Artificial Intelligence and the Rights of Persons with Disabilities

Submission to the Special Rapporteur on the rights of persons with disabilities

Castan Centre for Human Rights Law

Prepared by:

Dr Melissa Castan, Academic Director

Andrea Olivares Jones, Policy Manager

Scott Walker, Researcher

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Contents

Executive Summary

The Castan Centre for Human Rights Law welcomes the call for input by the Special Rapporteur on the rights of persons with disabilities on the subject of on *Artificial Intelligence and the rights of persons with disabilities.*

The Centre recognises that both States and private bodies are increasingly looking to embrace artificial intelligence (**AI**), machine learning, automated decision-making and similar technologies. This trend has been accelerated following the COVID-19 pandemic, which has seen communities around the world step further into the digital space than ever before.

The rise of AI technologies has unique implications for persons with disabilities. In some ways, these technologies can assist and support this group to enjoy the rights protected under international human rights law on an equal basis with others (for example, with the advancement and increased uptake of assistive technologies). Conversely however, without appropriate consultation, mechanisms to ensure accessibility and reasonable accommodations, as well as the effective regulation of AI technologies, there is a considerable risk that persons with disabilities will be negatively impacted by the increased uptake of AI in areas such as delivery of services, employment, education and more.

The Castan Centre has accordingly prepared the following submission to highlight the emergence of both beneficial and concerning AI technologies in Australia, and analysed their impact on the enjoyment of rights by persons with disability in this country. The Centre has also examined existing regulation of these technologies through human rights, privacy and anti-discrimination legal frameworks in Australia.

Ultimately, this submission concludes that more needs to be done to protect and promote the rights of persons with disabilities in the context of AI and the digital era in Australia. We make the following recommendations for the Special Rapporteur in this regard:

- **Recommendation 1:** Encourage States to prioritise the development of new AI technologies that are inclusive and accessible to persons with disabilities;

- **Recommendation 2:** Direct States to review the use of existing AI technologies and ensure accessibility and accommodation for the needs of persons with disabilities;

- **Recommendation 3:** Emphasise to States the need for meaningful consultation and co-design with persons with disabilities to ensure AI accessibility.

- **Recommendation 4:** Remind States of their obligations under international human rights law to *effectively* regulate the use of AI technologies by both State authorities and private bodies.

- **Recommendation 5:** Highlight to States (the need for effective monitoring and evaluation of AI systems used by government to ensure the enjoyment of rights by persons with disabilities.

Part 1: Background

1.1 About the Castan Centre for Human Rights Law

The Castan Centre for Human Rights Law (**Castan Centre**), based in the Faculty of Law at Monash University in Australia, is a research, education, and policy centre which aims to create a more just world where human rights are respected, protect, and fulfilled, allowing all people to flourish in freedom and dignity.

The Castan Centre has a long history of defending and promoting the realisation of human rights in Australia. It was founded in 2000 by a group of academics and human rights advocates and was named in honour of the world-renowned human rights advocate, Ron Castan AM QC.

The Castan Centre has a strong commitment to the rights of persons with disabilities. In relation to the rights of persons with disabilities, particularly persons with mental illness, the Castan Centre's new Executive Director, Professor the Hon Kevin H Bell AM QC, brings extensive experience as a former Justice of the Supreme Court of Victoria, Australia in judicially interpreting and applying the human rights of persons with disabilities under both international law and related domestic human rights instruments, including the Victorian *Charter of Human Rights and Responsibilities*.

The Castan Centre has also contributed extensively to research on the intersection between artificial intelligence technologies and human rights, including through a submission to UNICEF on AI and Children's Rights,[1] submissions to the Australian Human Rights Commission on Human Rights and Technology,[2] and a consultation report for the Australian Attorney-General's Department on AI, Automated Technologies and Human Rights,[3] among other publications by Castan Centre academics on related topics.

1.2 Terms of Reference

We recognise that the mandate of Special Rapporteur on the Rights of Persons with Disabilities (**Special Rapporteur**), Professor Gerard Quinn, is to, inter alia, make concrete recommendations on how to better promote and protect the human rights of persons with disabilities and combat stigma, discrimination, and other harmful practices that hinder the full enjoyment by persons with disabilities of their human rights, including to participate in the community on an equal basis with others and to equally exercise their human rights.[4]

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1 Castan Centre for Human Rights Law, Submission to UNICEF, *Consultation on Policy Guidance for AI and Children* (16 October 2020).

2 Castan Centre for Human Rights Law, Submission to Australian Human Rights Commission, *Discussion Paper on Human Rights and Technology* (2020); Castan Centre for Human Rights Law, Submission to Australian Human Rights Commission, *Human Rights and Technology Project* (2018).

3 Not released to the public. See generally Yee-fui Ng, 'Attorney-General's Consultancy on Artificial Intelligence and Automation', *Castan Centre Official Blog* (Blog, 22 November 2019).

4 *Special Rapporteur on the Rights of Persons with Disabilities*, HRC Res 11/10, UN Doc A/HRC/RES/44/10 (23 July 2020, adopted 16 July 2020)

We note the Special Rapporteur's focus on how artificial intelligence, machine learning and automated decision making can both advance the rights of persons with disabilities, as well as cause potential harm to persons with disabilities. We agree with the Special Rapporteur that the rise in the use of such technologies requires a thorough human rights analysis to ensure that the rights of persons with disabilities are respected, protected, and fulfilled.

This submission will seek to address questions 1-3, and 5-6 of Questionnaire B: as provided by the Special Rapporteur as part of the call for input on this subject. Due to time constraints, questions 4 and 7 will not be addressed in the present report.

The following terms of reference relevant to our submission	*Section/ Paragraphs*
1. Please provide information about the extent to which technologies such as AI, ML and ADM are used in engagements between the individual and State bodies and private bodies in a way which allows persons with disabilities to better engage positively in society.	**Part 4** *Para 4.1*
2. The following relationships are of particular interest: (i) the individual and State bodies; (ii) consumers and providers of goods and services; (iii) workers/employees and employers; (iv) learners and the providers of education; and (v) individuals and their right to live independently and being included in the community	**Part 4** *Paras 4.1, 4.2*
3. Please provide information about the extent to which technologies such as AI, ML and ADM pose a risk to the rights of person	**Part 4** *Para 4.2*
5. Please provide information about all relevant criminal and civil laws, codes, regulatory mechanisms, cases and other determination that address the rights of persons with disabilities and the matters highlighted in question 2	**Part 4** *Para 4.3*
6. Please explain the effectiveness of these laws, codes and regulatory mechanisms in relation to the protection and advancement of the rights of persons with disabilities (for example: the reach of those rights, access to courts and tribunals and other enforcement mechanisms)	**Part 4** *Para 4.3*

1.3 Submission Structure

This submission begins by providing key background information in **Part 1,** before examining the meaning of artificial intelligence and other key terms, and highlighting the link between these technologies and human rights generally in **Part 2.**

The submission then goes on in **Part 3** to outline the provisions under international human rights law that are relevant to discussions of the human rights of persons with disability and AI, ML and ADM. Specific reference is also made in the section to the General Comments of some key United Nations

treaty bodies where they assist in elucidating the meaning of the below rights, and the link between the rights and the technologies in question.

Having set out the relevant international human rights law, **Part 4** of this submission next examines the impact of AI technologies on the rights of persons with disabilities, focusing first on AI technologies that can *benefit* persons with disabilities (Q1), and then going on to discuss AI technologies which have a *negative impact* on the rights of persons with disabilities (Q2). This Part will also touch on the relevant law and current regulatory mechanisms that address the rights of persons with disabilities in relation to the above (Q5) and analyse the effectiveness of these measures with respect to the protection and advancement of the rights of persons with disabilities (Q6).

Part 2: Artificial Intelligence and Human Rights

2.1 Defining Key Terms

2.1.1 Artificial Intelligence

As has been noted by the Australian Human Rights Commission, artificial intelligence (**AI**), although widely used, is without a precise, universally accepted definition.[5] The Organisation for Economic Cooperation and Development has defined AI as a

> Machine-based system that can, for a given set of human defined objectives, make predictions, recommendations or decisions influencing real or virtual environments. It uses machine and/or human-based inputs to perceive real and/or virtual environments; abstract such perceptions into models (in an automated manner e.g. with ML or manually); and use model inference to formulate options for information or action. AI Systems are designed to operate with varying levels of autonomy.[6]

Escaping precise definition, AI can be understood broadly as 'an umbrella term that includes a variety of computational techniques and associated processes dedicated to improving the ability of machines to do things requiring intelligence, such as pattern recognition, computer vision, and language processing.[7] The United Nations High Commissioner for Human Rights (**UN High Commissioner**), Michelle Bachelet, has highlighted that AI systems rely on the collection of data sets, from which they can draw insights, patterns, and predictions.[8]

Because AI is defined broadly, our understanding of what constitutes AI is able to evolve as AI itself evolves.[9] Ultimately therefore, we do not consider that precise definition of AI is required in order to understand its human rights implications for the purposes of this submission. Accordingly, for the purposes of this submission, the Castan Centre uses the term AI in its broadest sense.

2.1.2 Other key terms

Machine learning (**ML**) is a subset of AI,[10] and utilises data sets to 'train' technology to 'perform tasks without being given explicit instructions how, instead learning how to perform those tasks by finding

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5 Australian Human Rights Commission, *Human Rights and Technology* (Final Report, 2021) 51 ('*Human Rights and Technology Final Report*')

6 Organisation for Economic Cooperation and Development, *Artificial Intelligence in Society* (OECD Publishing, 2019) 15.

7 Filippo A Russo et al, *Artificial Intelligence & Human Rights: Opportunities & Risks* (Berkman Klein Centre for Internet & Society, Harvard University, Research Paper, 25 September 2018) 10.

8 Michelle Bachelet, *Report of the United Nations High Commissioner for Human Rights*, UN Doc A/HRC/48/31 (13 September 2021) paras 12-20.

9 Russo et al (n 7) 10.

10 Victorian Information Commissioner ('VCO'), *Closer to the Machine: Technical, Social and Legal Aspects of AI* (Report, August 2019) 3.

patterns and making inferences'.[11] Through the extraction of correlations with minimal supervision, ML seeks to maximise the accuracy of predictive technologies.[12]

Automated decision-making (**ADM**) refers to the use of algorithms (either human created or supported by ML)[13] to automate either part, or all, of an administrative decision.[14] Such systems can themselves make decisions, recommend decisions to human decision-makers, guide human decision-makers through relevant information, make commentary about information for the decision-maker, make preliminary assessments for human decision-makers and can automate aspects of fact finding (i.e. matching data).[15]

This submission will focus on AI broadly, noting that AI is often an integral part of ML and ADM technologies and recognising that there can be overlap between these terms.

2.2 Emerging Human Rights Issues Arising from the Use of AI

AI has already, and will continue to impact upon the human rights of persons around the world, with new technologies both 'provid[ing] a new means to advocate for, defend and exercise human rights', as well as being used to violate the rights of persons vulnerable to being left behind.[16]

AI systems can be beneficial, including by way of improving in the delivery of services;[17] increasing safety and supporting problem solving in emergencies (i.e. the COVID-19 pandemic);[18] enabling access to education;[19] supporting humanitarian aid;[20] making access to justice more affordable, and (in some cases) removing human bias in decision-making.[21]

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11 Ibid.

12 Robin Allen and Dee Masters, 'Artificial Intelligence: the Right to Protection from Discrimination Caused by Algorithms, Machine Learning and Automated Decision-making' (2020) 20 *ERA Forum* 586.

13 Ibid.

14 Commonwealth Ombudsman, *Automated Decision-making: Better Practice Guide* (Report, 2019) 5.

15 Ibid.

16 Ibid [4].

17 Rowena Rodrigues, 'Legal and Human Rights Issues of AI: Gaps, Challenges and Vulnerabilities' (2020) 4 *Journal of Responsible Technology* 1, 1.

18 Rodrigues (n 17) 1.

19 Audrey Azoulay, Director-General of the United Nations Educational, Scientific and Cultural Organization, 'Towards an Ethics of Artificial Intelligence', *United Nations Chronicle* (online) <https://www.un.org/en/chronicle/article/towards-ethics-artificial-intelligence>.

20 Michael Pizzi, Mila Romanoff and Tim Engelhardt, 'AI for Humanitarian Action: Human Rights and Ethics', *International Review of the Red Cross* (online, March 2021) <https://international-review.icrc.org/articles/ai-humanitarian-action-human-rights-ethics-913>.

21 Australian Law Reform Commission ('ALRC'), Submission to Australian Human Rights Commission, *Human Rights and Technology Issues Paper* (July 2018) [2].

Conversely however, as the UN High Commissioner,[22] various other UN bodies,[23] academics,[24] and other organisations have made clear,[25] AI systems present a multitude of challenges including: replicating and entrenching bias; enabling over surveillance by governments; fuelling misidentifications in predictive policing; facilitating discrimination in recruitment, employment, the provision of public services and welfare; aiding the control and censorship of information online, and even influencing individuals' and groups' actions and activities.

The ongoing COVID-19 pandemic has both highlighted the prevalence of AI technologies, and accelerated their uptake, including through measures such as geolocation tracking, the recording of health information, as well as monitoring the spread of the disease.[26] With States around the world already rapidly embracing digital technologies, including those equipped with AI, it is critical to ensure inclusivity and access for all to ensure that these technologies 'are a force for good…and leave no one behind'.[27]

Given that human rights are 'indivisible and interdependent', and noting how ubiquitous the use of AI, ML and ADM is likely to become, these technologies will engage numerous human rights across various international human rights law instruments.[28]

Noting the Special Rapporteur's mandate, and the purpose of the present call for input however, this submission will focus specifically on some of the key rights engaged by these digital technologies as they relate to persons with disabilities. In particular, the following section (Part 3) will examine the rights to equality and non-discrimination, privacy, accessibility, live independently and freedom of expression as they are provided for under the *International Covenant on Civil and Political Rights* (**ICCPR**),[29] the *International Covenant on Economic, Social and Cultural Rights* (**ICESCR**),[30] and the

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22 Bachelet (n 8) 6-10.

23 See, eg, Azoulay (n 19); António Guterres, United Nations Secretary-General, *Road Map for Digital Cooperation: Implementation of the Recommendations of the High-level Panel on Digital Cooperation,* UN GAOR, 74th sess, UN Doc A/74/821 (29 May 2020) 13-14; UNICEF, *Policy Guidance on AI for Children* (Report, 2020) 19.

24 Pizzi, Romanoff and Engelhardt (n 10); Rodrigues (n 18) 1; Sahajveer Baweja, 'Beginning of Artificial Intelligence, End of Human Rights', *London School of Economics* (Blog, 16 July 2020) <https://blogs.lse.ac.uk/humanrights/2020/07/16/beginning-of-artificial-intelligence-end-of-human-rights/>; Karine Gentelet and Sarit K Mizrahi, 'We Need Concrete Protections from Artificial Intelligence Threatening Human Rights', *The Conversation* (online, 26 September 2021) <https://theconversation.com/we-need-concrete-protections-from-artificial-intelligence-threatening-human-rights-168174>.

25 See, eg, ALRC (n 21).

26 Bachelet (n 8) para 3.

27 'Ensure digital technologies are 'a force for good', Guterres says in message for International Day', *UN News* (online, 17 May 2021) < https://news.un.org/en/story/2021/05/1092052>.

28 'What are Human Rights', *United Nations Office of the High Commissioner for Human Rights* (Web Page) < https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>.

29 *International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)* arts 2, 17 ('ICCPR').

30 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 933 UNTS 3 (entered into force 3 January 1976) arts 2(2), 12 ('ICESCR')

Convention on the Rights of Persons with Disabilities (**CRPD**), among others.[31] This submission will also consider the right to equality before the law and equal legal capacity in the unique context of persons with disabilities as recognised under the CRPD.

Further examination of the impact of AI on other rights of persons with disabilities—including the potential of AI to contribute to the respect, protection, and fulfilment of the rights of persons with disabilities— is encouraged in future.

31 See generally *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('CRPD').

Part 3: AI and the Human Rights of Persons with Disabilities

This submission recognises that the rights of persons with disabilities are enshrined in several international human rights instruments, including under the ICCPR and ICESCR which 'apply to everyone, including people with disability', and the CRPD, which 'applies human rights specifically to the context of people with disability'.[32] Accordingly, the key rights identified above as particularly relevant to the discussion of AI within all three of these instruments will be briefly highlighted in the following section.

3.1 Rights to Equality and Non-Discrimination

The rights to equality and non-discrimination are relevant to considerations of AI because such technologies have both the potential to both advance and undermine equality for persons with disabilities.

AI has in many cases been used to enable the equal enjoyment of rights by persons with disabilities. This includes, for example, AI systems that can describe a person's surroundings for those with visual impairments, robotic limbs that can support physical movement, and decision-support tools to aid both persons with disabilities themselves, and their carers or clinicians.[33] Such technologies facilitate the enjoyment of the rights to live independently, work, obtain an education, and enjoy the highest attainable standard of physical and mental health (among other rights).

Conversely, AI technologies can also create and exacerbate disadvantage and discrimination against persons with disabilities. For example, as highlighted by the Australian Human Rights Commission (**AHRC**), AI can replicate and exacerbate bias and discrimination against persons with disabilities, due to errors or bias in data sets and algorithms.[34] This can impact on the rights of persons with disabilities in various aspects of their lives, including by generating barriers to education, fuelling discrimination in recruitment and employment, and negatively impacting upon the receipt of healthcare and other

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32 'Rights of People with Disability', *Australian Government Attorney-General's Department* (Web Page) <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/rights-people-disability>.

33 Peter Smith and Laura Smith, 'Artificial intelligence and disability: too much promise, yet too little substance?' (2021) 1 *AI and Ethics* 81, 81. See eg, Jackie Snow, 'How People with Disabilities Are Using AI to Improve Their Lives', *PBS* (online, 31 January 2019) <https://www.pbs.org/wgbh/nova/article/people-with-disabilities-use-ai-to-improve-their-lives/>; Laura Melrose, 'Robotics and the Potential to Improve Access to Rights for People with Disabilities', *UNSW Australian Human Rights Institute* (Web Page) <https://www.humanrights.unsw.edu.au/news/robotics-and-potential-improve-access-rights-people-disabilities>; Wendy Gonzales, 'Three Ways AI is Improving Assistive Technology', *Forbes* (online, 21 September 2021) <https://www.forbes.com/sites/forbesbusinesscouncil/2021/09/21/three-ways-ai-is-improving-assistive-technology/?sh=45579d3c419d>.

34 Edward Santow, 'Commissioner's Foreword: Using Artificial Intelligence to Make Decisions: Addressing the Problem of Algorithmic Bias', *Australian Human Rights Commission* (Web Page, November 2020) <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/using-artificial-intelligence-make-decisions-addressing>.See eg, Gus Alexiou, 'Algorithmic And AI Assessment Tools — A New Frontier In Disability Discrimination', *Forbes* (online, 13 December 2020) <https://www.forbes.com/sites/gusalexiou/2020/12/13/algorithmic-and-ai-assessment-tools---a-new-frontier-in-disability-discrimination/?sh=54dcab87544f>; Sheridan Wall and Hike Schellman, 'Disability Rights Advocates are Worried about Discrimination in AI hiring Tools', *MIT Technology Review* (online, 21 July 2021) <https://www.technologyreview.com/2021/07/21/1029860/disability-rights-employment-discrimination-ai-hiring/>.

services.[35] In addition, even though AI technologies are increasingly being used by both State bodies and the private sector, not all of these technologies are accessible for persons with disabilities (see Part 3.3 for further discussion). Accordingly, persons with disabilities may experience being left behind as AI technologies become more integrated with everyday life.

The rights to equality and non-discrimination are provided for under a number of provisions within the UN's core human rights treaties. Firstly, art 2(1) of the ICCPR requires States to undertake to:

> [T]o respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[36]

Article 26 of the Covenant further entitles all persons to equality before the law, and equal protection of the law, protecting against discrimination on any of the aforementioned grounds.[37] The United Nations Human Rights Committee (**Human Rights Committee)** has defined discrimination to refer to any 'distinction, exclusion, restriction or preference' based on a protected status, which 'has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms'.[38]

Article 2(2) of the ICESCR contains a similar provision.[39] The Committee for Economic, Social and Cultural Rights (**CESCR**) in its *General Comment No 5* on Persons with Disabilities, has confirmed that disability falls under 'other status',[40] and defines discrimination against this group (in similar terms to the Human Right Committee) as 'any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights'.[41]

CESCR has made clear that such discrimination can take both overt forms (i.e. prejudice, denial of educational opportunities) and 'subtle' forms (i.e. neglect, ignorance, false assumptions, segregation and social isolation through physical and social barriers).[42] Fields identified by CESCR as particularly

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35 'Rights of Persons with Disabilities: Safeguarding human rights in the era of artificial intelligence', *Council of Europe Portal* (Web Page, 3 July 2018) <https://www.coe.int/en/web/disability/-/safeguarding-human-rights-in-the-era-of-artificial-intelligence>>

36 ICCPR (n 29) art 2(1).

37 Ibid art 26.

38 United Nations Human Rights Committee ('Human Rights Committee'), *General Comment No 18 (Non-discrimination)* (10 November 1989) para 7.

39 United Nations Committee on Economic, Social and Cultural Rights ('CESCR'), *General Comment No 20: Non-discrimination in Economic, Social and Cultural Rights (Art 2 para 2 of the International Covenant on Economic, Social and Cultural Rights,* UN Doc E/C.12/GC/20 (2 July 2009) para 28 ('*General Comment No 20*').

40 CESCR, *General Comment No 5: Persons with Disabilities,* UN Doc E/1995/2 (9 December 1994) para 5 ('*General Comment No 5*').

41 CESCR, *General Comment No 5* (n 40) para 15.

42 Ibid.

affected include 'education, employment, housing, transport, cultural life and access to public places and services'.[43]

CESCR has also noted in its *General Comment No 20* on non-discrimination in economic, social and cultural rights that discrimination can be both direct (i.e. treating an individual less favourably than another in a similar situation on the basis of a prohibited ground) and indirect (i.e. laws, policies, practices that appear neutral but have a disproportionate impact on groups on the basis of prohibited grounds).[44] The Committee has rightly noted that individuals may also face multiple discrimination (i.e. discrimination on more than one prohibited ground), [45] and that discrimination can occur in both the public and private sphere.[46]

Under ICESCR, States have 'an immediate and cross-cutting obligation to guarantee non-discrimination under the Covenant.[47]This includes eliminating discrimination of any kind, both formally and substantively,[48] through the adoption of legislation to address discrimination, and accompanying strategies, policies and plans to action to address discrimination by private and public actors.[49] States also have obligations to eliminate systemic discrimination, and provide avenues for accountability, as well as remedies for harms caused by discrimination.[50] They should also effectively monitor the implementation of such measures to ensure that measures are appropriate and effective in achieving the elimination of discrimination.[51]

With respect to preventing discrimination against persons with disabilities specifically, the Committee has indicated that States have an obligation to address discrimination on the basis of disabilities in both public and private spaces.[52] They have also emphasised that States are required to take appropriate measures to the maximum extent of available resources to enable persons with disabilities to overcome disadvantages experienced in the enjoyment of their rights under ICESCR.[53]

43 Ibid.

44 Ibid para 10.

45 Ibid para 17.

46 Ibid para 11.

47 Ibid para 7.

48 Ibid para 8-9.

49 CESCR, *General Comment No 20* (n 39) paras 37-8.

50 Ibid paras 39-40.

51 Ibid para 41.

52 CESCR, *General Comment No 20* (n 39) para 28.

53 CESCR, *General Comment No 5* (n 40) para 5.

In addition to the above requirements imposed by the ICCPR and ICESCR, the CRPD (which adopts a broad categorisation of persons with disabilities)[54] is intended to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'.[55] The Convention clarifies how rights apply to persons with disabilities, and highlights the key areas where adaptation is required in order to enable persons with disabilities to fully and effectively exercise their rights under international law.[56]

Article 3 of the CRPD outlines the key principles of the Convention, which guide the interpretation of the substantive rights within the treaty, and include:[57] (a) respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons; (b) *non-discrimination*; (c) full and effective participation and inclusion in society; (d) respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; *equality of opportunity*; accessibility; (e) equality between men and women; and (f) respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Article 5 of the CRPD further directly enshrines the rights to equality and non-discrimination in the Convention. The Committee on the Rights of Persons with Disabilities (**CRPD Committee**) has emphasised that these rights are 'among the most fundamental principles...because they are interconnected with human dignity'.[58] Accordingly, such rights are 'cornerstones' of international human rights law, and are at the very heart of the CRPD, and reflected in a number of provisions throughout the Convention.[59]

The CRPD makes clear that the rights to equality and non-discrimination under the CRPD are both interpretative tools for all other principles and rights in the Convention, as well as rights in and of themselves.[60] The rights encompass the right to be both equal before the law (i.e. entitlement to equal application of the law) and equal under the law (able to engage in legal relationships).[61] The rights also require the equal protection and benefit of the law without discrimination. The CRPD Committee highlights prohibition of discrimination,[62] as well as measures to ensure accessibility, reasonable

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54 United Nations Committee on the Rights of Persons with Disabilities ('CRPD Committee'), 'Questions and Answers', *United Nations Office of the High Commissioner for Human Rights* (Web Page) <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/QuestionsAnswers.aspx>. See CRPD (n 31) art 1.

55 CRPD (n 31) art 1.

56 CRPD Committee, *Questions and Answers* (n 54).

57 CRPD (n 31) art 3 (emphasis added).

58 CRPD Committee, *General Comment No 6 (2018) on Equality and Non-discrimination,* UN Doc CRPD/C/GC/6 (26 April 2018) para 4 ('*General Comment No 6*).

59 Ibid paras 5, 7.

60 CRPD Committee, *General Comment No 6* (n 59) paras 12-3.

61 Ibid paras 14-5.

62 Ibid para 17-8

accommodations and individual support as ways through which this can be achieved.[63] The Committee has also acknowledged that discrimination can take many forms (i.e. direct and indirect discrimination, denial of reasonable accommodation, harassment, multiple or intersectional discrimination).[64]

Under the CRPD, States have positive obligations to protect persons with disabilities from discrimination, through both specific and comprehensive anti-discrimination legislation, appropriate legal remedies and sanctions and other measures such as reasonable accommodations.[65]

3.2 Right to Privacy

The UN High Commissioner has emphasised that the right to privacy 'is an expression of human dignity and is linked to the protection of human autonomy and personal identity'.[66] She went on to expand upon the centrality of the right to privacy in discussions concerning the use of AI:

> Aspects of privacy that are of particular importance in the context of the use of AI include informational privacy, covering information that exists or can be derived about a person and her or his life and the decisions based on that information, and the freedom to make decisions about one's identity.

Key privacy issues relating to AI that have been identified by the High Commissioner include the collection, storage, acquisition, merger and sharing of personal data, which can expose information about a person's life or decisions with 'countless recipients', including companies and States; the analysis and pattern recognition of personal data, which can be unreasonably intrusive, and sometimes be used to predict or influence individuals' behaviour;[67] opaque decision making, and the replication of error and historical bias; as well as the lack of regulation and public scrutiny over AI systems.[68] Furthermore, the removal of human decision-makers in AI technologies may result in a loss of safeguards to ensure the respect for privacy,[69] and the rise of anthropomorphic AI technologies may also raise 'novel privacy concerns' (i.e. influencing people to develop trusting relationships with AI and share private information).[70]

Persons with disabilities are 'uniquely at risk of discrimination' with respect to privacy protections for various reasons, including the tendency of institutional setting within which some persons with

63 Ibid para 16.

64 Ibid paras 19-20.

65 Ibid para 22.

66 Bachelet (n 8) para 6.

67 Ibid paras 16-8. See also *Artificial Intelligence and Privacy - Issues and Challenges', Office of the Victorian Information Commissioner* ('OVIC')(Report, August 2018) 7 ('*Artificial Intelligence and Privacy*').

68 Bachelet (n 8) paras 12-20.

69 OVIC, *Artificial Intelligence and Privacy* (n 67) 7.

70 Ibid 7.

disabilities live to be more subject to private and public intrusion, and the dependence of some persons with disabilities on technical and personal aids 'which may lead to situations of vulnerability'.[71]

Broadly speaking therefore, AI presents unique and unprecedented privacy challenges for persons with disabilities. Given the above risks, careful consideration must be had about the right to privacy as it relates to persons with disabilities, provided for under both the ICCPR and CRPD.

As a starting point, art 17 of the ICCPR provides that:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
> 2. Everyone has the right to the protection of the law against such interference or attacks.[72]

The Human Rights Committee has, in their *General Comment No 16* on the right to privacy (**General Comment No 16)**, clarified that the term unlawful refers to interference without basis in law, while the term 'arbitrary interference' refers to interference which, although lawful, is not in accordance with the provisions, aims and objectives of the ICCPR, or reasonable in the circumstances.[73] Where interferences do conform to the Covenant, the relevant legislation must specify 'in detail the precise circumstance in which interferences may be permitted', and authority to do so must be designated under law, and 'on a case-by-case basis'.[74] Interferences can be from State authorities themselves, or other natural or legal persons.[75]The Committee has made clear that States have an obligation to guarantee the right to privacy against such interference and attack through legislative and other measures.[76]

As to the use of technology specifically, the Committee has emphasised that 'surveillance, whether electronic or otherwise … should be restricted to a search for necessary evidence and should not be allowed to amount to harassment'.[77] They have also noted that the 'gathering and holding of personal information on computers, data banks and other devices' *must* be regulated by law.[78] States accordingly have obligations to put in place effective safeguards to prevent information about the private lives of individuals to reach those not authorised under law to receive, process and use it, or utilise it for purposes that are 'incompatible with the Covenant'.[79]

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71 Mark C Weber, Protection for Privacy under the United Nations Convention on the Rights of Persons with Disabilities (2017) 6(10) *MDPI Laws* 1, 3, 7-8.

72 ICCPR (n 29) 17.

73 Human Rights Committee, *General Comment No 16: Article 17 (Right to Privacy)* (8 April 1988) paras 3-4 ('*General Comment No 16*').

74 Ibid para 8.

75 Ibid para 1.

76 Human Rights Committee, *General Comment No 16* (n 73) para 1.

77 Ibid para 8.

78 Ibid para 10.

79 Ibid.

As for control of data by the individual, the Committee has stated that all individuals should have 'the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes'.[80] Individuals should also be able to ascertain who controls, or can control their files, and request rectification or elimination of personal data.[81]

The right to privacy is also provided for under art 22 of the CRPD, which states that:

> 1. No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks.
>
> 2. States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others.

In addition, under art 31(1)(a) of the Convention (statistics and data collection), States are required to collect and maintain statistical and research data, and establish safeguards' including legislation on data protection, to ensure confidentiality and respect for the privacy of persons with disabilities'.[82] Notably, the reference to the privacy of personal, health and rehabilitation information 'reflects special concerns about health related information' and concern that its disclosure could lead to discrimination against persons with disabilities.[83]

3.3 Right to Accessibility

The right to accessibility is central to discussion about AI, firstly because 'people with disability have diverse experience with Digital Communication Technologies'.[84] Indeed, 'different disabilities bring different accessibility requirements', so a technology that is accessible to some persons with disability, will not be accessible to all persons with disability.[85]Accordingly, AI technologies need to be designed and operated in a way that is responsive and adaptive to these unique needs.

At present however, a gap exists between technologies that can make aspects of life *more* accessible for persons with disabilities (i.e. assistive technologies) and technologies not accommodating the needs of persons with disabilities, and subsequently presenting barriers to the enjoyment of education, employment, health and other rights for this group. [86]

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80 Ibid para 11.

81 Ibid.

82 CRPD (n 31) art 31(1)(a).

83 Weber (n 71) 3.

84 Australian Human Rights Commission ('AHRC'), *Human Rights and Technology* (Final Report, 2021) 14, 142.

85 Ibid 145.

86 Ibid 142.

Understanding the meaning of accessibility, and State obligations to facilitate accessibility in order to bridge this gap is therefore critical to considerations of AI and persons with disability.

The right to accessibility is enshrined under art 9 of the CRPD, and is intended to 'enable persons with disabilities to live independently and participate fully in all aspects of life', requiring States to 'take appropriate measures to ensure to persons with disabilities access, on an equal basis with others', and eliminate obstacles and barriers to the accessibility of physical environments (i.e. buildings, roads, transportation, other facilities) and information, communications and other services.[87] Article 9(2) delineates specific actions to be taken by States, including the development, promulgation and monitoring of minimum standards and guidelines to facilitate accessibility; ensuring that private entities facilitate accessibility; promoting forms of assistance and support to ensure to persons with disabilities access to information and communications technologies, including the internet; and promoting the design, development production and distribution of accessible ICT at an early stage.[88]

The CRPD Committee in its *General Comment No 2* on accessibility, highlighted that persons with disabilities face both technical and environmental barriers to accessibility (i.e. lack of appropriate access to buildings, information in inaccessible formats).[89] Accordingly, the Committee has called on States to address accessibility 'in all its complexity' to ensure that all goods, products, and services open to the public are accessible to all.[90] Such accessibility should be ensured *ex ante,* which is to say before receiving an individual request to use a place or service.[91] The Committee has further made clear that the denial of access 'should be considered to constitute a discriminatory act, regardless of whether the perpetrator is a public or private entity'.[92]

The CRPD Committee has further clarified that accessibility should also account for intersecting characteristics, including disability and race, colour, sex, language, religion or other status.[93] Accessibility has been identified as 'the precondition for persons with disabilities to live independently, participate fully and equally in society, and have unrestricted enjoyment of all their human rights and fundamental freedoms on an equal basis with others'.[94]

With respect to information and communication, the Committee has acknowledged that ICT can 'open up a wide range of services, transform existing services and create greater demand for access to information and knowledge' particularly in excluded populations such a persons with

87 CRPD (n 31) art 9.

88 Ibid art 9(2)(a)-(c), (f)-(h).

89 CRPD Committee, *General Comment No 2: Article 9 (Accessibility),* UN Doc CRPD/C/GC/2 (22 May 2014) para 3.

90 Ibid 13.

91 Ibid 25.

92 Ibid 13.

93 Ibid.

94 Ibid 14.

disabilities.[95]Accordingly, they have called on States to promote appropriate forms of assistance and support to persons with disabilities to ensure their access to information and communication, including the internet, through 'mandatory accessibility standards'.[96]

They have further emphasised that 'new technologies can be used to promote the full and equal participation of persons with disabilities in society, *but only if they are designed and produced in a way that ensures their accessibility*'.[97] Accordingly, the Committee requires that accessibility 'be achieved from the outset', meaning from the earliest stages of design and production.[98]

3.4 Right to Live Independently and Be Included in the Community

As has been emphasised by the CRPD Committee, 'persons with disabilities have historically been denied their personal and individual choice and control across all areas of their lives', arising from lack of supports and resources to enable independent living.[99] AI technologies however present an opportunity to change this by facilitating inclusion and empowering persons with disability to enjoy independent living.

Article 19 of the CRPD requires:

> States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community…[100]

Specific areas highlighted by the CRPD include choice of place of residence and whom to live with on an equal basis with others, access to specific support services to facilitate inclusion of persons with disability in the community, and access to community services and facilities that are available to the general population.[101]

The CRPD Committee rightly emphasises that the foundation of this right is recognition of the equal dignity, worth and rights of every person.[102]

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95 Ibid 5.

96 Ibid.

97 Ibid 22 (emphasis added)

98 Ibid 15.

99 CRPD Committee, *General Comment No 6* (n 59) para 1.

100 CRPD (n 31) art 19.

101 CRPD (n 31) art 19.

102 CRPD Committee, *General Comment No 5* (n 59) paras 2-3.

Relevant to both civil and political, as well as economic, social and cultural rights, art 19 covers two central concepts – the right to independent living, and the right to be included in the community.[103] The Committee has defined living independently as 'exercising freedom of choice and control over decisions affecting one's life with the maximum level of self-determination and interdependence within society' (individual dimension).[104] The right to inclusion in the community refers to the positive right to develop inclusive environments (social dimension).[105]

Notably, among the core elements of art 19 is the requirement

> [t]o develop, implement, monitor and sanction non-compliance with legislation, plans and guidance on accessibility requirements for basic mainstream services to achieve societal equality, including participation by persons with disabilities within social media, and secure adequate competence in information and communications technologies to ensure that such technologies are developed, including on the basis of universal design, and protected.[106]

3.5 Right to Equality Before the Law and Equal Legal Capacity

Article 12 reaffirms the right of persons with disabilities to 'recognition everywhere as persons before the law'.[107] It recognises that persons with disabilities are to enjoy this right on an equal basis with others, in all aspects of their lives. [108] It also recognises an obligation on States parties to provide supports so that persons with disabilities may exercise their right to legal capacity.[109] Article 12 also requires that States parties provide 'appropriate and effective' safeguards for persons with disabilities against the abuse of their legal capacity. [110]

The CRPD Committee has outlined that the right to equality before the law 'is a basic general principle of human rights protection and is indispensable for the exercise of other human rights'.[111] The CRPD Committee is also unequivocal that the denial of the legal capacity of persons with disabilities must end and that legal capacity must not be restricted for persons with disabilities on an unequal basis with others.[112]

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103 Ibid para 19.

104 Ibid para 8.

105 Ibid para 19.

106 CRPD Committee, *General Comment No 5* (n 59) paras 38(d), 39.

107 CRPD (n 31) art 12(2)

108 Ibid.

109 Ibid art 12(3).

110 Ibid art 12(4).

111 CRPD Committee, *General Comment No 1: Article 12 (Equal Recognition Before the Law)*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014) para 1.

112 Ibid paras 9-7.

Part 4: The Use and Impacts of AI on Persons with Disabilities

4.1 The Utilisation and Benefits of AI

> ***Question 1:*** *Please provide information about the extent to which technologies such as AI, ML and ADM are used in engagements between the individual and State bodies and private bodies in a way which allows persons with disabilities to better engage positively in society.*

As touched on above, for persons with disabilities, AI can enhance inclusivity through assisting persons with hearing difficulties to hear, those with seeing impairments to see, and those with learning difficulties to learn.[113] Accordingly AI offers the 'possibility to improve the lives of persons with disabilities' as well as other groups.[114]

This in mind, the following section will examine existing AI technologies that are used in engagements between the individual and the State (see Part 4.1.1) and private bodies (see Parts 4.1.2 - 4.1.4) to benefit and better facilitate the enjoyment of human rights by persons with disabilities in Australia.

4.1.1 State Bodies

> ***Question 2:*** *The following relationships are of particular interest:*
> *(i) the individual and State bodies (for example: the distribution of social advantages, the determination of appropriate taxation/monitoring for taxation fraud, security including border control, the determination/monitoring of immigration status, humanitarian responses including during times of military conflict);*

Australian academic Anna Higgins notes that the 'trend toward automation of government processes is accelerating', with AI tools 'now used to make or facilitate decisions in a range of government agencies'.[115] Similarly, the Australian Human Rights Commission has acknowledged that governments are 'starting to use AI to make decisions in welfare, policing and law enforcement, immigration and many other areas'.[116]

This is evident in the rhetoric emerging from the Australian Federal Government, which has stated its objective to become a 'world-leading digital economy and society by 2030'.[117] Central to this is the

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113 VCO (n 10) 20.

114 Ibid.

115 Anna Higgins, 'We Need Human Oversight of Machine Decisions to Stop Robo-Debt Drama', *The Conversation* (online, 2 July 2019) <https://theconversation.com/we-need-human-oversight-of-machine-decisions-to-stop-robo-debt-drama-118691>.

116 Edward Santow, 'Commissioner's Foreword: Using Artificial Intelligence to Make Decisions: Addressing the Problem of Algorithmic Bias', *Australian Human Rights Commission* (Web Page, November 2020) <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/using-artificial-intelligence-make-decisions-addressing>.

117 Jane Human, 'Foreword', *Digital Economy Strategy 2030* (Policy Paper, 2021).

advancement of digital technologies including AI, and the development of digital capabilities for Australians to 'ensure inclusivity', as well as access education, health and other essential services.[118] States within Australia such as Victoria and New South Wales have also indicated that they will embrace AI technologies.[119]

Notwithstanding the above, governments around Australia have only made limited moves forward in the development of AI technologies to benefit persons with disabilities. The development of dedicated AI technologies has been limited in scope to only certain areas of social services (see below), and has to date been unsuccessful or discontinued during the development stages.

Further, while AI, ML and ADM technology is used in technologies for the general population in areas including the determination of taxation,[120] some security measures as part of border control,[121] and the determination of immigration status,[122] these technologies have not been specifically designed or adapted to meet the needs of persons with disabilities. Instead, State authorities more commonly provide non-AI based support materials to enable the use of AI technologies, or recommend reverting to traditional or human-to-human delivery of services. Accordingly, considerable barriers to inclusion of persons with disabilities remain.

Distribution of Social Services

While it is acknowledged that persons with disabilities are by no means the only group within the Australian population that interact with social services and receive welfare, it is nevertheless important to consider the unique experiences of persons with disabilities in receiving and interacting with these services.

The Australian Government has in the past attempted to develop AI technologies designed specifically to benefit and support persons with disabilities with respect to the delivery of social services. At a federal level, the Australian Government's Department of Human Services, and more specifically an agency within the department known as 'Services Australia', administers social services. Services

118 Australian Government, *Digital Economy Strategy 2030* (Report, 2021) 18.

119 See eg, Daniel Andrews, 'Backing Victoria as a Leading AI Technology Destination', *Premier of Victoria* (Media Release, 16 February 2021)<https://www.premier.vic.gov.au/backing-victoria-leading-ai-technology-destination>; ; 'Artificial Intelligence', *New South Wales Government: Digital NSW* (Web Page) <https://www.digital.nsw.gov.au/policy/artificial-intelligence-ai>.

120 'Lodge Your Tax Return Online with myTax', *Australian Taxation Office* (Web Page) <https://www.ato.gov.au/Individuals/Your-tax-return/How-to-lodge-your-tax-return/Lodge-your-tax-return-online-with-myTax/?=redirected_mytax> ('myTax').

121 'SmartGate', *Australian Border Force* (Web Page) <https://www.abf.gov.au/entering-and-leaving-australia/smartgates/arrivals>.

122 Peter Papadopoulos, 'Digital Transformation and Visa Decisions: An Insight into the Promise and Pitfalls' (Presentation at the 2018 AIAL National Administrative Law Conference, 28 September 2018) 4. See *Migration Act 1958* (Cth) s 495A.

Australia and its predecessors 'have had carriage of AI within government over much of the recent past'.[123]

The stated aim of the Department in its *Technology Plan 2016-20* is for government services to become driven by individual needs and circumstances, providing customer-centric services and to respond in an agile way in the delivery of government services.[124] The use of Information and communications technology (**ICT**) has been identified by the Department as central to this objective.[125] Notwithstanding these aims, the delivery of this strategy has been limited and controversial.

One of the limited concrete proposals made by the Department was the introduction of 'virtual assistants to guide customers through their interactions with the department'.[126] Of particular relevance to persons with disabilities specifically was the development of an AI virtual assistant program by the National Disability Insurance Agency (**NDIA**), known as 'Nadia'.[127]

The Nadia technology was intended to assist persons with disability to navigate the National Disability Insurance Scheme (**NDIS**)[128] - a funding program to support persons with intellectual, physical, sensory, cognitive and psychosocial disability.[129] Developers sought to use cognitive technology to enable the virtual assistant to respond to questions with an animated face and mouth.[130] The Nadia technology was intended to alleviate the pressure on the NDIA's call centre and 'make information available to NDIS participants in a more accessible and personalised way'.[131]

In 2017 however, development of the technology was stalled following technical issues (including a lag in the time it took for the program to deliver responses to questions),[132] and the failure of other rollouts of AI and ADM technology from the government that were unsuccessful (see i.e. discussion of the Robodebt in Part 4.2.5 below). The Nadia program was later abandoned completely.[133]

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123 Terry Carney, 'Artificial Intelligence in Welfare: Striking the Vulnerability Balance?' (2020) 46(2) *Monash University Law Review* (Advance) 1-30, 9.

124 Australian Government, Department of Human Services, *Technology Plan 2016-20* (undated) 3.

125 Ibid 3, 5.

126 Ibid 7.

127 Christopher Knaus, 'NDIA denied Cate Blanchett-voiced 'Nadia' Virtual Assistant is in Doubt', *The Guardian* (online 22 September 2017) <https://www.theguardian.com/australia-news/2017/sep/22/ndia-denies-cate-blanchett-voiced-nadia-virtual-assistant-is-in-doubt>.

128 Andrew Probyn, 'NDIS Virtual Assistant Nadia, voiced by Cate Blanchett, Stalls after Recent Census, Robo-debt Bungles', *ABC News* (online, 21 September 2017) <https://www.abc.net.au/news/2017-09-21/government-stalls-ndis-virtual-assistant-voiced-by-cate-blanchet/8968074>.

129 National Disability Insurance Agency, *Understanding the NDIS* (Booklet 1) 4.

130 Probyn (n 126).

131 Ibid.

132 Knaus (n 127).

133 Carney (n 123) 10.

Taxation

The Australian Taxation Office (**ATO**) utilises the myTax system to enable individuals to lodge their tax returns online through computer, smartphone or tablet.[134] The ATO uses AI (specifically ML) to process large amounts of tax related information for analysis and assessment.[135] With myTax, tax information is pre-filled from data provided by employers, banks, government agencies, health funds and other parties.[136] This simplifies the tax return process for individuals, and allows for faster tax refunds which usually take place within 14 days.[137]

While the technology itself has not been adapted to accommodate persons with disability, some tools have been developed to better enable persons with disabilities to utilise the myTax system.[138] This includes additional information in accessible formats (i.e., video guides with transcripts - some of which are in languages other than English, and easier to read guides on tax for persons with low literacy or reading difficulties).[139] Persons with disabilities may also lodge their tax returns by paper if they prefer to do so, with a number of tools available to facilitate this (i.e., audio format instructions and summaries to support completion of tax returns).[140]

Border Security

The Australian Government has since 2007[141] utilised the 'SmartGate' technologies in airports to expedite the process of passport control.[142] This technology uses kiosks enabled with facial recognition and ePassport technology to verify the identity of passengers.[143] The Australian Border Force (**ABF**) requires passengers to first go to an electronic kiosk and insert their passport - eligible passengers are then directed to present at the SmartGate which uses a camera and AI technology to complete a biometric match against the information contained in the individual's ePassport.[144]

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134 ATO, myTax (n 120).

135 'How We Use Data and Analytics', *Australian Taxation Office* (Web Page) <https://www.ato.gov.au/About-ATO/Commitments-and-reporting/Information-and-privacy/How-we-use-data-and-analytics/>.

136 ATO, myTax (n 120).

137 Ibid.

138 'Our Services for People with Disability', *Australian Taxation Office* (Web Page) <https://www.ato.gov.au/Individuals/People-with-disability/Our-services-for-people-with-disability/>.

139 Ibid.

140 Ibid.

141 Australian Parliament, House of Representative Committee, Joint Committee of Public Accounts and Audit, 'Chapter 5 Audit Report No.50 2011–12 Processing and Risk Assessing Incoming International Air Passengers', *Report 435: Review of Auditor-General's Report Nos 33 to 55 (2011-12) and No 1 (2012-13)* (November 2012) 46.

142 Australian Border Force (n x).

143 Ibid.

144 Ibid.

The ABF has indicated that the electronic kiosks can be used by persons with limited vision, as well as those sensitive to sharp light or colours.[145] They have also stated that SmartGates themselves can accommodate individuals in wheelchairs.[146] No other mention is made of how SmartGates are made accessible to persons with other physical disabilities. Passengers with disabilities are encouraged to seek help from an ABF officer and/or join the manual processing queue.[147]

Health Records

The Australian Government has also recently pushed for the digitisation and accessibility of health records though My Health Record. My Health Record is a digital 'place where your key healthcare information can be kept' which provides an up-to-date record of key health information to ensure that it is accessible to multiple health providers.[148] My Health Record contains medical history, medicine and prescription details, immunisation history, and pathology and diagnostic imaging test reports (among other health information).[149]

As at August 2021, there are an estimated 21.5 million records on this platform, including clinical documents by healthcare providers like hospitals, pathologists and radiologists, medical documents uploaded by general practitioners and pharmacists, and consumer documents uploaded by users.[150] My Health has been promoted as facilitating 'better continuity of care' for persons accessing health services.[151]

The government has emphasised their intention to make My Health Record accessible to persons with disabilities. They are currently working towards this objective by requiring accessibility compliance reviews throughout the software design and delivery processes; accessibility focused usability testing; and obtaining third-party reviews on accessibility.[152] Some accessibility issues remain (i.e. uploaded documents are not always in accessible format).[153]

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145 Ibid.

146 Ibid

147 Ibid.

148 Australian Government, Department of Health, 'What is My Health Record?', *My Health Record* (Web Page) <https://www.digitalhealth.gov.au/initiatives-and-programs/my-health-record>.

149 Victorian Government, Department of Health, 'What is My Health Record?', *My Health Record for Victorian Health Services* (Web Page) <https://www2.health.vic.gov.au/hospitals-and-health-services/quality-safety-service/my-health-record>.

150 Australian Digital Health Agency, 'Statistics and Insights: August 2021', *My Health Record* (Fact Sheet) <https://www.digitalhealth.gov.au/sites/default/files/documents/myhealthrecord-statistics-august21.pdf>.

151 Ibid.

152 'Accessibility', *My Health Record* (Web Page) <https://www.myhealthrecord.gov.au/accessibility>.

153 Ibid.

Datasets from My Health Record are already being used in AI technologies, and will likely continue to be used for such technologies in future. For example, data from My Health Record has been used by researchers in Australia to 'identify the role of folate in pregnancy in reducing neural tube defects such as spina bifida'.[154] Data has also been used by the Australian Government's Commonwealth Scientific and Industrial Research Organisation (**CSIRO**) to develop a Patient Admission Prediction Tool to streamline hospital admissions.[155] Data has also been used in the Northern Territory in research examining admissions to hospitals and aged care services which has highlighted the higher prevalence of dementia among First Nations peoples in the territory.[156]

The above examples of the Australian Government's engagement with AI technologies indicate a reluctance to effectively develop and adequately resource AI-enabled assistive technologies for specific use by persons with disabilities. The above discussion also indicates a general lack of adequate measures to ensure that AI technologies intended for use by the general population are appropriately adapted to accommodate the needs of persons with disabilities.

Indeed, the Nadia initiative highlighted the potential of AI technologies to advance the enjoyment of the rights to equality and non-discrimination by persons with disabilities by making the delivery of social services more accessible and effective. Had the initiative been successful, it could have reduced wait time to access important disability support services, and improved access to information about the NDIS for persons with disabilities.

Unfortunately however, the Australian Government's decision to abandon the Nadia program indicates a reluctance to fully embrace AI in the delivery of services for persons with disabilities. This reluctance has been compounded by the failure of other AI, ML and ADM technologies in other areas (see i.e. Part 4.2).

Furthermore, while some effort has been made by the Australian Government to make AI technologies utilised for the purposes of taxation, border security and health services accessible, the application of these measures is inconsistent across these services. For example, while the management of My Health Record by the Australian Digital Health Agency indicates that some consultation has, and continues to, take place to ensure accessibility of the technology for persons with disability, there is limited evidence to indicate that similar steps have been taken by other departments such as the ATO and ABF. Accordingly, persons with disabilities cannot rely on equal access to a variety of services that are increasingly integrating AI technologies.

The above discussion also indicates the need to engage and collaborate with persons with disabilities on a real and genuine basis in the design, development, and implementation of AI, ML and ADM technologies which are intended for their use. It is not consistent with a human rights-based approach to the delivery of government services for persons with disabilities to develop such technologies in any other way or with persons with disabilities as an afterthought. Consultation alone is insufficient.

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154 'Big Data and AI', *Australian Trade and Investment Commission* (Web Page) <https://www.austrade.gov.au/digital-health-big-data-ai>.

155 Ibid.

156 Ibid.

4.1.2 Employment

> ***Question 2**: The following relationships are of particular interest:*
> *...*
> *(iii) workers/employees and employers (for example: recruitment, access to decent work, access to work, reasonable adjustments and other accommodations, health and safety monitoring and support, training and personal development, and disciplinary and termination procedures);*

In the private sector, AI technologies have reportedly been used to support 'meaningful work for people with disability'.[157] For example, one social enterprise, Ability Works, is utilising AI powered robots to support the work of persons with vision impairments and complex cognitive disabilities.[158] Such robots can perform physical tasks (i.e. robotic arms that can scan and move produce) as well as other tasks such as scanning and reading mail which can enable the employment of persons with low literacy skills.[159] Ability Works is also trialling an AI supported program that uses video game technology to support the skills training of persons with intellectual disabilities through simulated activities and repetition of tasks. [160]

4.1.3 Independent Living

> ***Question 2:** The following relationships are of particular interest:*
> *...*
> *(v) individuals and their right to live independently and being included in the community (for example: policies and practices in support of independent living, including access to appropriate housing, essential services, healthcare, transport, and financial security*

<u>Practices to Support Independent Living</u>

AI technologies have aided the development and use of assistive technologies,[161] which can support persons with disabilities to 'live healthy, productive, independent, and dignified lives, and to participate in education, the labour market and civic life'.[162] In Australia, these technologies have predominantly been developed by the private sector for use by individuals with varied disabilities.

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157 Maggie Coggan, 'The Robots are Coming (to Support People with Disability into Work), *Probono Australia* (online, 1 July 2021) <https://probonoaustralia.com.au/news/2021/07/the-robots-are-coming-to-support-people-with-disability-into-work/>.

158 Ibid.

159 Coggan (n 157).

160 Ibid.

161 Natalia Suarez, 'Powering Inclusion: Artificial Intelligence and Assistive Technology', *European Disability Forum* (Web Page, 30 August 2021) <https://www.edf-feph.org/powering-inclusion-artificial-intelligence-and-assistive-technology/>.

162 'Assistive Technology', *World Health Organization* (Web Page, 18 May 2018) <https://www.who.int/news-room/fact-sheets/detail/assistive-technology>.

One example of such technology is the 'Soundscape' technology, developed by Microsoft Australia and Vision Australia, a provider of blindness and low vision services in Australia.[163] According to Vision Australia:

> Soundscape uses 3D audio and location awareness to provide users with information about their surroundings to help build a mental map of what's around them. By setting an audio beacon on a chosen destination or a familiar landmark, a user will always be able to keep track of where that location is as they make their way there. The app will also call out roads, intersections, and landmarks as a user walks past.[164]

This technology facilitates greater independence for persons who are blind or have low vision.[165] Microsoft Australia's Artificial Intelligence and Research team have indicated that they deliberately partnered with Vision Australia in order to better understand the challenges people who are blind or have low vision face on a daily basis, and with the aim of making technology more accessible to persons with these disabilities.

Microsoft has also launched other assistive technologies in Australia, including 'Seeing AI',[166] an application that can describe nearby scenarios and people, read facial expressions, text in documents, barcodes, and identify currency and other objects.[167] The technology can support people who are blind or have vision impairment to navigate their surroundings, pay their own bills, and live independently.[168] The technology can also be controlled by movement of the mouth for those unable to use hands, and has functions to assist persons with learning disabilities such as dyslexia (i.e. reading aloud, increasing text spacing, breaking words into syllables).[169]

Access to Housing

Australia has also seen some companies develop 'smart home' technologies to support persons with disabilities to live independently. For example, SDA Smart Homes Australia (**SDA**) offers rental properties that are specifically designed to facilitate independent living for persons with high physical support needs.[170] SDA has been certified as a specialist disability accommodation provider under the

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163 'Who We are and What We Do', *Vision Australia* (Web Page) <https://www.visionaustralia.org/about-us/who-we-are-and-what-we-do>.

164 'Microsoft launches navigation app, Soundscape, in partnership with Vision Australia', *Vision Australia* (Media Release, 12 September 2018) <https://www.visionaustralia.org/community/news/2019-08-23/microsoft-launches-navigation-app-soundscape-partnership-vision-australia>.

165 Vision Australia (n 164).

166 'Seeing AI', *Microsoft* (Web Page) <https://www.microsoft.com/en-us/ai/seeing-ai>.

167 Ibid.

168 Neelima Chouhan, 'Technology Breaking Barriers for People with Disability', *The Age* (online, 18 November 2017) <https://www.theage.com.au/national/victoria/technology-breaking-barriers-for-people-with-disability-20171116-gzmlbc.html>.

169 Ibid.

170 'About Us', *SDA Smart Homes Australia* (Web Page) <https://www.sdasmarthomes.com.au/about-us>>

NDIS,[171] and uses AI technologies such as home assistants (i.e. Amazon's Alexa), automated lighting and air conditioning, and automated blinds and roller doors.[172] SDA's homes are only available for persons that fulfil specific criteria, including having a 'permanent and significant disability', SDA funding approval through an individual's NDIS plan, and requiring special accommodation to enable that individual to receive the needed support (among other eligibility criteria).[173]

Another Australian company, Home Guardian, has also developed an incident detection tool, which uses AI systems to 'support people to live independently for longer' by alerting care providers to falls, flu-like symptoms, and other changes in behaviour.[174] The technology is accessible at no cost for participants of the NDIS.[175]

Healthcare

(a) Remote Health Services

While digital technologies had begun to be utilised in healthcare service delivery, the use of digital technologies rapidly increased as a result of the COVID-19 pandemic. While this is not AI as such, this indicates the potential speed with which new technologies can be adopted and their use accelerated. In particular, wholly or partially Medicare-funded telehealth services (appointments with mental health clinicians facilitated by telephone and video conferencing platforms)[176] were introduced in March 2020 at the beginning of the COVID-19 pandemic in Australia.[177] These have been extended until 31 December 2021.

As noted by the Royal Australian and New Zealand College of Psychiatrists (**RANZCP**), Medicare funded telehealth services enabled 'patients to maintain contact using telehealth with their provider and avoid potentially harmful disruptions in their care'[178]. RANZCP have also stressed the benefits of increased accessibility that telehealth provides for people living in remote, rural and regional areas who may otherwise face barriers to accessing high-quality healthcare services.[179] A July 2020 survey

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171 Ibid.

172 'SDA Smart Home Artificial Intelligence', *SDA Smart Homes Australia* (Web Page) <https://www.sdasmarthomes.com.au/assistive-technology>.

173 'Are You Eligible', *SDA Smart Homes Australia* (Web Page) <https://www.sdasmarthomes.com.au/1-are-you-eligible>.

174 'User Portal', *Home Guardian* (Web Page) <https://homeguardian.ai/>.

175 Ibid.

176 Royal Australian College of Physicians, 'Telehealth' (Web Page) <https://www.racptelehealth.com.au>.

177 Australian Government, Department of Health, 'COVID-19 Temporary MBS Telehealth Services', *MBS Online* (Web Page, 24 September 2021) <http://www.mbsonline.gov.au/internet/mbsonline/publishing.nsf/Content/Factsheet-TempBB>.

178 Royal Australian and New Zealand College of Psychiatrists, 'Continuation of Telehealth Essential for Mental Health' (Media Release, 31 March 2021) <https://www.ranzcp.org/news-policy/news/continuation-of-telehealth-essential-for-mental-he>.

179 Ibid.

of RANZCP members found that 95.2% of respondents were using or had used telehealth services over the course of the COVID-19 pandemic, compared with 47.3% of psychiatrists who had used telehealth services pre-COVID-19 pandemic and just 4.8% who did not use or were not using telehealth services during the COVID-19 pandemic.[180]

The July 2020 RANZCP survey identified a number of advantages of the increased utilisation of telehealth services including 'increased accessibility for patients, improved patient wellbeing and engagement during COVID-19, the ability for patients to maintain a higher frequency of appointments, increased engagement with hard-to-reach patients and increased service availability'.[181] The survey results also noted that feedback from patients utilising telehealth services was 'reported as being positive'.

(b) Remote delivery of mental health services

As regards the delivery of mental health services specifically, digital technologies have brought about much needed improvements for persons with disabilities in this area. For example, the recent Royal Commission into Victoria's Mental Health System (one of Australia's most populous states) found that Victoria's mental health system 'is antiquated' and has 'failed to keep up with people's changing needs and expectations for contemporary approaches to treatment, care and support'.[182] In particular, the Royal Commission noted that Victoria's mental health system 'has failed to keep up to date with the latest advances in digital technology, which could improve peoples' experiences and outcomes'.[183] The Royal Commission considered that the future will see Victoria's mental health system 'enabled through digital technology'.[184] Such technical advancements have the potential to reimagine mental health service delivery and access.[185]

Notwithstanding the slowness of Victoria's mental health system to respond to changes in digital technology, digital technologies are currently being used in the mental health systems. These include the use of telehealth, online courses and therapies, self-help applications (including mindfulness applications), digital assessments, digital patient records and e-booking platforms.[186]

In addition to the above, health service providers are also increasingly adopting patient-focussed online digital platforms which are said to make it easier and more convenient for individuals to view upcoming appointments, access their health information (including their medical records) and communicate with

180 Royal Australian and New Zealand College of Psychiatrists, *Results of RANZCP Member Survey on Telehealth in Psychiatry in Australia* (Report, September 2020) 4.

181 RANZCP Telehealth Survey (n 180) 2.

182 *Royal Commission into Victoria's Mental Health System* (Final Report, February 2021) summary and recommendations, 18 ('RCVMHS Final Report').

183 Ibid.

184 Ibid 30.

185 *Royal Commission into Victoria's Mental Health System* (Interim Report, November 2019) 527.

186 RCVMHS Final Report (n 2) vol 5, 14.

service providers. Examples of such platforms include the AlfredHealth Patient Portal and the Royal Melbourne Hospital Health Hub.[187]

As well as what might be referred to as more traditional digital technologies, mental healthcare, in particular, has demonstrated the potentially wide utilisation of AI in the diagnosis, prediction, and treatment of mental illness.[188] A potentially positive utilisation of AI is in assisting 'with differential diagnostic challenges', including 'by bolster[ing] the ability to differentiate between diagnoses with similar initial clinical presentations'.[189] In this sense 'AI technologies have great potential to *support* [traditional] clinical treatments'.[190]

4.2 The Negative Impacts of AI

> **Question 3:** *Please provide information about the extent to which technologies such as AI, ML and ADM pose a risk to the rights of persons with disabilities when deployed in relation to the areas highlighted in question 1.*

4.2.1 Privacy Implications

The Australian Productivity Commission has identified that the anonymous use of digital platforms to bully, harass and scam people is a particular concern in the growing use of digital technologies.[191] In particular, the Productivity Commission notes if there is to be increasing use and reliance on online systems to access supports, greater awareness is needed to protect individual's privacy and e-safety. The inherently personal nature of health and other information that is utilised in AI technologies requires that significant protections are in place to protect that data from unauthorised access or misuse.

4.2.2 Solutionism and the Replacement of Person-to-Person Care

Disability is a complex social issue. The increasing use of AI and digital technologies leads to the risk of 'solutionism', which 'valorises an approach to solving real-world problems based on computation, algorithms and digital technology'.[192] This is an erroneous view that 'every social problem has a technological fix, and that simple technological fixes are possible for what, in reality, are complex social

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187 Alfred Health, 'Patient Portal' (Web Page) <https://www.alfredhealth.org.au/patients-families-friends/patient-portal>; Royal Melbourne Hospital, 'Health Hub' (Web Page) <https://health-hub.org.au/Health-Hub/Authentication/Login?mode=stdfile&option=faq>. My

188 Marc Fakhoury, 'Artificial Intelligence in Psychiatry' in Yong-Ku Kim (ed), *Frontiers in Psychiatry: Artificial Intelligence, Precision Medicine, and Other Paradigm Shifts* (Springer, 2019) 119.

189 Ellen E Lee et al, 'Artificial Intelligence for Mental health Care: Clinical Applications, Barriers, Facilitators, and Artificial Wisdom' (2021) 6(9) *Biology and Psychiatry: Cognitive Neuroscience and Neuroimaging* 856, 857.

190 Ibid 858 (emphasis added).

191 Australian Productivity Commission, *Digital Disruption: What Do Governments Need to Do?* (Report, June 2016) 119-20.

192 Jeffrey C Looi et al, 'Maslow's Hammer: Considering the Perils of Solutionism in Mental Healthcare and Psychiatric Practice' (2021) *Australasian Psychiatry* 1177:1-3, 1.

issues'.[193] In this way, solutionism risks an emphasis on the medical model of disability with its focus on diagnosis and cure. This stands in contrast with the human rights-based approach to disability, grounded in the social model, which is adopted by the CRPD.

There is also a risk that the increasing use of AI and other digital technologies in healthcare settings may lead to a narrowing of the space for person-to-person care. While the digitisation of some aspects of service delivery may bring benefits for persons with disabilities, digital therapies and other online modalities of care and support 'will only remain positive if they *augment* rather than *replace* quality face-to-face support'.[194]

The right to equality before the law and the right to equal legal capacity of persons with disabilities[195] requires that states recognise and give effect to the decisions of persons with disabilities. Together with the CRPD's support paradigm and the CRPD's emphasis on the autonomy and self-determination of persons with disabilities, this requires that persons with disabilities have the real opportunity to choose the support and care services they receive. This must include a real opportunity to choose the mode by which those supports and care services are engaged with and delivered. Thus, while AI and other digital technologies may increase accessibility to high-quality support and care services, the decision to use those services must be one made by persons with disabilities themselves and not a default which is forced upon persons with disabilities.

4.2.3 Digital Equity and Access to Technology

A further key issue with the use of AI and digital technologies in support and care is access to those digital technologies. This is integral to ensuring that persons with disabilities have a real choice about whether to engage with or utilise AI and digital technologies. In the adoption of AI and other digital technologies by support and care service providers, it must be borne in mind that some people simply do not have access to technologies to engage with digital services. This raises significant concerns of health equity,[196] particularly for those in regional and remote areas who may be required to more frequently utilise digital technologies in order to access the highest attainable equality of support and care services.

4.2.4 National Disability Insurance Scheme Independent Assessments

The National Disability Insurance Scheme (**NDIS**) was introduced on 1 July 2013 and was subsequently introduced across Australia from July 2016.[197] The NDIS is a scheme jointly funded and governed by

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193 Witness Statement to Royal Commission into Victoria's Mental Health System (Piers Gooding) (23 June 2020) 14[42(e)].

194 Ibid 12 [32(a)].

195 CRPD (n 31) art 12.

196 Sharona Hoffman, 'The Emerging Hazard of AI-Related Healthcare Discrimination' (2021) *Hastings Centre Report* 51(1) 8, 8.

197 Luke Buckmaster and Shannon Clark, 'The National Disability Insurance Scheme: A Chronology' (Parliamentary Library, Parliament of Australia, 13 July 2018) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1819/Chronologies/NDIS>.

the Federal, state and territory governments.[198] The purpose of the NDIS is to provide 'support to people with disability, their families and carers'.[199]

In order to obtain funding through the NDIS, the person must (inter alia) have a permanent and significant impairment.[200] To determine 'the functional level of an individual with disability' and then employ that assessment to assess the ' 'level of funding that person would receive'', the Federal Government proposed independent assessments.[201] Whereas '[u]nder the current system, people demonstrate this by gathering evidence from their own specialists', independent assessments 'would instead have seen people assessed by a government-contracted allied health professional unknown to them in a three-hour interview'.[202] This assessment would then be used to determine the level of funding that the person was entitled to. Under the Federal Government's proposal, this assessment would then be 'fed into an artificial intelligence system informed by an algorithm'.[203]

The Federal Government's proposal for independent assessments faced significant criticism, including from peak disability organisations.[204] In particular, the Australian Disability Discrimination Commissioner, Dr Ben Gauntlett expressed his concerns about whether the proposal for independent assessments was CRPD-compliant.[205] In response to significant public and political pressure, the Federal Government halted its proposal for independent assessments, but continues to assess reforms to the NDIS.[206]

4.2.5 Robodebt Scandal

One of the most highly publicised uses of AI by Australian government services was the predecessor to Services Australia's Online Compliance Initiative (colloquially known as 'Robodebt'). As Terry Carney explains:

198 Ibid.

199 Ibid.

200 *National Disability Insurance Scheme Act 2013* (Cth) s 24. See also National Disability insurance Scheme, 'Eligibility Checklist', *Am I Eligible* (Web Page) <https://www.ndis.gov.au/applying-access-ndis/am-i-eligible>.

201 Helen Dickinson and Anne Kavanagh, 'NDIS Independent Assessments are off the Table for Now. That's a Good Thing - The Evidence Wasn't There', *The Conversation* (10 July 2021) <https://theconversation.com/ndis-independent-assessments-are-off-the-table-for-now-thats-a-good-thing-the-evidence-wasnt-there-164163>.

202 Ibid.

203 Michael Cummins, 'Fears Changes to NDIS Will Leave Disabled without Necessary Supports', *The Age* (online, 7 July 2021) <https://www.smh.com.au/national/fears-changes-to-ndis-will-leave-disabled-without-necessary-supports-20210706-p58756.html>.

204 Helen Dickinson, '"Dehumanising" and "a Nightmare": Why Disability Groups Want NDIS Independent Assessments Scrapped', *The Conversation* (online, 12 March 2021) <https://theconversation.com/dehumanising-and-a-nightmare-why-disability-groups-want-ndis-independent-assessments-scrapped-156941>.

205 Katrina Curtis, 'NDIS Independent Assessment "Unsatisfactory" Disability Commissioner Says After Taking Part in Trial", *The Age* (online, 27 May 2021) <https://www.smh.com.au/politics/federal/ndis-independent-assessment-unsatisfactory-disability-commissioner-says-after-taking-part-in-trial-20210527-p57vu7.html>.

206 Hamish Hastie, 'Reynolds Scraps Independent Assessments in NDIS After State Revolt', *The Age* (online, 9 July 2021) <https://www.smh.com.au/politics/federal/reynolds-scraps-independent-assessments-in-ndis-after-state-revolt-20210709-p588e1.html>.

> Robodebt built on existing date matching exchanges of simple earnings information between the [Department of Social Services (DSS)] and the [Australian Taxation Office (ATO)]. In place of the past practice of investigating and proving debt amounts robodebt assumed that there was a debt whenever the *average* fortnightly earnings calculated from ATO data did not agree with information previously reported to DSS for what frequently were fluctuating casual fortnightly earnings.[207]

Once an apparent debt was identified by the Online Compliance Initiative, an individual was required to prove that a debt did not exist. As Carney identifies, Robodebt was flawed for several reasons including that it failed to take into account fortnightly earnings but instead relied on a projected 26 weeks' earning cycle and required individuals to disprove the existence of a debt.[208]

As the Robodebt scandal demonstrates, while AI has the ability to increase efficiency in government processes and reduce the risk of human error, 'if there is a bias or error in the computer program or data set, a flawed decision-making logic will be applied systematically, meaning large numbers of people could be affected.[209] In approving a AUD $1.8 billion settlement in a class action concerning the recovery scheme, the Federal Court of Australia called the scheme 'a shameful chapter in the administration of the [Australian] social security system and a massive failure of public administration'.[210] The Court also recognised 'the financial hardship, anxiety and distress, including suicidal ideation and in some cases suicide, that people say that have suffered through the Robodebt system, and that many say that felt shame and hurt at being wrongly branded "welfare cheats"'.[211] Examples like the robodebt scandal give content to the former Special Rapporteur on extreme poverty and human rights' warning of 'a "digital welfare dystopia" in which unfettered data-matching is used to expose, survey and punish welfare beneficiaries'.[212]

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207 Carney (n 123) 13.

208 Ibid.

209 Higgins (n 115).

210 *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634 [5].

211 Ibid [23].

212 Philip Alston, *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, UN Doc A/72/48307 (11 October 2019) para 31.

4.3 Regulation of AI in Australia

Question 5: *Please provide information about all relevant criminal and civil laws, codes, regulatory mechanisms, cases and other determinations that address the rights of persons with disabilities and the matters highlighted in response to question 2.*

Question 6: *Please explain the effectiveness of these laws, codes and regulatory mechanisms in relation to the protection and advancement of the rights of persons with disabilities (for example: the reach of those rights, access to courts and tribunals and other enforcement mechanisms).*

4.3.1 Human Rights Frameworks

Australia does not have either a stand-alone legislated or constitutionally enshrined national human rights instrument, and while some rights may be protected in a piecemeal manner through other legislation, the right to privacy is not embedded in Australia's domestic law at the Federal level. However, three of the eight state and territory jurisdictions in Australia recognise the human right to privacy and reputation in substantially similar terms to art 17 of the ICCPR.[213]

A right to privacy has long been discussed in Australia. Whether a legal right to privacy exists in Australia's common law has also been the subject of attention by Australia's judiciary, including by Australia's final court of appeal, the High Court of Australia. At present, the High Court has recognised no legal or equitable right to privacy in Australian law, but has left open the possibility of the court finding that a civil cause of action (a tort) may arise from the unjustified invasion of privacy.[214] Such a tort of invasion of privacy has been recognised by two lower courts,[215] however the existence of any such tort has not been recognised by superior courts to date.

The right to privacy has also attracted the attention of law reform bodies and parliamentary inquiries across Australia. The Australian Law Reform Commission has recommended the introduction of a statutory cause of action for serious invasions of privacy to be contained in a new, stand-alone Act of the Commonwealth Parliament.[216] A New South Wales parliamentary inquiry has also recommended the introduction in that state of a stand-alone statutory cause of action for invasion of privacy.[217] The effectiveness of the right to privacy as recognised in the Victorian *Charter of Human Rights and*

213 *Human Rights Act 2004* (ACT) s 12; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13; *Human Rights Act 2019* (Qld) s 25.

214 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2002) 208 CLR 199; *Victoria Park Racing and Recreating Grounds Company Ltd v Taylor* (1937) 58 CLR 479.

215 *Grosse v Purvis* [2001] QDC 151; *Doe v Australian Broadcasting Corporation* [2007] VCC 281.

216 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (Final Report No 123, June 2014) ch 4 (see especially recommendation 4-1).

217 New South Wales Parliament Legislative Council Standing Committee on Law and Justice, *Remedies for the Serious Invasion of Privacy in New South Wales* (Report No 57, 3 March 2016) ch 3 (recommendation 3).

Responsibilities has also been considered by the Victorian Law Reform Commission.[218] Despite this, no such statutory cause of action has been recognised either.

The right to privacy in Australian law is therefore generally conceived of as a legal or equitable right and not generally understood or considered in human rights terms. Further, a civil cause of action for invasion of privacy puts responsibility on the person whose right to privacy has been infringed to take action in civil courts to pursue a remedy for that breach. This may be prohibitive for persons seeking to pursue a remedy for breach of privacy, including because of the costs of and time involved in seeking such a private remedy. For persons with disabilities, conceiving action for breach of privacy as a civil cause of action in this way leads to further issues about accessibility of the civil justice system and the availability of supports so that persons with disabilities may exercise their legal rights.

4.3.2 Privacy Regulation

Privacy is statutorily regulated both Federally and in each state and territory jurisdiction of Australia, though the legislative scheme for the protection and regulation of privacy is broadly similar across Australia. In this section, we outline the key provisions and themes of the federal regulation through the *Privacy Act 1988* (Cth) (**Commonwealth Privacy Act**) and the regulation of health information in Victoria under the *Health Records Act 2001* (Vic) (**HRA**).

Federal Regulation of Privacy

The objects of the Commonwealth Privacy Act are, among other things, 'to promote the protection of the privacy of individuals', to provide for a 'nationally consistent' regime for the regulation of privacy, to promote 'responsible and transparent handling of personal information' and 'to implement Australia's international obligation in relation to privacy'.[219]

The Commonwealth Privacy Act empowers the Information Commissioner to conduct, inter alia, monitoring, advice and guidance functions under the Act.[220] The Commissioner may investigate complaints made to the Commissioner by individuals as to an act or practice that may constitute an interference with the individual's privacy if the Commissioner considers that such an investigation is necessary.[221] The Commissioner is also empowered to give reports to the Government about investigations undertaken where the Commissioner considers that the matter cannot be adequately resolved through conciliation.[222]

The Commonwealth Privacy Act also creates the Australian Privacy Principles (**APPs**).[223] The APPs set out in detail the permitted collection, use, and disclosure of private information held by an APP

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218 Victorian Law Reform Commission, *Surveillance in Public Spaces* (Final Report No 18, May 2010).

219 *Privacy Act 1988* (Cth) s 2A.

220 Ibid s 27.

221 Ibid s 36.

222 Ibid s 30.

223 Ibid s 14, sch 1.

entity. APP entities are government agencies and organisations of the Federal Government, including a Minister of State, a Department of the Australian Government, bodies and tribunals established under Commonwealth Law.[224] of The APPs do not apply to personal, family, or household affairs.[225]

The Commonwealth Privacy Act does not cover a number of bodies and organisations, including:

- state or territory government agencies, including public hospitals or other health care facilities;
- an individual acting in a private capacity;
- most universities (excluding personal universities and the Australian National University);
- public schools;
- most small businesses; and
- media organisations acting in the course of journalism.[226]

Regulation of Health Information in Victoria

The HRA's purpose is to 'promote fair and responsible handling of health information' by protecting the privacy of individual's health information, provide individuals with a right of access and providing a framework for the resolution of complaints in respect of handling (including access) of health information.[227] 'Health information' is exhaustively to mean (among other things) information or opinion about

> (i) the physical, mental or psychological health (at any time) of an individual; or
> (ii) a disability (at any time) of an individual; or
> (iii) a health service provided, or to be provided to an individual ….[228]

The HRA applies to a broad range of persons and organisations including a Minister, a member of parliaments, courts and tribunals, Victoria Police, and private and public hospitals. [229] The HRA provides persons with a right of access to health information,[230] sets out the procedure by way such health information may be accessed,[231] and the procedure which the holders of health information must follow in providing health information upon a request.[232]

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224 Ibid s 6.

225 Ibid s 16.

226 Office of the Australian Information Commissioner, 'Rights and Responsibilities', *The Privacy Act* <https://www.oaic.gov.au/privacy/the-privacy-act/rights-and-responsibilities>.

227 *Health Records Act 2001* (Vic) s 1.

228 Ibid s 3.

229 Ibid ss10-11.

230 Ibid s 25.

231 Ibid s 28.

232 Ibid s 29.

The HRA establishes the Health Privacy Principles (**HPPs**) which organisations collecting health information must comply with in the handling of health information.[233] The HPPs set out how health information may be lawfully collected,[234] and provide that health information may only be disclosed for the purpose for which it was provided or, in the case of a secondary purpose, with the consent of the person or under lawful authority.[235] HPP principle 6.1 requires that the holder of health information *must* provide access to the information upon request unless certain circumstances exist. Such circumstances which would permit an organisation not to disclose health information include if 'providing access would pose a serious would pose a serious threat to the life or health of any person'[236] or if 'providing access would have an unreasonable impact on the privacy of other individuals'.[237]

The requirements for access to health information under the HRA and the HPPs pose a number of concerns, in particular for persons with disabilities. The HRA and the HPPs do not provide explicitly for a formal or informal support mechanism which would enable a person, other than the person the health information relates to, to assist a person with disabilities to make a request for access to health information. This may mean that in order to access health information for or on behalf of a person with disabilities it would be necessary to obtain a formal guardianship or like arrangement in order to access such information. If this was required, this step would amount to a denial of the equality before the law and right to legal capacity of persons with disabilities provided for in art 12 of the CRPD.

Another concern relates to the circumstances in which an organisation holding health information may refuse access to that health information, in particular where providing access 'would pose a serious threat to the life or health of any person'. Although on the face of the law this provision is disability-neutral, there is a risk that a best-interests assessment might be undertaken in respect of persons with disabilities requesting access to their health information which would discriminate against them on the basis of their disability and deny them their legal capacity to request their health information in breach of art 12. Such a risk is compounded when no formal or informal support arrangement is explicitly provided for in the HRA or the HPPS (as discussed above). Such a potential impact is also relevant to Australia's obligation under ICESCR to guarantee non-discrimination, including substantive discrimination.[238]

4.3.3 Discrimination Protections

The *Disability Discrimination Act 1992* (Cth) (**DDA**) is one of Australia's federal anti-discrimination laws 'designed to protect persons in Australia against discrimination based on disability' by 'promot[ing] equal rights, opportunities and access for people with disability, as well as making disability

233 Ibid pt 3, sch 1 ('Health Privacy Principles').

234 Ibid Health Privacy Principles, principle 1.

235 Ibid Health Privacy Principles, principle 2.

236 Ibid Health Privacy Principles, principle 6.1(a).

237 Ibid Health Privacy Principles, principle 6.1(b).

238 CESCR, *General Comment No 20* (n 39) paras 37-8.

discrimination unlawful'.[239] Disability is defined in the DDA by reference to various physical and mental impairments.[240]

The DDA prohibits discrimination in a number of areas of public life, namely:

- work;
- education;
- access to premises;
- goods, services, and facilities;
- accommodation;
- land;
- clubs and incorporated associations;
- sport;
- Federal laws and programs; and
- requests for information. [241]

While it may be thought that the prohibition of discrimination in respect of goods, services, and facilities may offer protections for persons with disabilities from discrimination in respect of the use of AI and related technologies, services is defined narrowly and without reference to technologies other than telecommunications.[242] This may largely be as a result of the DDA being enacted prior to the increased use and rapid development of AI and related technologies.

Further, Australia's anti-discrimination laws provide separate protection for disability discrimination, racial discrimination,[243] sex discrimination,[244] and age discrimination.[245] The effect of such a separate legislative anti-discrimination scheme is that the intersectional impacts of discrimination may not be adequately accounted for and protected against in Australia's anti-discrimination laws. For example, the particular rights denials which women and gender minorities with disabilities face may not be adequately protected against.[246]

States and territory jurisdictions also have anti-discrimination laws, such as Victoria's *Equal Opportunity Act 2010* (Vic) which, together with the Victorian *Charter of Human Rights and Responsibilities* 'places

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239 Piers Gooding and Rosemary Kayess, 'Human Rights and Disability: An Australian Experience' in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights in Australian Law* (Lawbook Co, 2021) 191, 202.

240 *Disability Discrimination Act 1992* (Cth) s 4 ('DDA').

241 Ibid pt 2.

242 Ibid s 4.

243 *Racial Discrimination Act 1975* (Cth).

244 *Sex Discrimination Act 1984* (Cth).

245 *Age Discrimination Act 2004* (Cth).

246 See, Anna Arstein-Kerslake, *Legal Capacity & Gender* (Springer, 2021).

greater emphasis on duty-bearers' obligations to improve reasonable accommodations for persons with disabilities'.[247]

[247] Gooding and Kayess (n 239) 204-7; *Slattery v Manningham City Council* [2013] VCAT 1869.

Part 5: Conclusion and Recommendations

Taking into consideration the above analysis, it is clear that the rise of AI will have serious implications for the enjoyment of rights by persons with disabilities. Accordingly, and in line with the guidance provided by the Human Rights Committee, CESCR and CRPD Committee, States must ensure that these new technologies are designed and utilised in accordance with international human rights law to ensure equality and non-discrimination, respect for privacy, inclusion and accessibility, and the freedom to live independently for persons with disabilities.

The Castan Centre recognises that the Special Rapporteur is well placed to provide clear guidance to both States and private bodies with respect to the design, development and use of AI technologies in accordance with international law on the rights of persons with disabilities. Accordingly, the Castan Centre sets out the following recommendations for the Special Rapporteur:

- **Recommendation 1:** Encourage States (including Australia) to prioritise the development of new AI technologies that are inclusive and accessible to persons with disabilities.

- **Recommendation 2:** Direct States (including Australia) to review the use of existing AI technologies used in the delivery of public services, and ensure that these technologies are appropriately adapted to accommodate the unique needs of persons with disabilities.

- **Recommendation 3:** Emphasise to States (including Australia) the necessity of engaging in meaningful consultation and co-design with persons with disabilities in order to gauge how best to ensure AI technologies are accessible to persons with disabilities.

- **Recommendation 4:** Remind States (including Australia) of their obligations under international human rights law to effectively regulate the use of AI technologies by both State authorities and private bodies, in particular to facilitate equality and prevent discrimination; ensure respect for privacy; and facilitate accessibility, independent living and inclusion in the community for persons with disabilities. This includes

    (a) The implementation of effective safeguards to prevent discrimination arising from incorrect or biased data, algorithms, or application of automated decision-making;

    (b) The implementation of appropriate measures to ensure fairness, transparency, explainability and accountability, even where ML and similar processes make decision-making processes opaque; and
    (c) Explicit formal and informal support mechanisms in law so that persons with disabilities may exercise their rights in respect of private information collected in the use of AI and related technologies.

- **Recommendation 5:** Highlight to States (including Australia) the need for effective monitoring and evaluation of AI systems used by government (noting that these can be rapidly evolving in the context of digital technologies) to ensure they do not undermine the enjoyment of rights by persons with disabilities, or any other group on the basis of protected characteristics.