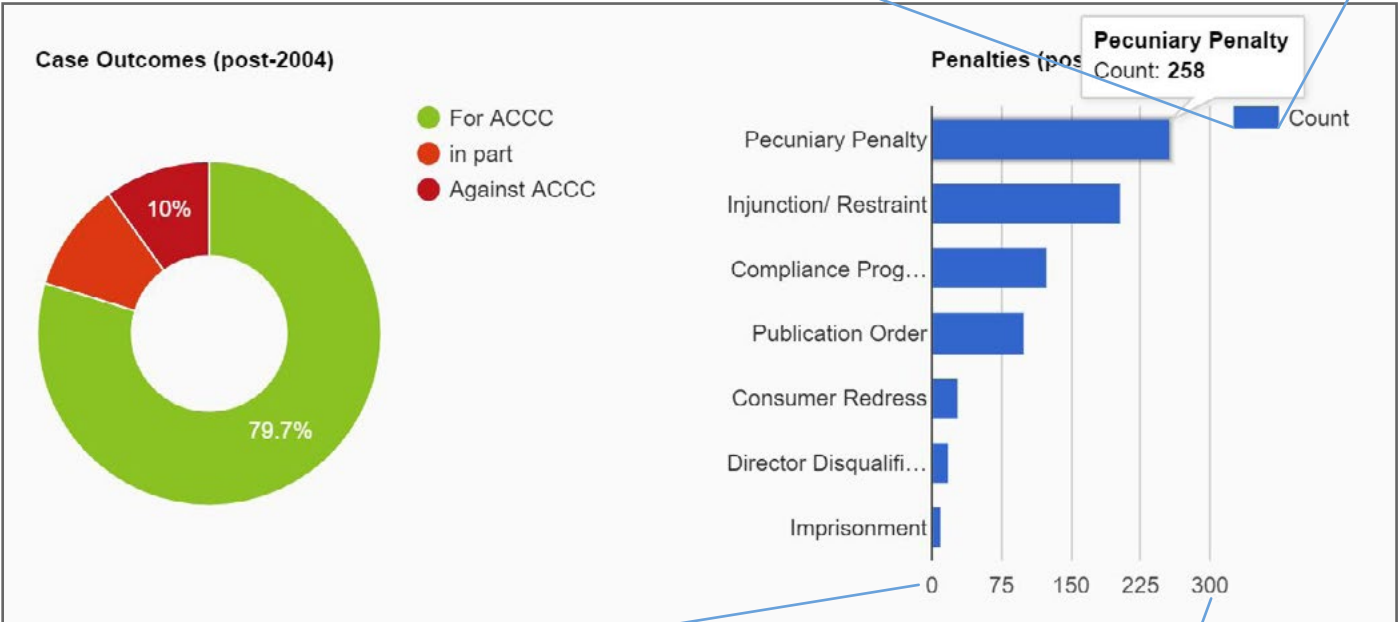


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of green in the world, and gauge the particular shades of blue and yellow used to make any green you show it.

Unsupervised machine learning is when we just give the machine data without any answers. The machine's task is not to provide new answers but to uncover relationships in the data that humans didn't know about. Give the machine the complete works of Shakespeare and it may conclude that comedies must include a case of mistaken identity, or that the author had a habit

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Catchwords:
Corporations - Offences - Unconscionable conduct and breach of obligation - Determination

Case Outcome:
For applicant

Penalties:

Alleged Section(s) Contravened: ACL s 18 | ACL s 21 | ACL s 29(1)(h) | ACL s 37(2) | CCA s 51ACB | Franchising Code of Conduct cl 6

Total Pecuniary Penalty: \$4,201,000 [More Details]

Director Disqualification: 5 years [SANAM ALI] | 4 years [CHARLES CAMERON]

Consumer Redress: Yes [SANAM ALI]

of ending every seventh sentence with letters containing odd numbers.

Why is this relevant to the law? Because to apply one of these machine learning techniques to legal content, you must start with training data. In a common law system like ours, there are hundreds of years of published legal

content to draw on, which is an incredible gift. However, there is a key distinction between content and data.

3. Your algorithm is only as good as your data... and your data isn't good enough (yet): the case for legal knowledge engineers

Legal content abounds: historical law reports, textbooks

and statute. With increased efficiency in our courts and tribunals, and improved access to justice, the flow of available judgments has further increased. This should present a huge opportunity to apply machine learning techniques to extract insight.

Before we can make any major leaps in AI, legal content needs to be turned into structured legal data. At present legal content is, at best, captured as semi-structured data. Judgments are slabs of paragraphs with the occasional heading. Catchwords are profoundly valuable but have limited application due to their high-level nature. Legislation is hyper-structured to the human eye, but the only relationships in the data are context-driven and open-ended and therefore, not reliable.

To facilitate the transition from content to data we need knowledge engineers: legally trained humans who can extract meaning from the law in a way that a machine

The important lesson is that all the legal training data we could possibly use for machine learning purposes will be biased in some way, even if we cut out the relevant sensitive data points with the best of intentions.

can digest. Unlike a regular lawyer, a legal knowledge engineer needs to understand both the semantics and grammar of the law, and be able to translate that understanding for an AI engineer to turn into code.

Until we invest in improving legacy content and teaching information architecture principles to judges and legislative drafters, as well as see a rise in the number of legal knowledge engineers, legal AI is going to be slow to get moving.

4. Rules as Code and other neat concepts

Computer code is a set of instructions that tells a machine what to do. The law is a set of instructions that

tells humans how to behave. It should be easy to turn the latter into the former, yet that's far from reality. Potential applications include chatbots automating answers to simple legal queries thereby improving access to cheap or free legal advice. One can imagine eventually speeding up the justice system by separating low-level matters into a case management stream presided over by one human judge or magistrate for every six machines.

Whether we, as society, are comfortable with the idea of conveyor belt justice is an important philosophical question. Especially when one can imagine that the low-level matters shunted into a separate stream would likely disproportionately impact vulnerable members of our community.

But we will have a fair bit of time to search our conscience for the answers to those questions since the Rules as Code concept is founded on a somewhat naïve premise. Namely, that our law isn't riddled with exceptions, gaps, ambiguity, subjective discretion and near-invisible subtext. Why else would we rely so heavily on interpretative aids like explanatory memoranda?

5. AI bias is human bias

You have no doubt heard a lot about the dangers of algorithmic bias, as illustrated by the racial bias embedded in the COMPAS recidivism assessment tool used in the US. In that case, we are told, race was not an explicit data point used to train the algorithm. However, long-standing social and economic inequality provided a host of proxy data points to which the tool did have access.

The important lesson is that all the legal training data we could possibly use for machine learning purposes will be biased in some way, even if we cut out the relevant sensitive data points with the best of intentions. Realities like the self-selecting nature of civil litigation, or the impact that different methods of policing certain communities inevitably has on incarceration rates for those communities, result in inherently biased data.

To avoid AI perpetuating systemic inequality — which is to say continuing the cycle established by existing human bias but faster and cheaper — we need to candidly recognise the flaws in our existing training data and ensure that any outcomes derived from a new algorithm are equitable or explicitly labelled otherwise. 🌐



The importance of an Australian anti-slavery commissioner as a strength to the rule of law



Andrea Tokaji¹

Lecturer,
Business and Law at Sheridan, Perth

Australia's National Modern Slavery Reporting Requirement² seeks to encourage the Australian business community to identify and address their modern slavery risks by maintaining responsible and transparent supply chains.

In Australia, entities required to comply with the Reporting Requirement are currently preparing their own annual Modern

Slavery Statement. This Statement is required to set out a business's investigation, as well as their proposed specific actions to assess and address modern slavery risks in their operations and supply chains. The Statement is to be made publicly available through an online central register.³

Slavery often exists because the rule of law has come under threat or is compromised, and corruption thrives as a result. When mitigating against the violation of the all-important democratic principles of the rule of law, it is imperative to have the correct structures and competencies in place. This ensures the correct checks and balances keep the process, and those within it, honest.

The extension in Corporate Social Responsibility within human rights⁴ is a step in the right direction towards sustainable and

¹ Andrea Tokaji is a Lecturer in Business and Law at Sheridan, Perth, is a trained international human rights lawyer, a human rights advocate, a parliamentary lobbyist currently completing her PhD in slavery in Business supply chains at NDU, and runs a Consulting firm in Human Rights in Business. Andrea was the Founder and CEO of Fighting for Justice Foundation, an anti-slavery NFP advocacy lobbying organisation dedicated to disrupting human trafficking within a preventative model after working for the Government as a lawyer, and the UN in a humanitarian capacity.

² Outlined; Home Affairs Department, at: <https://www.homeaffairs.gov.au/criminal-justice/files/modern-slavery-reporting-entities.pdf>

³ The Modern Slavery Business Engagement Unit in the Department of Home Affairs is responsible for implementing the Act, including providing general advice and support to entities about compliance with the Reporting Requirement: Home Affairs Department Business Engagement Unit at: <https://www.homeaffairs.gov.au/reports-and-publications/submissions-and-discussion-papers>

⁴ Corporate Social Responsibility and Human Rights: The concept of Corporate Social Responsibility (CSR) is generally understood to mean that corporations have a degree of responsibility not only for the economic consequences of their activities, but also for the social and environmental implications. This is sometimes referred to as a 'triple bottom line' approach that considers the economic, social and environmental aspects of corporate activity. Various terms are used to describe CSR initiatives, including 'Corporate Responsibility', 'Corporate Accountability', 'Corporate Citizenship' and 'Sustainability'. The meaning and value of CSR may differ in various contexts, depending on local factors including culture, environmental conditions, and the legal framework. Human rights are relevant to the economic, social and environmental aspects of corporate activity. At: <https://www.humanrights.gov.au/our-work/corporate-social-responsibility-human-rights>

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equitable human rights standards of business practice globally. However, it cannot be done adequately without administrative oversight. If Australia is indeed serious about its separation of powers and upholding the rule of law, a Commissioner dedicated to oversee the *Modern Slavery Act* with independence is an integral part of this process.

Many principles in the International Bill of Rights reflect the meaning and content of the notions of the rule of law and democracy. The rule of law is expressed in the provisions asserting that all are equal before the law and are entitled, without discrimination, to the equal protection of the law.

According to Mr Kevin Hyland OBE⁵, UK's first Anti-Slavery Commissioner, Australia's *Modern Slavery Act* can only succeed if we have an independent Anti-Slavery Commissioner. As noted in its Interim Report, Mr Hyland, told the Australian Parliamentary Committee that "... my role as the Commissioner is about working with government and other agencies."⁶

There is much international precedent for Commissioners taking on an integral administrative role, including the 2005 appointment of the European Union National Rapporteur by the Council of Europe,⁷ and the European Commissioner establishing the office of the Anti-Trafficking Coordinator⁸ in 2011.

In April 2000, the Netherlands established the independent National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children.⁹ In 2009, Finland's Ombudsman for Minorities was given the role of National Rapporteur on Trafficking in Human Beings.¹⁰

In the United States, the Department of State's Office to Monitor and Combat Trafficking in Persons (TIP Office) leads the US Government's global efforts to combat modern slavery. The TIP Office was established in accordance with the Trafficking Victims Protection Act of 2000.¹¹

The rule of law is imperative in the pursuit of good governance, a transparent and fair system of government, as well as the enforcement of laws through regulation, law enforcement and public policy initiatives. This is the reason why, in keeping with the UK's *Modern Slavery Act* (2015), an Anti-Slavery Commissioner is imperative to take on the role of mediator between the legislation, the government, corporations requiring to report, lobbyists, advocates, as well as the general public who all need transparent data and information as a part of the process.

This is the main reason governments appoint Commissioners who have a central administrative role that requires them to represent the Executive in the out-working of certain laws while retaining autonomy and independence to stakeholders who may wish to whistle-blow, report corruption, draw the Commissioner's attention to instances of inefficient application of the law, or any gaps in the system that may exist.

Many principles in the International Bill of Human Rights reflect the meaning and content of the notions of the rule of law and democracy. The rule of law is expressed in the provisions asserting that all are equal before the law and are entitled, without discrimination, to the equal protection of the law.

As has been noted: "The rule of law is an overarching principle which ensures that Australians are governed by laws which their

5 Interview with Kevin Hyland, former Anti-Slavery Commissioner of the UK; Gloria Jeans Cafe, Central Station, Sydney, NSW 6th July 2019.

6 Mr Kevin Hyland OBE, Independent Anti-Slavery Commissioner, Committee Hansard, Canberra, 30 May 2017, p. 3.

7 Council of Europe, Convention on Action against Trafficking in Human Beings, adopted 16 May 2005 (entered into force 1 February 2008), <https://ec.europa.eu/anti-trafficking/node/4538>

8 The Coordinator's role was established under EU Anti-Trafficking Directive 2011/36/EU.

9 The current Rapporteur is Mrs Corinne Dettmeijer-Vermeulen. See: National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, <https://www.dutchrapporteur.nl/>

10 The current Rapporteur is Ms Kirsi Pimiä. See: Non-Discrimination Ombudsman, National Rapporteur on Trafficking in Human Beings, <https://www.syrjinta.fi/en/web/en/rapporteur-on-trafficking>

11 US Department of State, Office to Monitor and Combat Trafficking in Persons, <https://www.state.gov/bureaus-offices/under-secretary-for-civilian-security-democracy-and-human-rights/office-to-monitor-and-combat-trafficking-in-persons/>

elected representatives make, and which reflect the rule of law. It requires that the laws are administered justly and fairly.¹² This administration of the laws in a just, fair and equitable way requires the independence of a Commissioner to oversee and administer the *Modern Slavery Act*, similar to the UK.

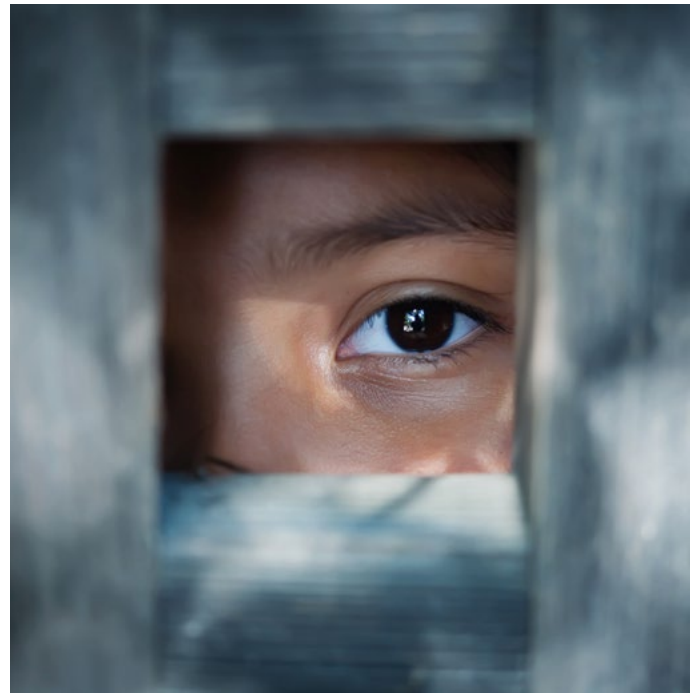
As the Anti-Slavery Commissioner of UK, Mr Hyland's independent role enabled him to nationally educate corporations on their obligations under the *Modern Slavery Act* (UK) 2015, liaise with international counterparts, gather evidence and data, collaborate on particular anti-slavery projects and report to governments without compromise or political agenda. When this independence is compromised, it is extremely difficult to undertake these highly political tasks, including negotiating the international relations aspect of the implementation of this legislation in our region.

Mr Hyland OBE was strongly in favour of the role of the Anti-Slavery Commissioner partly providing a sense-checking role, such as identifying system failures and fixing them before it becomes disastrous for victims. Accordingly, he expressed the opinion that *“A good independent Commissioner will be exercising their independence through sense checking for system failures and addressing needs as they arise before the failures can occur and an inquiry is required.”*¹³

At an Inquiry hearing in 2017, Mr Hyland OBE told the Australian Parliamentary Committee that the key focus of his role as Commissioner is in assisting to identify and support victims of modern slavery, and prosecute offenders.¹⁴ Some UK submitters highlighted the important role the UK Commissioner has played in addressing modern slavery. Ms Caroline Haughey, who undertook a review of the Modern Slavery Act in 2016, told the Committee that the introduction of the Anti-Slavery Commissioner has *‘been a success’*:

*“As well as raising the profile of the issue, Kevin Hyland OBE has challenged data recording, ensured that there is an independent voice on the national and international stage presenting the UK picture. He has also brought back experience and knowledge from other jurisdictions.”*¹⁵

The Commissioner takes on an important role in upholding the rule of law and ensuring justice is upheld, crimes are reported, and legislative reform eventuates from their recommendations. Despite Mr Hyland's autonomy as Commissioner in the UK, he still faced resistance by the UK Government to his recommendations. Despite this, he was not shy in his public statements during and after his role as UK's first Anti-Slavery Commissioner. Mr Hyland described the UK's system for preventing people-trafficking into



the country as “failing” - calling for urgent reform.¹⁶ He expressed anger at the UK Government's ability to adequately investigate the criminal networks of human traffickers and modern-day slave-holders responsible, noting that the UK views human trafficking merely as a social issue¹⁷ and still fails to treat it as a serious organised crime.

¹² Robin Speed, former President of the Rule of Law Institute of Australia, at: <https://www.ruleoflaw.org.au>

¹³ Ms Caroline Haughey, Submission 190, p. 5.

¹⁴ Mr Kevin Hyland OBE, Independent Anti-Slavery Commissioner, Committee Hansard, Canberra, 30 May 2017, p. 3.

¹⁵ Ms Caroline Haughey, Submission 190, p. 5.

¹⁶ Amelia Gentleman, Ex-commissioner condemns 'failing' UK approach to human trafficking, Kevin Hyland expressed frustration many of his 2017 anti-slavery recommendations have not been adopted, The Guardian, 29th October 2019, at: <https://www.theguardian.com/law/2019/oct/28/ex-commissioner-condemns-failing-uk-approach-to-human-trafficking>

¹⁷ Independent Anti-Slavery Commissioner Report, Combating Modern Slavery Experienced by Vietnamese Nationals En Route to, and Within, the UK, 2017, at: <https://www.antislavery-commissioner.co.uk/media/1159/iasc-report-combating-modern-slavery-experience-by-vietname-nationals-en-route-to-and-within-the-uk.pdf>



Although the UK *Modern Slavery Act* of 2015 was “ground-breaking” in Mr Hyland’s opinion, insufficient resources had been allocated to investigating the trafficking networks, failing to urge officials to view human trafficking as an organised crime to be tackled by a determined police force. Following this, he was formally rebuked by the UK Home Office in 2017 for being “disproportionately critical” of law enforcement agencies in his report *Combating Modern Slavery Experienced by Vietnamese Nationals En Route to, and Within, the UK*.¹⁸ “The Home Office said they thought this was disproportionate criticism; they told me that in writing,” Hyland said.¹⁹

Mr Hyland resigned from his role as an Independent Commissioner in 2018, only four years after his appointment. Pointing out that it

was his job to be critical and offer recommendations for making the system more effective, Hyland complained of government interference in his work.

Currently, Australia’s Border Force within the Home Affairs Department are proposed to take on the entirety of the Commissioner’s role under the specific directive of the Minister. There are, however, systemic rule of law issues with this arrangement. Given the lack of separation of powers, these issues may lead to a lack of transparency and autonomy of the reporting processes. As stated by the then Judge Joe Harman: “The existence of laws is fundamental to a society governed by the rule of law. However, the creation and enforcement of laws does not, of itself, constitute or enable a society to be governed by the rule of law. The important distinction must be drawn between a society governed by laws and a society governed by the rule of law. A society governed by laws, without consideration and embrace of the rule of law as a guiding and underlying principle, has the potential to be a tyrannical or police state.”²⁰

It is clear that States that uphold the principles of the rule of law will often have a stronger promotion of human rights. Their national laws and process of creating pathways to promote justice and equality require certain conditions, such as, a

clear separation of powers exercised, a strong independent legal profession and judiciary, an effective and well resourced Executive, including offices for the public service that is entirely separate to ensure the efficient functioning of the legal system and uphold of the principles of the rule of law in general.

An Independent Australian Anti-Slavery Commissioner is integral to ensuring transparent, fair and independent responsibilities as exemplified by the UK’s Anti-Slavery Commissioner, Kevin Hyland. Without a Commissioner, we need to strongly question the enforcement and success of Australia’s *Modern Slavery Act* to disclose cases of slavery in business supply chains, protect the most vulnerable, and hold perpetrators to account. 🌐

¹⁸ Amelia Gentleman, Ex-commissioner condemns ‘failing’ UK approach to human trafficking, Kevin Hyland expressed frustration many of his 2017 anti-slavery recommendations have not been adopted, *The Guardian*, 29th October 2019, at: <https://www.theguardian.com/law/2019/oct/28/ex-commissioner-condemns-failing-uk-approach-to-human-trafficking>

¹⁹ Presentation by Judge Joe Harman at the Legal Studies Teachers Conference 15 March, 2014, Federal Circuit Court of Australia, at: <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/speeches-conference-papers/2014/speech-harman-rule-of-law>

²⁰ Presentation by Judge Joe Harman at the Legal Studies Teachers Conference 15 March, 2014, Federal Circuit Court of Australia, at: <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/speeches-conference-papers/2014/speech-harman-rule-of-law>

Secondary Infektion: disinformation and good governance in the era of evolving global threats



Jenna Allen

Editorial, Capital Monitor

The spread of COVID-19 across the world is currently the omnipresent issue on a usually competitive agenda of global governance matters. Along with the multitude of policy challenges present in trying to address the pandemic, many governments have also faced the additional phenomena of disinformation ubiquitous to the information environment – especially in a crisis. Work by the Digital Forensics Research Lab (DFRLab) in 2019 information operation targeting the West known as Secondary Infektion may be ongoing and impacting global responses to COVID-19.

Without finding a way to push back on targeted disinformation and the other tools of hostile social manipulation, good governance responses that require public consensus, cohesion and cooperation will continue to struggle on both national and global scales.

Disinformation – Past and present

The term disinformation is broadly defined as information that is false or deliberately distorted to harm a person, social group, organisation or country.¹ Despite really only entering the popular zeitgeist following Russian interference in the 2016 United States Presidential elections, Dr Geoffrey Nunberg of the School of Information at the University of California at Berkeley cited the word disinformation as being “10 times as common in media headlines as it was five years ago” by 2019.² But the fundamental idea underlying the use of disinformation as a tool isn’t new. And while many democratic nations have an inherent opposition to government influence in the information space,³ the underlying premise of deception being an instrument of

¹ <https://en.unesco.org/fightfakenews>

² <https://www.ischool.berkeley.edu/news/2019/geoff-nunbergs-word-year-disinformation>

³ <https://www.belfercenter.org/publication/geopolitics-information>

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effective governance has been woven into the fabric of political thought and conduct from Themistocles to Sun Tzu.

Many countries, if not all, have engaged in subversive activities for the purpose of social manipulation. A clear example of this would be the widespread use of national propaganda, especially in times of conflict; such as Britain's widespread use of propaganda to galvanize resistance to the Nazi's during World War II. Countries like Russia have an extensive background in "disinformatiya" as a practice dating back to at least the Cold War.⁴ The important distinction here between propaganda and disinformation is that the former attempts to *convince* someone to believe something, while the later is explicitly designed to *deceive* someone into belief. Additionally, misinformation is false but lacks the intent of causing harm.⁵

Ultimately, it is the mode of this subterfuge that has changed the ballgame in the current context. The rapid evolution and permeation of technology has provided an infrastructure perfectly suited to aid the malicious spread of information with increased speed, scale and impact. Saturation of personal communication devices, connection to the internet and the advent of platforms like social media have created a direct cognitive link between most individuals on the planet, and a possible manipulator that is more anonymous than ever before.

Disinformation and COVID-19

In moments where broad public consensus, compliance and cooperation need to be activated quickly, distrust and confusion in the information environment can be crippling to good governance. The emergence of the COVID-19 pandemic is a clear example of this.

Possible disinformation and misinformation around the current pandemic range from medically unsound cures through to conspiracy theories about its origin, and even existence altogether. For example, reports that the COVID-19 virus was created in a lab in Wuhan and unleashed as an attack on the United States; or contrastingly that the virus was an invention of the CIA planted by the US to destabilize China. These have manifested in ways that have impacted the response of the public and institutions to the pandemic; for example, protests in the United States or hoarding toilet paper in Australia.

Again, this isn't a new phenomenon. In the midst of the HIV/AIDS epidemic in the 1980s, the Soviet Union KGB carried out a disinformation campaign titled Operation "Infektion" by concocting and planting the story that the United States had created HIV/AIDS to kill people who were black or gay.⁶ In 2019, the DFRLab – a think tank research unit of the Atlantic Council employed to help companies like Facebook track and analyze disinformation – reported a likely Russian-based information operation. Titled Operation Secondary Infektion, the campaign used fake accounts, forged documents, and dozens of online platforms to spread stories in a way that is "strongly reminiscent" of the tactics used in Operation Infektion decades earlier.⁷ Despite the report being released, the Operation was suspected to be ongoing at the time of the report's release in June 2019, yet with considerably small reach/low impact.

Emergencies and disinformation – So what do we do?

Without the public's widespread cooperation, implementing good governance in an emergency is difficult in democratic societies like Australia. However, managing a more open information environment around crises like COVID-19 have become a particularly hairy problem for countries since they are particularly vulnerable to manipulation. So, what do we do?

In the context of COVID-19, there are two primary challenges.

First, to be disinformation something must have been created with malicious intent. However, it is often spread from the far corners of the internet unknowingly by people who simply believe the content is true and with no malice what-so-ever. Your Uncle Larry likely isn't an information operative just because he shares a post about dolphins swimming in the canals of Venice, but he is part of the problem. This makes the process of distinguishing between the two, and the attempt to build consensus and apply governance measures, difficult. In the case of disinformation, the adage stands – sunlight is the best cure. Education and individual understanding, given the direct connection between an individual and a potential manipulator, is key. For example, DFRLab's investigation into Operation Secondary Infektion concluded that it had gained little traction by the release of the report in 2019. This was attributed partially to the increased public awareness of online information campaigns.

⁴ <https://www.cia.gov/library/readingroom/docs/CIA-RDP84B00049R001303150031-0.pdf>; see also <https://www.nytimes.com/2018/11/12/opinion/russia-meddling-disinformation-fake-news-elections.html#one>

⁵ <https://rm.coe.int/information-disorder-report-november-2017/1680764666>

⁶ <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/vol53no4/pdf/U-%20Boghardt-AIDS-Made%20in%20the%20USA-17Dec.pdf>; See also <https://www.theguardian.com/science/blog/2017/jun/14/russian-fake-news-is-not-new-soviet-aids-propaganda-cost-countless-lives>

⁷ https://www.atlanticcouncil.org/wp-content/uploads/2019/08/Operation-Secondary-Infektion_English.pdf

Second, the biggest impact that disinformation can have as a tool is when it is brought into the mainstream discourse without being discredited. In the case of Operation Infektion, experts attribute its ultimate virality and success to exposure from being picked up by a popular news show of the 1980s in the United States itself. In the context of the COVID-19 pandemic, the role that state officials and leaders – for example, from both the United States and China – have played in perpetuating unverified or even discredited information during the pandemic amplified disinformation. Perhaps unsurprisingly, in countries where disinformation has been amplified by national leaders there has also been a struggle to create and implement unified governance and policy measures needed in the current chaos.

Governance, cohesion and consensus

While widespread awareness about disinformation as a targeted practice is critical, many main-stream discussions tend to focus on the when and where it occurs. This is important work that is often difficult to do well. It can also perpetuate the problem by amplifying a story that misses the question critical to neutralizing disinformation and galvanizing public resilience against its influence. Why? Why does anyone choose to use disinformation as a method or tool? For what ends? Why, frankly, is it worth the time and energy?

It's an idea as old as politics itself. The instability of an adversary can open the possibility for your own gains in power and influence. And in a democratic society the greatest source of power, and therefore largest possible catalyst for instability, is the people and public opinion. To diminish this power, disinformation sews discord and covertly presses on points of internal tension (e.g. the trustworthiness of science or political parties different to our own) with the aim of weakening trust in social cohesion and governance institutions. The goal, according to DFRLab, in both Operation Infektion and Operation Secondary Infektion was to divide, discredit and distract Western countries.⁸ The long-term aim is to pull apart the social fabric of a society along its most vulnerable seams, because every society has its fracture points. And particularly in liberal democracies, the spectrum of opinions allowed to exist within an open society increases the number of these potential fracture points. Consensus is often hard-won

and harder to maintain. In this way, governance failures around COVID-19 in countries like the US serve as a clear illustration of why disinformation is used and why it is so powerful.

Regardless of whether any of the current COVID-19 related disinformation is directly tied to Russia or Operation Second Infektion, DFRLab's point about current disinformation efforts mimicking tactics should be heeded moving forward.

It is widely known that disinformation activities like Operation Infektion have historically: 1) washed a story of its fakeness by placing it in a developing country where journalistic practices were not as rigorous, 2) let the story go cold (sometimes for years) and 3) then resurfaced it at a strategically opportune moment.⁹ Now, however, any stop gap of verification (e.g. source verification etc.) provided by even basic journalistic practice and standards doesn't exist. Instead, disinformation can simply be placed in any unregulated corner of the internet to be found by sympathetic minds or grown and utilized later. It can also be catapulted into the mainstream by irresponsible or ignorant leadership and spread with a single Tweet. We have no way of knowing how many disinformation campaigns involving COVID-19 are currently being planted and washed. However, we shouldn't assume that if they do not gain traction right now that they won't be resurfaced at a destabilizing or dangerous moment in the future.

CIO of Graphika and leading disinformation investigator Camille Francois said in an interview recently that disinformation is now simply a part of geo-politics.¹⁰ But there is also a fly in the ointment of the thinking that supports disinformation being used as a tool of geopolitics. Because the most existential threats we face today, whether climate change or a global pandemic, cannot be effectively addressed merely at the national level. Creating instability in your adversaries today may cause short term gains, but it will also cause catastrophic instability that will not be able to insulate us from in the future.

Ultimately, the ability for governance systems in countries like Australia to preserve internal stability by maintaining public consensus and cooperation is fundamental to the success or failure of how it will face future global threats like COVID-19. 🌐

⁸ Ibid.

⁹ <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/vol53no4/pdf/U-%20Boghardt-AIDS-Made%20in%20the%20USA-17Dec.pdf>

¹⁰ <https://www.brookings.edu/techstream/podcast-camille-francois-on-covid-19-and-the-abcs-of-disinformation/>



Getting the balance right: privacy in emergency responses



James Dawson

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Australians' right to privacy is under constant challenge. Australian local, state and federal governments are collecting and using more data about individuals than ever before, while national security and emergency responses provide the impetus for rolling back privacy protections. The private sector amasses and leverages vast stores of data too, as tech giants develop ever more finely grained perspectives on consumer behaviour. As a result, government and corporate data stores have become ripe targets for persistent and pervasive hacking, including by arms of foreign governments. Australians are right to be concerned about these developments. We may enjoy the protection and convenience that are the fruits of government and corporate data collection, but there remains a strong undercurrent of public dissatisfaction when data collectors and users overstep the mark.

Legislating privacy and data in Australia

In April, the Parliamentary Joint Committee on Intelligence and Security (PJCS) completed its review of the [mandatory data retention regime](#), with a report due by the end of July. Law enforcement bodies such as the Australian Federal Police (AFP) [recommended](#) that no reduction be made in the current two-year limit for data retention. The AFP also noted that complex and more serious investigations may necessitate retrieval of data older than two years, voicing their approval with telecommunications providers who store metadata for longer than the current two-year minimum. The Victorian Independent Broad-based Anti-Corruption Commission (IBAC) also [added](#) support for the use of telecommunications data stating that it can make more invasive investigative techniques, such as physical surveillance and telecommunications interception, unnecessary.

In contrast, the Commonwealth Ombudsman [noted](#) potential gaps, ambiguities or inconsistencies in the mandatory retention legislation, including: 1) the lack of framework for agencies to issue verbal authorisations to access telecommunications data; 2) the absence of any obligation on agencies to retain or destroy the telecommunications data they receive from a carrier; and

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3) ambiguity regarding what constitutes content and whether agencies should have access to this information when disclosed by a carrier under an authorisation. Additionally, providers like [Telstra](#) and [Optus](#) are concerned that the profusion of requests for data is imposing an unreasonable burden on the industry.

High profile examples like journalist Annika Smethurst have brought the controversies and complexities of data access and privacy to the front of the public agenda. Although Ms Smethurst was vindicated by the High Court of Australia, which [declared](#) the AFP raid on her Canberra home unlawful, the AFP will retain the data they seized during the raid and may yet use it in a future prosecution. Ms Smethurst has said that until she receives assurances from Australia's Attorney-General, she remains concerned about her legal position. The AFP raid has left journalists worried not only about their own privacy, but their confidential sources too, imposing a significant burden on press freedom. More broadly, this exemplifies the concerns of individuals who are troubled by law enforcement access to personal and business data.

COVIDSafe: Questions and concerns

The current COVID-19 pandemic has brought its own challenges to Australians' privacy from both the government and the private sector. The [Privacy Amendment \(Public Health Contact Information\) Act 2020](#) that passed into law on 15 May, enforces an earlier determination from Health Minister Greg Hunt that enabled the COVIDSafe app - the legislation moved the enabling of the COVIDSafe app from regulation into legislation. Minister Hunt said the app had already been downloaded more than 5.68 million times. This makes the app one of the most downloaded in Australia but leaves it short of the Government's goal of 40 per cent saturation required for the app to be optimally effective.

Shortly after the Act legalising the use of the app passed, Attorney-General Christian Porter and Health Minister Greg Hunt [emphasised](#) the "strict privacy protections" contained in the legislation. "This legislation clearly defines the very limited circumstances in which COVIDSafe data can be collected, used or disclosed, as well as prescribing significant criminal and civil penalties for any misuse," Mr Porter said. "That includes jail terms of up to five years, or a fine of \$63,000 per offence. It is also a criminal offence under the legislation for anyone to coerce a person to use the app, to store or transfer COVIDSafe data to a country outside Australia, and to decrypt app data."

The contract for developing and hosting the app was awarded to Amazon Web Services (AWS), all but a fait accompli after the Department of Home Affairs selected the company to

develop the prototype. Labor's Ed Husic, formerly the Shadow Minister for the Digital Economy, has called for AWS to be dropped from the contract, saying that it "beggars belief" that the contract was awarded to an US data hosting giant when there are several Australian Cloud Service providers that could have been selected instead. Mr Husic paid respect to AWS and their capability but said it would have been better for the Government to "put the national interest first" and give priority to the Australian technology industry. This point is particularly salient when considering the implications of international hosting of Australian information.

The Australian Government has emphasised that, although AWS is a US company, all data related to the COVIDSafe app is to be stored in Australia. The Digital Transformation Agency (DTA), which is now the data store administrator for the app, defended the selection of AWS. In its [response to a question on notice](#) from Senate Committee hearings on 6 May, DTA said that it would have "introduced additional risk and complexity to the COVIDSafe system" to go with an Australian developer or hosting provider because AWS had completed the work on the prototype. As an American company, however, AWS is subject to the US [CLOUD Act](#), which mandates that electronic communication service providers must comply with warrants to disclose stored data to US law enforcement and security services, regardless of whether the data is located within or outside the United States. This adds to the concerns that Australians have about how their data will be stored and secured, especially in an era of increased requests for telecommunications data and the My Health Record data breach saga.

Conclusion

In March, research conducted by the Complex Human Data Hub of the University of Melbourne's School of Psychological Science found that 70% of Australians [surveyed](#) were in favour of a contact tracing app and would download one if it were available. However, a more recent survey conducted by the group found that only 44% of respondents had downloaded the app. Among those who hadn't downloaded the app, privacy was the predominant concern. Ultimately, public opinion indicates the complexity of privacy in the current era. And controversy on the topic is further compounded in times of emergency. It will be up to governments moving forward to find a way to balance legitimate concerns over privacy rights with utilising data as an effective tool for good governance. Whether that balance can or will be struck by Australia in the context of COVID-19 is yet to be seen. ●



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