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

Human Rights and Technology (December 2019)

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Professor Dan Jerker B. Svantesson
[redacted]

Summary of major points

- The Australian Human Rights Commission ought to be congratulated on this timely Discussion Paper. It raises a range of important questions.
- The Australian Human Rights Commission's work on human rights and technology represents a valuable opportunity to explore Australia's position on jurisdictional issues associated with the protection of human rights online.
- More of the questions raised in the Discussion Paper ought to have been directed at the international dimensions.
- There is evidence suggesting that cross-border legal challenges on the Internet will become increasingly acute, that we currently lack the right institutions to address these challenges and that there is insufficient international coordination. The Australian Human Rights Commission can play an important role in the work needed to address these concerns and all decisions made to affect domestic conditions must be informed by the international implications of those decisions.
- Where an AI-informed decision-making system developed overseas is employed on the Australian market, and such a system would have been subject to a human rights impact assessment had it been developed in Australia, an assessment ought to be made as to whether Australia has (a) a substantial connection to its use and (b) a legitimate interest in regulating its use. Where these criteria have been satisfied, and assuming (c) the exercise of jurisdiction is reasonable given the balance between Australia's legitimate interests and other interests, such an AI-informed decision-making system developed overseas should be subject to the human rights impact assessment tool.

1. General remarks

1. I welcome the initiative taken by the Australian Human Rights Commission to seek input via the Discussion Paper on *Human Rights and Technology*.

2. These submissions are intended to be made public.

3. While acknowledging the great importance of all the issues raised in the Paper, such as those relating to accessibility of technology, these submissions deal only with one specific issue, namely the question raised as Question E, sub-question (d):

> *"In relation to the proposed human rights impact assessment tool in Proposal 14:*
>
> *[…]*
>
> *(d) How should a human rights impact assessment be applied to AI-informed decision-making systems developed overseas?"*

2. The cross-border dimension

4. While noted throughout the Discussion Paper, as far as the questions go, the international dimension of the issues being addressed are mainly of relevance for the one single question noted above. Thus, the questions do not sufficiently engage with the relevant cross-border issues that inevitably impact the matters discussed.

5. As noted in my submission in relation to the 2018 Issues Paper, there are several reasons why the Australian Human Rights Commission's work on human rights and technology must engage with cross-border issues. Most obviously:

(a) Internet intermediaries play a central role in the exercise of human rights online, and

(b) the majority of technology companies with which Australians interact are based outside Australia.

6. The *2019 Internet & Jurisdiction Global Status Report*, published in November 2019 by the Internet & Jurisdiction Policy Network, brings attention to a widespread perception that cross-border legal challenges on the Internet will become increasingly acute in the next three years.[1]

[1] Dan Jerker B. Svantesson, Internet & Jurisdiction Global Status Report 2019, Internet & Jurisdiction Policy Network (2019), p. 15.

7. The same Report suggests that we currently lack the right institutions to address these challenges and that there is insufficient international coordination.[2] The Australian Human Rights Commission can play an important role in the work needed to address these concerns and all decisions made to affect domestic conditions must be informed by the international implications of those decisions.

3. Responding to Question E, sub-question (d)

8. Proposal 14 in the Discussion Paper reads as follows:

> *"The Australian Government should develop a human rights impact assessment tool for AI-informed decision making, and associated guidance for its use, in consultation with regulatory, industry and civil society bodies. Any 'toolkit for ethical AI' endorsed by the Australian Government, and any legislative framework or guidance, should expressly include a human rights impact assessment."*

9. In the context of this Proposal, Question E, sub-question (d) asks how such impact assessment ought to be applied in relation to AI-informed decision-making systems developed overseas.

10. Where an AI-informed decision-making system developed overseas is employed on the Australian market, and such a system would have been subject to a human rights impact assessment had it been developed in Australia, an assessment ought to be made as to whether Australia has (a) a substantial connection to its use and (b) a legitimate interest in regulating its use. Where these criteria have been satisfied, and assuming (c) the exercise of jurisdiction is reasonable given the balance between Australia's legitimate interests and other interests, such an AI-informed decision-making system developed overseas should be subject to the human rights impact assessment tool.[3]

Professor Dan Jerker B. Svantesson

Professor Svantesson is based at the Faculty of Law at Bond University. He is also a Researcher at the Swedish Law & Informatics Research Institute,

[2] Dan Jerker B. Svantesson, Internet & Jurisdiction Global Status Report 2019, Internet & Jurisdiction Policy Network (2019), pp. 33 & 35.

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

Stockholm University (Sweden), a Visiting Professor, Faculty of Law, Masaryk University (Czech Republic) and serves on the editorial board on a range of journals relating to information technology law, data privacy law and law generally.

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

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