



The Impact of Artificial Intelligence Upon the Teaching of Constitutional Law

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© June 2022

Centre for Professional Legal Education

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This Report was commissioned by the Bond University Centre for Professional Legal Education as part of the research project 'The Impact of Emergent Technologies Upon the Teaching of Core Law Units in the Australian Law Curriculum'. The project has Ethics Approval from Bond University: Ethics Reference Number CP01045.

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ABOUT THE PROJECT



This Report was commissioned by the Bond University Centre for Professional Legal Education as part of the research project ‘The Impact of Emergent Technologies Upon the Teaching of Core Law Units in the Australian Law Curriculum’.

The structure of the accredited Australian law degree – both the Bachelor of Law (LLB) and the Juris Doctor (JD) – continues to be determined primarily by the need to demonstrate coverage of the ‘Priestley 11’ (P11) prescribed areas of knowledge: administrative law, civil dispute resolution, company law, constitutional law, contract law, criminal law and procedure, equity, evidence, professional conduct, property law and tort law. The P11 areas of knowledge are taught via a series of core law units within the law degree, the content of which is relatively consistent across Australian law schools.

Meanwhile, the practice of law is undergoing rapid change, largely because of the emergence of disruptive digital technologies. There is a clear need for law schools to adjust the way law is taught to ensure law graduates continue to be effectively prepared for contemporary

legal practice. Many of the recent reports regarding the future of legal education and of the legal profession call for an increased emphasis in the law curriculum upon teaching digital skills and knowledge of emergent technologies, equipping work-ready graduates for technology-enhanced or technology-centric practice, while at the same time emphasising the need to retain the existing emphasis upon more traditional legal knowledge and skills.

The challenge confronting Australian law schools is the fact that many of the legal academics responsible for teaching the core law units lack the time, resources and expertise to identify and evaluate the impact of emergent technologies upon the law curriculum. The objective of this Project is to assist Australian law schools to address this challenge.

The Project is investigating the impact of emergent technologies upon the teaching of the core law units in the Australian law curriculum. The Project Leadership Team has settled the overall research questions and method. Legal scholars from a variety of Australian law schools have been invited to identify the impact of each category of emergent technology upon each P11 area of knowledge, and to prepare a Report identifying the impact of particular emergent technologies upon a

particular P11 area of knowledge and any consequent changes to the way the P11 area of knowledge should be taught.

The focus of this Report is upon the impact of artificial intelligence upon the teaching of constitutional law.

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WHAT IS ARTIFICIAL INTELLIGENCE?

[A description of the relevant emergent technology.]

The particular focus of this Report is on Artificial Intelligence (AI), with its progress having been described as ‘rapid, unprecedented, and transformative’.¹ Briefly, AI describes computer and machine problem-solving and decision making, and is commonly defined as ‘a system’s ability to interpret external data correctly, to learn from such data, and to use those learnings to achieve specific goals and tasks through flexible adaptation’.²

Despite the increased interest in AI from public institutions, private industry and academia, a meta-analysis of the definitions of AI published by the European Commission reveals that in fact ‘there is no standard definition’ for AI.³ Notwithstanding, the Commission adopts the following definition of its High Level Expert Group on Artificial Intelligence (HLEG)⁴ ‘as its starting point’:

Artificial intelligence (AI) systems are software (and possibly also hardware)

systems designed by humans that, given a complex goal, act in the physical or digital dimension by perceiving their environment through data acquisition, interpreting the collected structured or unstructured data, reasoning on the knowledge, or processing the information, derived from this data and deciding the best action(s) to take to achieve the given goal. AI systems can either use symbolic rules or learn a numeric model, and they can also adapt their behaviour by analysing how the environment is affected by their previous actions.⁵

Given AI is increasingly relied on by governments (to make decisions in areas such as law enforcement, welfare, immigration, and many others) and private industry (for advertising, selling products, etc) alike, the effective legislative regulation of AI and associated technologies is of paramount importance.

LITERATURE REVIEW

[A summary of current and likely future impact of the technology upon the law in the P11 area of knowledge, and the way law in the area is administered, enforced, and practised, according to recent scholarship and media commentary.]

Unsurprisingly, the literature is sparse on the constitutional dimensions of AI in Australia. Legislative regulation of such technologies, and in fact of any matter, is subject to constitutional arrangements which set out the legislative competencies of the

Commonwealth and various States and Territories. Australia does not have any *specific* laws regulating AI. Fragmentary regulation occurs, for example, through existing privacy and data security laws and intellectual property laws.⁶ Specific Commonwealth legislation on

¹ The Centre for Long-Term Resilience, *Future Proof: The Opportunity to Transform the UK’s Resilience to Extreme Risk*, (Report, June 2021) 23.

https://www.cser.ac.uk/media/uploads/files/Future_Proof_report_June_2021.pdf (‘Future Proof Report’).

²² Michael Haenlein and Andreas Kaplan, ‘A Brief History of Artificial Intelligence: On the Past, Present, and Future of Artificial Intelligence’ (2019) 61(4) *California Management Review* 5, 5. Moreover, AI can be thought of in terms of ‘narrow’ (programmed to perform a single task with ‘narrow’ intelligence) or ‘broad’ (can perform a broad range of tasks with ‘general’ intelligence) senses. How AI develops will bear upon what is possible now and into the future.

³ Sofia Samoili et al, ‘AI Watch: Defining Artificial Intelligence – Towards an operational definition and taxonomy of artificial intelligence’ (Publications Office of the European Union, EUR 30117 EN, 2020) 7.

⁴ The European Commission’s HLEG on AI is composed by 52 representatives from academia, civil society and industry. See Samoili et al (n 3) 29.

⁵ *Ibid* 9.

⁶ See Jordan Cox, Aya Lewih and Irene Halferty, ‘AI, Machine Learning & Big Data Laws and Regulations 2021 Australia, *Global Legal Insights* (Web Page) <<https://www.globallegalinsights.com/practice-areas/ai-machine-learning-and-big-data-laws-and-regulations/australia>>.

AI may come within the scope of multiple constitutional heads of legislative power, including, for example, the corporations power,⁷ the defence power,⁸ or possibly the ‘post and telegraph power’.⁹ Alternatively, a crisis or emergency involving AI may be sufficient to enliven the Commonwealth’s implied nationhood power, providing a possible constitutional basis for its regulation.¹⁰ Of course, the Constitution may be amended through referendum to confer such power upon the Commonwealth, though that seems unlikely.¹¹

The Constitution also secures the right to judicial review of an administrative decision made by an ‘officer of the Commonwealth’.¹² Legislation can declare that a decision made by AI is *deemed* to have been made by a relevant Commonwealth officer. Consequently, legislation can exclude or extend the right to judicial review regarding AI decision-making. Broader constitutional issues regarding rule of law concerns might also emerge.¹³ Although Commonwealth Parliament *can* deem a decision made or supported by AI to be that of ‘an officer of the Commonwealth’ and therefore *prima facie* constitutionally valid under s 75(v), the High Court may nevertheless find that such decision making is contrary to the rule of law and therefore unconstitutional. Whether AI legislation and AI’s role in administrative decision making is constitutional is ultimately a question for the High Court.

One approach to thinking about how AI may affect constitutional law is in terms of both form (procedure

and process) and substance. Regarding form, one inference available to draw is that AI may aid constitutional lawyers in constructing legal arguments and tracing networked histories of ideas or themes.¹⁴ With its sheer computational power, it is foreseeable that AI will be able to generate ‘answers’ to any legal question.¹⁵ For example, supplied with Beethoven’s entire catalogue of works, AI has used this information to ‘complete’ his unfinished 10th symphony. Similarly - and given AI’s ever-increasing sophistication - it is foreseeable that uploading judicial decisions and writings will enable judgments to be generated or ‘written’ for complex constitutional law matters. For example, it is conceivable that AI will be able to furnish complete judgements (replete with the stylistic nuances and rhetorical flourishes) of, say, Isaacs, Dixon, Barwick, Mason or Kirby JJ - including *their* ‘reasoning’.

Regarding the substance of constitutional law, the evolving nature of AI may require careful consideration of its continuing status either as a technology or legal person. This could result in the extension of legal personhood to AI, particularly sentient AI.¹⁶ Recognition of this sort might be challenged before the High Court and, moreover, call into question fundamental constitutional principles concerning the very notion of who or what is to be included in the *polis*. The granting of ‘constitutional’ (as opposed to merely ‘legal’) personhood to corporations in the US opens up, conceptually at least, the possibility of such recognition into the future.¹⁷ Consequently, non-human legal persons such as corporations (and possibly AI in the

⁷ *Australian Constitution* s 51(xx).

⁸ *Ibid* s51(vi).

⁹ *Ibid* s51(v). This power confers Commonwealth legislative power for ‘postal, telegraphic, telephonic and *other like services*’. Although broadly a communications power, whether the provision for ‘other like service’ will capture AI is yet to be considered.

¹⁰ For example, the nationhood power has been used to support regulation concerning the Global Financial Crisis where no other heads of Cth legislative power were available to support the impugned legislation. See *Pape v Commissioner of Taxation* (2009).

¹¹ Since Federation in 1901, only 8 out of 44 referenda have been successful. No referendum has passed since 1977. As at 2021, it has been 44 years since Australia has formally changed its constitution.

¹² *Australian Constitution* s 75(v).

¹³ See Monika Zalnieriute, Lyria Bennett Moses and George Williams, ‘The Rule of Law and Automation of Government Decision-Making’ (2019) 82 *Modern Law Review* 425; Monika Zalnieriute, Lyria Bennett Moses and George Williams, ‘The Rule of Law ‘By Design?’ (2021) 95(5) *Tulane Law Review* 1063.

¹⁴ Daniel Goldsworthy, ‘Dworkin’s Dream: Towards a Singularity of Law’ (2019) 44(4) *Alternative Law Review* 286.

¹⁵ *Ibid*.

¹⁶ Simon Chesterman, ‘Artificial Intelligence and the Limits of Legal Personality’ (2020) 69 *International and Comparative Law Quarterly* 819; Rafael Dean Brown, ‘Property Ownership and the Legal Personality of Artificial Intelligence’ (2021) 30(2) *Information & Communications Technology Law* 208.

¹⁷ Whilst corporations are recognised in the Constitution and there is a separate head of legislative power allowing for their regulation (s51(xx)), the more novel question is where a legal person (such as a corporation) might also rely upon this status as a legal person to argue for constitutional protection, as has been done in the US. In Australia, for example, might an Australian corporation assert that legislation seeking to curtail certain types of communication contravenes its implied freedom of political communication? And moreover, might it do so (and be granted standing to do so) in its own right. This can be thought of as an extension of legal personhood to constitutional personhood. Consequently, might it also be possible for AI, having been granted legal personhood, to assert its constitutional personhood (the implied right to vote, perhaps?). See Zoe Robinson, ‘Constitutional Personhood’ (2016) 84(3) *The George Washington Law Review* 605.

future) might claim - in their *own* right - certain constitutional protections or rights in the Australian context. In light of predictions regarding the emergence

of artificial general intelligence (AGI),¹⁸ these substantive questions may require legal answers in the following decades.



PRACTITIONER PERSPECTIVES

[A summary of the views of various law teachers and legal practitioners regarding the current and likely future impact of the technology upon the law in the P11 area of knowledge, and the way law in the area is administered, enforced and practised.]

Professor Hunter describes AI as technologies that 'leverage data to predict subsequent behaviour based on past behaviour'.¹⁹ His overarching view is that, 'the Priestly 11, looked at as individual units, as individual subjects, probably are not going to be affected really dramatically by technology.'²⁰ Moreover, Professor Hunter considers the implications for AI generally, and what it means specifically for legal education in Australia

and the teaching of the P11 through a particular lens. The framing he offers is to approach the challenge posed by AI in two key respects: first, *unmet legal demand*; and second, *integrated decision making*. On the first, he says

We will be able to build systems - and indeed some are - to actually deal with

¹⁸ Cem Dilmengani, 'When will singularity happen? 995 experts' opinions on AGI' (6 November 2021 <<https://research.aimultiple.com/artificial-general-intelligence-singularity-timing/>>. Future Proof Report (n 1) 24. Notably, '...when hundreds of scientists were surveyed about when they believed AI would reach general human-level intelligence, the median response was 2040.'

¹⁹ Interview with Professor Dan Hunter, Executive Dean of The Dickson Poon School of Law, King's College, London (Daniel

Goldsworthy, video-conference call, 2 December 2021). Professor Dan Hunter is uniquely positioned to offer insights into how information technologies will affect the P11. He has the distinction of being both an international expert in AI and legal systems and the future of legal practice. Professor Hunter was formerly Dean of Law at Queensland University of Technology 2020 – 2022 as well as the Foundational Dean at Swinburne Law School 2014 – 2020, responsible for launching its law course.

²⁰ Ibid.

those problems, where human beings are just too expensive to deal with them. A really good example is in the provision of Centrelink entitlements and those decisions. Seemingly hundreds of thousands of those sorts of decisions made every year can now be made automatically *with a reasonable degree* of certainty that they [the decisions] *are about what a human being would make*. It's better to *have a machine making that decision pretty well than a human being making that decision about as well*.²¹

On the second matter, Professor Hunter says we can think about integrated decision making where machines make a component of the decision but human beings engage in the final determination and the 'creative part'.²²

Machines are really, really good at parsing all the way through to 'what is the outcome, based upon this next move' and presenting the alternatives to humans to say 'this is perhaps what you should be thinking about'.²³

With these two factors in mind – unmet legal demand and integrated decision making – he advises that 'you can ask "what does this mean for any given area of the Priestley 11?" and then you can kind of work it out.'²⁴ For constitutional law, Professor Hunter says that

[i]f it's *relatively high value* [such as] around constitutional reasoning, then you're going to have an integrated human-machine kind of bionic or cyborg where there's a human and machine connection that can lead to potentially better conclusions. Human beings are bad at finding lots of information in a haystack and machines are really bad at making interesting, creative decisions - so let's use both of them together.²⁵

'It's not a radical change of the Priestly 11' says Professor Hunter.²⁶ 'It's the same sort of thing with administrative law or constitutional law, which is to say, these systems are making decisions related to human beings that ordinarily only human beings have made, so it implicates the rights of those affected human beings and we need to deal with that'.²⁷

CONSEQUENCES 1

[An explanation of how this will change what current and future lawyers need to know and be able to do.]

AI already outperforms humans in many process-driven tasks requiring pattern recognition. The susceptibility of certain tasks to automation can be understood through Morevac's paradox.²⁸ The paradox holds that although computers are adept at reasoning and pattern recognition (such as solving equations and reviewing documents), it is sensorimotor intelligence in unstructured environments (think gardening, clearing tables) - which are often unconscious and have evolved over hundreds of thousands of years - that human beings find innately simple but are, currently, almost impossible for AI to imitate.²⁹

Generally, what constitutional lawyers will need to know and be able to do will be shaped by what tasks AI can 'do better' than constitutional lawyers, and what tasks they cannot. Those tasks based on pattern recognition are open to artificial intelligence, whereas tasks requiring creative and social intelligence are not (yet) and still remain the domain of natural intelligence.³⁰ What does all this mean for lawyers?

There are a number of large-scale changes in AI that will affect the legal profession.³¹ These changes/developments are likely to undermine the special (and sometimes revered) status of the legal

²¹ Ibid [emphasis added].

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Hans Moravec, 'When Will Computer Hardware Match the Human Brain?' (1998) 1 *Journal of Evolution and Technology* 1.

²⁹ Ibid.

³⁰ Daniel Goldsworthy, 'The Future of Legal Education in the Twenty First Century' (2020) 41(1) *Adelaide Law Review* 243, 253.

³¹ See Dan Hunter, 'The Death of the Legal Profession and the Future of Law' (2020) 43(4) *UNSW Law Journal* 1199; See Goldsworthy (n

profession that challenge the delivery of traditional legal services will ‘overwhelmingly favour ‘alternative legal service providers’ like legaltech companies, managed legal services companies, and legal process outsourcers.’³² It is not artificially intelligent machines, but the ‘rise of platform technologies which will have the biggest impact on the evolution of the legal

profession’.³³ For constitutional lawyers working in private practice and government alike it is likely to mean, in the short to medium term at least, the ‘hollowing out’ of the middleclass of legal jobs where process-driven tasks constitute a large part of legal work.³⁴

CONSEQUENCES 2

[An explanation of how this will change the way the core law unit should be taught to law students, including the scope of the unit, the learning outcomes for the unit, the learning activities undertaken by the students, and how students within the unit should be assessed.]

In the context of technologies like AI which fundamentally alter our relationship to information and knowledge, a broad legal education will enable law students and lawyers alike to contextualise these advancements and carefully consider appropriate legal and regulatory responses.³⁵ Constitutional law may be less affected than other P11 units in the short term because, by its very nature, it is more engaged in principle and doctrine. Given the likely future impact of AI, it is foreseeable that our political and legal structures – including constitutional arrangements – will need to respond to the challenges and opportunities these technologies will present.

It is useful to think about legal education in terms of pre-admission to practice (university) and post-admission (continuing legal education). ‘I agree’ Professor Hunter says, that ‘in general there is significant scope for post-qualification education, and rethinking what we expect lawyers who are qualified to be able to do and what they need to be able to work on.’³⁶ Continuing legal education is much better placed to deliver competencies on specific aspects of information technologies such as AI and its legal dimensions.³⁷ Rather than directly embed content about AI into

constitutional law, the response should instead be a renewed focus on constitutional theory and jurisprudence to equip students to be able to contextualise these technologies within broader constitutional principles. Moreover, the exponential growth of technology means embedding substantive content on particular information technologies risks being outdated or obsolete before long. One way to avoid this challenge to curriculum design is to use these technologies as applied examples within the existing P11.

Understanding smart contracts or contract lifecycle maintenance *within* contract law, understanding natural language parsing and e-discovery *within* civil procedure – those sorts of things [can be delivered] where it’s essentially a tutorial or a class that you are doing.³⁸

In this vein, understanding the constitutional dimensions of AI regulation and of integrated human-machine decision making and its constitutional implications for judicial review *within* the current subject is but an example of this approach.

31); See Richard Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (Oxford University Press, 2017); Richard Susskind, *Tomorrow’s Lawyers: An Introduction to Your Future* (Oxford University Press, 2nd ed, 2017).

³² Hunter (n 32) 1200 – 1201.

³³ Ibid 1201.

³⁴ Morgan R. Frank et al, ‘Toward Understanding the Impact of Artificial Intelligence on Labor’ (2019) 116(14) *Proceedings of the National Academy of Sciences of the United States of America* 6531, 6532; Organisation for Economic Co-operation and Development, *Under Pressure: The Squeezed Middle Class* (OECD Publishing, 2019) <<https://doi.org/10.1787/689afed1-en>>.

³⁵ See Martha C Nussbaum, ‘Why Lawyers Need a Broad Social Education’ (2017) 91(11) *Australian Law Journal* 894.

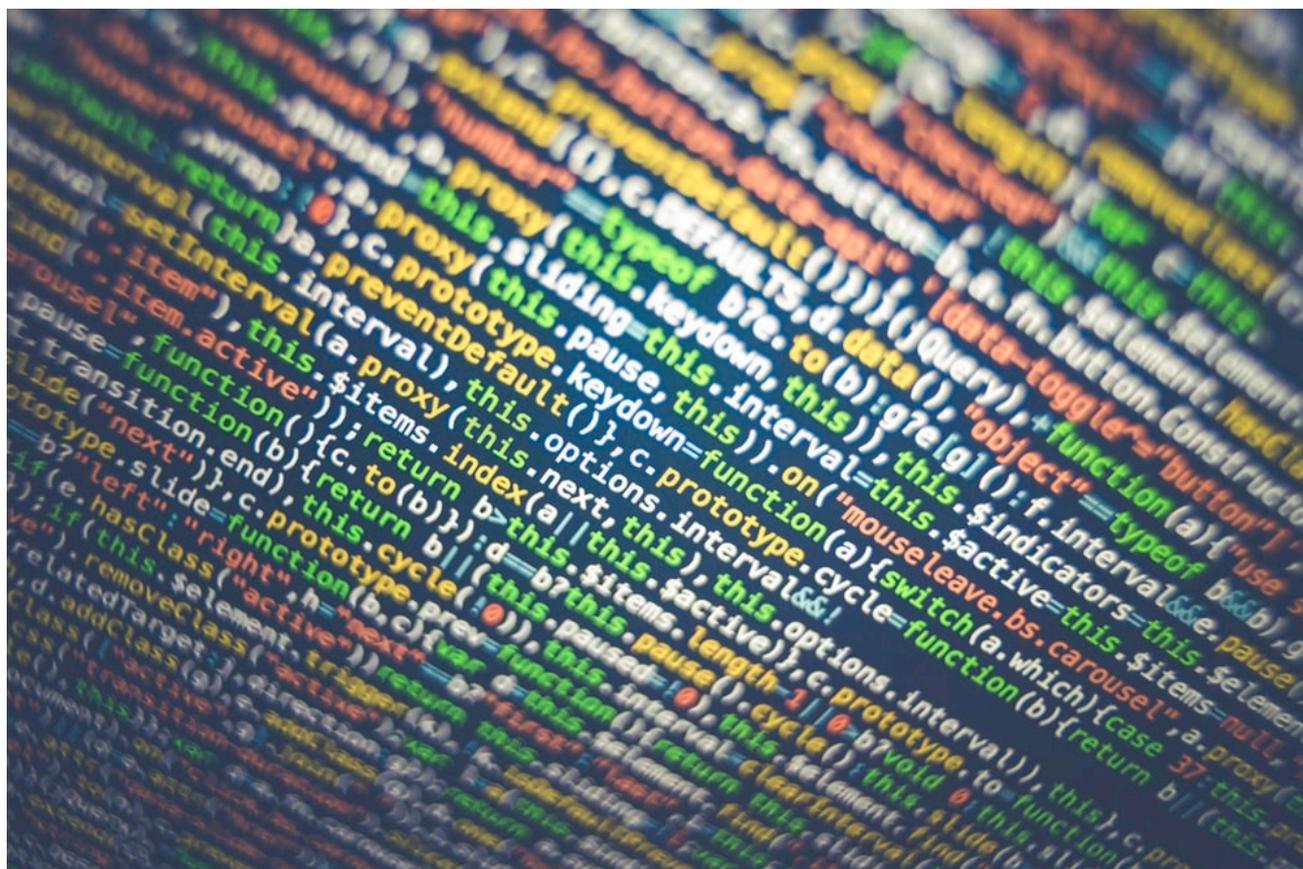
³⁶ Hunter (n 20).

³⁷ Michele R Pistone and Michael B Horn, *Disrupting Law School: How Disruptive Innovation Will Revolutionize the Legal World* (Report, 2016) 17–18 <<https://www.christenseninstitute.org/wp-content/uploads/2016/03/Disrupting-law-school.pdf>>. ‘[m]odular flexibility enables online competency-based providers to create and scale a multitude of stackable credentials... These modules can come from a wide range of backgrounds, many outside the traditional legal academy... [and] can provide well-designed modules on topics relevant to lawyer-based competencies’.

³⁸ Hunter (n 20).

Another approach is considering how AI might fundamentally alter legal and political institutions. In this regard, assessment regimes would do well to pose hypothetical scenarios that stimulate deep engagement and thinking about how these technologies might challenge constitutional arrangements and structures.³⁹ By studying constitutional law, students should come

away with deeper understandings of the nature, structure, and scope of their legal system; grounded in constitutional and political theory. Only with a deep grounding in doctrine and principle will students more fully comprehend how such technologies may affect – for better or worse – legal institutions and the rights and obligations of human beings.



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