ADM in Social Services: Implications for vulnerability, transparency and decision-making quality
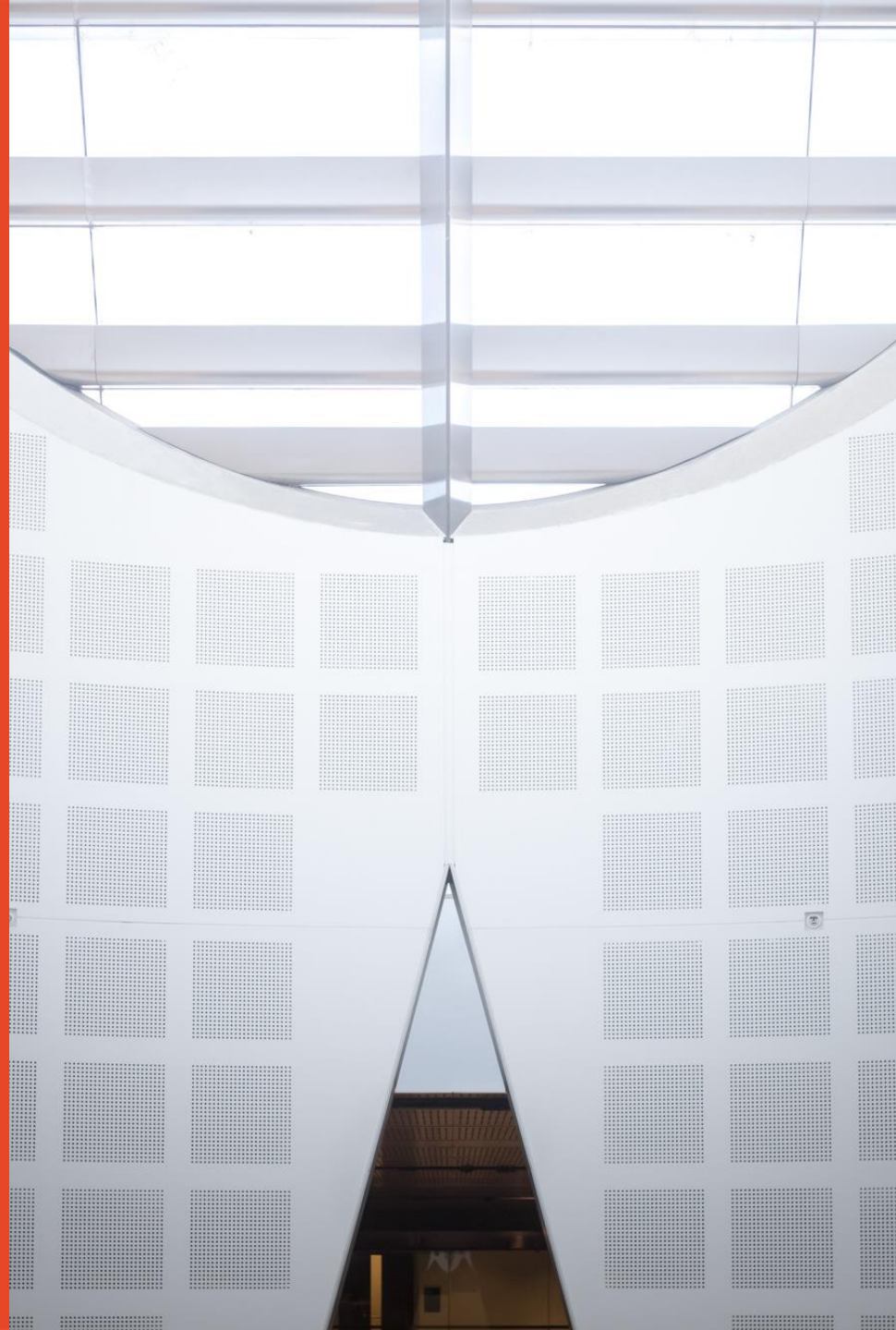
Em. Prof Terry Carney AO

Sydney Law School

Outline

Backgrounding

AHRC (2021) *Human Rights and Technology: Final Report.* Sydney: Australian Human Rights Commission. https://tech.humanrights.gov.au/downloads

Carney, T., 'Automated Decision-making in Welfare' (2021) 7, ii, *Social Security Rights Review* https://mailchi.mp/1a5cac356af5/social-security-rights-review-july-4875810

Carney, T. (2020a). "Artificial Intelligence in Welfare: Striking the vulnerability balance?" *Monash University Law Review* **46**(2): Advance 1-29

1   Introduction

- AI too broad; ADM the relevant subset; 'new public analytics' good label for contemporary administration

- Technology is technology, is technology…

- Some technology calls for creative new law and administrative accountability; as is true here

- Focus on risk to vulnerable in social services (= SS + NDIS)

- Breakneck rush to 'digital first', with SS & NDIS in vanguard (as too in UK)

- Robodebt epitome of government incompetence and level and scale of harms to vulnerable…

  - *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634, para [5].
  - Eubanks, V. (2017). *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor*. NY: St Martins Press.

ll   Issues posed by AI in social services

- Paul Henman (2020) argues risks and pitfalls of AI increase as we progress from merely recognising 'patterns', through 'sorting' people into categories, and most of all when making 'predictions'
  - ➢ Henman, P. (2020). "Improving Public Services Using Artificial Intelligence: Possibilities, pitfalls, governance." *Asia Pacific Journal of Public Administration*: Ahead of print DOI: 10.1080/23276665.2020.1816188.

1. **Comprehensibility challenges:**

    (a) Early Centrelink digitisation of all documents, decision notes and rate etc calculations
    - ➢ Comprehension 'fog' because served internal admin not public face or review
      - ▪ Initial investment in pilots to classify and file supporting documents for claims processing (Aaron Tan, 'Services Australia taps AI in document processing' *ComputerWeeklyCom* 16 October 2020 https://www.computerweekly.com/news/252490630/Services-Australia-taps-AI-in-document-processing
      - ▪ Took till latest Budget to allocate $200 million for enhancements to provide a 'simpler and more tailored experience for Australians based on their preferences and interactions' (Asha Barbaschow, 'All the tech within the 2021 Australian Budget' *ZDNet* 11 May 2021 https://www.zdnet.com/article/all-the-tech-within-the-2021-australian-budget/)
    - ➢ Comprehensibility of debt calculations and other routine high incidence transactions to ordinary citizens surely should be the first reform priority.

ll (cont)

2. ADM and casemanagement

(a) <u>NDIS Chatbot 'Nadia'</u>

- ➤ Designed for aspects of client interaction and case management
- ➤ A machine learning cognitive computing interface using data mining & pattern recognition for human interaction by natural language processing
- ➤ Able to read emotions and respond accordingly, 'remembering' things like your favourite sporting team

- But machine learning system needed a large training set of actual NDIS clients to develop and refine accuracy.

- Aborted at trial stage;   far too much risk: 'one incorrect decision may disrupt a person's ability to live a normal life'
  - Park, S. and J. Humphry (2019). "Exclusion By Design: Intersections of social, digital and data exclusion." *Information, Communication & Society* **22**(7): 934-953 at 946).

ll 2 (a)(cont)

- Overseas casemanagement examples equally problematic
  - ➢ Ontario Canada's audit trail reform of equivalent of Jobactive employment services and payments led to widespread 'work-arounds'
    - ▪ Raso, J. (2017). "Displacement as Regulation: New Regulatory Technologies and Front-Line Decision-Making in Ontario Works." *Canadian Journal of Law and Society* **32**(1): 75-95
  - ➢ US federal medicaid requirement to automate verification of payment entitlement wreaked havoc for clients and providers of home care in States such as Arkansas that applied a poorly designed app (with geo-location) to this sector of care (unlike eg Virginia)
    - ▪ Eubanks, V. and A. Mateescu (2021) '"We don't deserve this": new app places US caregivers under digital surveillance'. *Guardian Australia,* 28 July, https://www.theguardian.com/us-news/2021/jul/28/digital-surveillance-caregivers-artificial-intelligence

ll 2 (b)

(b) <u>NDIA's aborted ADM assessment and planning reforms</u>

- Assessment tool distilled from a suite of existing measures and administered by independent assessors
- Rating scores were intended not only to underpin and improve consistency of decisions about access, but also generate one of 400 personas + presumptive budgets
  - Dickinson & Yates et al. 2021
  - Shelved 9 July 2021, at least for time being
- Characterised as 'robo-planning'
  - ➢ lowering rates of eligibility
  - ➢ smaller and less appropriate packages of support
  - ➢ loss of individualisation (including loss of personal knowledge reflected in medical reports no longer to be part of the assessment)
  - ➢ substantial reduction of human case planner involvement
    - Barbaschow 2021

ll 3   'Predictive ADM'

- Risks associated with ADM are arguably most evident when it is predictive in character (Henman 2020: 210)
- JSCI tool for prediction of need is:
  - A product of logistic regression (less sophisticated than machine learning)
  - The algorithm is not publicly available (not transparent)
  - Statistical profiling has sensitivity and specificity issue; Including potential of discrimination
    - van Landeghem, Desiere & Struyven 2021
- Better predictive tool as merely an 'aid' to streaming etc as in NZ, Austria, Netherlands?
  - Desiere, Langenbucher and Struyven (2019)
- Danish 'mid-range' co-production conditionality unfeasible?
  - Larsen and Casswell (2020)

lll   Discussion

- Common to assessing all of these examples of automation and artificial intelligence in welfare is the impact on vulnerable clients

- As Murphy J wrote in approving the class action settlement in *Prygodicz* (No 2) (para [7])

  It is fundamental that before the state asserts that its citizens have a legal obligation to pay a debt to it, and before it recovers those debts, the debts have a proper basis in law. <u>The group of Australians who, from time to time, find themselves in need of support through the provision of social security benefits is broad and includes many who are marginalised or vulnerable and ill-equipped to properly understand or to challenge the basis of the asserted debts so as to protect their own legal rights. Having regard to that, and the profound asymmetry in resources, capacity and information that existed between them and the Commonwealth</u>, it is self-evident that before the Commonwealth raised, demanded and recovered asserted social security debts, it ought to have ensured that it had a proper legal basis to do so. The proceeding revealed that the Commonwealth completely failed in fulfilling that obligation

- But ADM accountability through judicial remedies is rarely viable.
- Judicial review is costly to mount, gameable and confined to those risks stemming from clear illegality.
- Robodebt a superb but very rare exception to the rule
  - ➤ *Masterton* test case prior to *Amato* was gamed by government.
  - ➤ *Amato ditto* had government been less stubborn on 'interest'.
  - ➤ *Prygodicz* settlement shows negligible prospect of establishing government duty of care in negligence, much less proof of breach
    - ▪ *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634, paras [172]-[183] Murphy J.
- Admin merits review gameable (AAT1 secret if not appealed)
- Neither judicial nor admin review address *systemic grievances*
- ADM doesn't have an amenable *process* or *reasons*

So radical new thinking is called for (O'Sullivan 2021)

lV   Conclusion

> As public law scholars, we must evaluate how legality or governance functions within administrative institutions in everyday and effectively final decisions. As we develop theories of how it ought to function, **we must interrogate how decision making *is* functioning** (Raso 2020: 15)

- Principal lessons of Oz ADM for 'everyday' social service interactions?:
  - ➤ Failure of administration → much harm to vulnerable (Carney 2020);
 - ➤ Destruction of citizen/government trust (Braithwaite 2020)

> In an increasingly automated state, administrative law will need to find ways to encourage agencies to ensure that members of the public will continue to have opportunities to engage with humans, express their voices, and receive acknowledgment of their predicaments. **The automated state will, in short, also need to be an empathic state** (Coglianese 2021: 106)

- Only 'baby-step' anti-gaming of AAT1/ADJR & systemic 'admin class action'
- So the lions share of the creative thinking and work is still to be done!!
- **In short, the conversation about the ADM implications for vulnerability, transparency and decision-making quality in welfare has barely begun.**

Selected references

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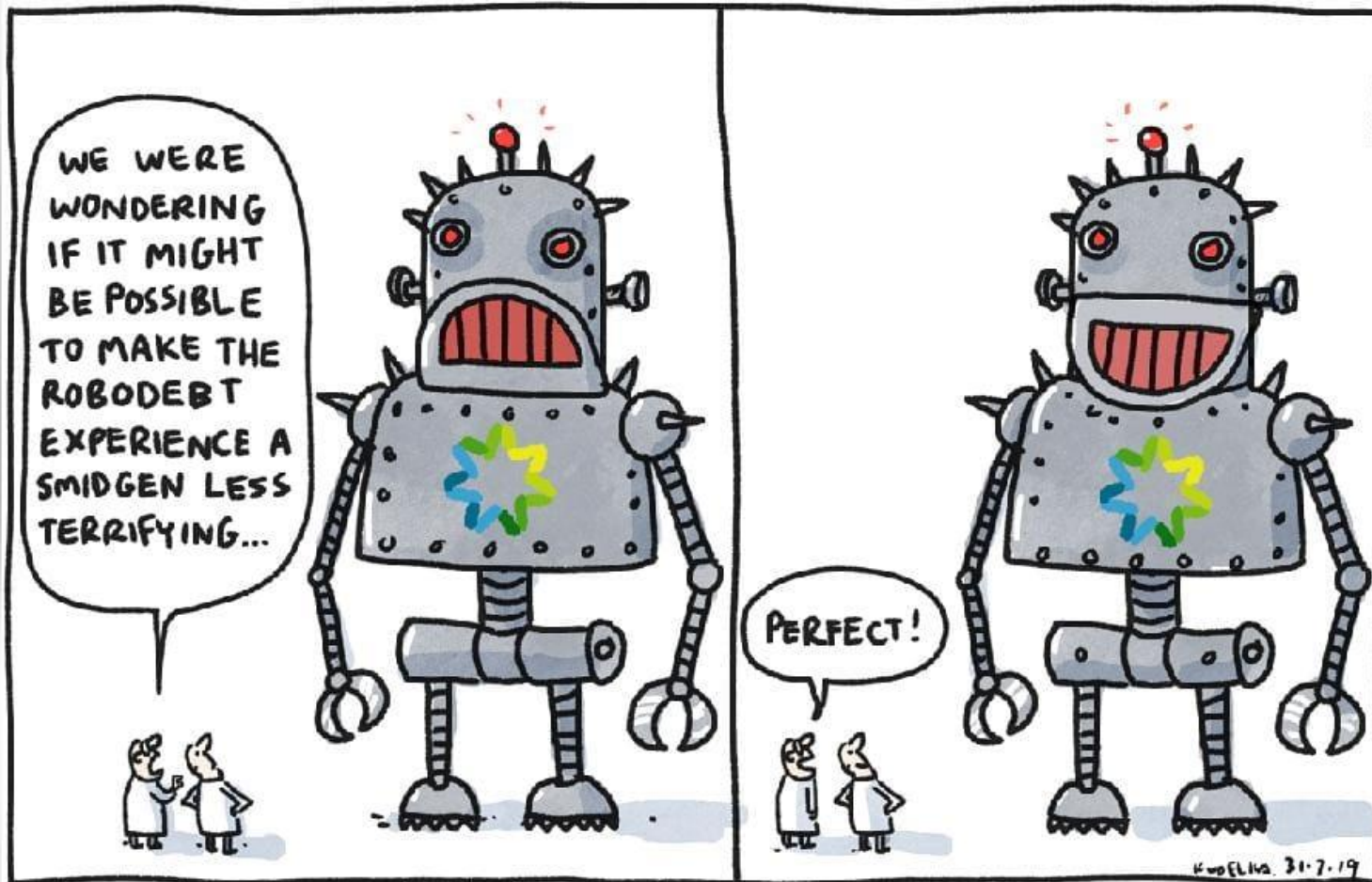
Australian: 31 July 2019

HOPEFULLY ADM IN SOCIAL SERVICES HAS A BETTER FUTURE?