Money, Power and AI: The impact of AI on both information access and privacy rights

Information Commissioner and Privacy Commissioner Presentation to the UNSW Law & Justice Conference
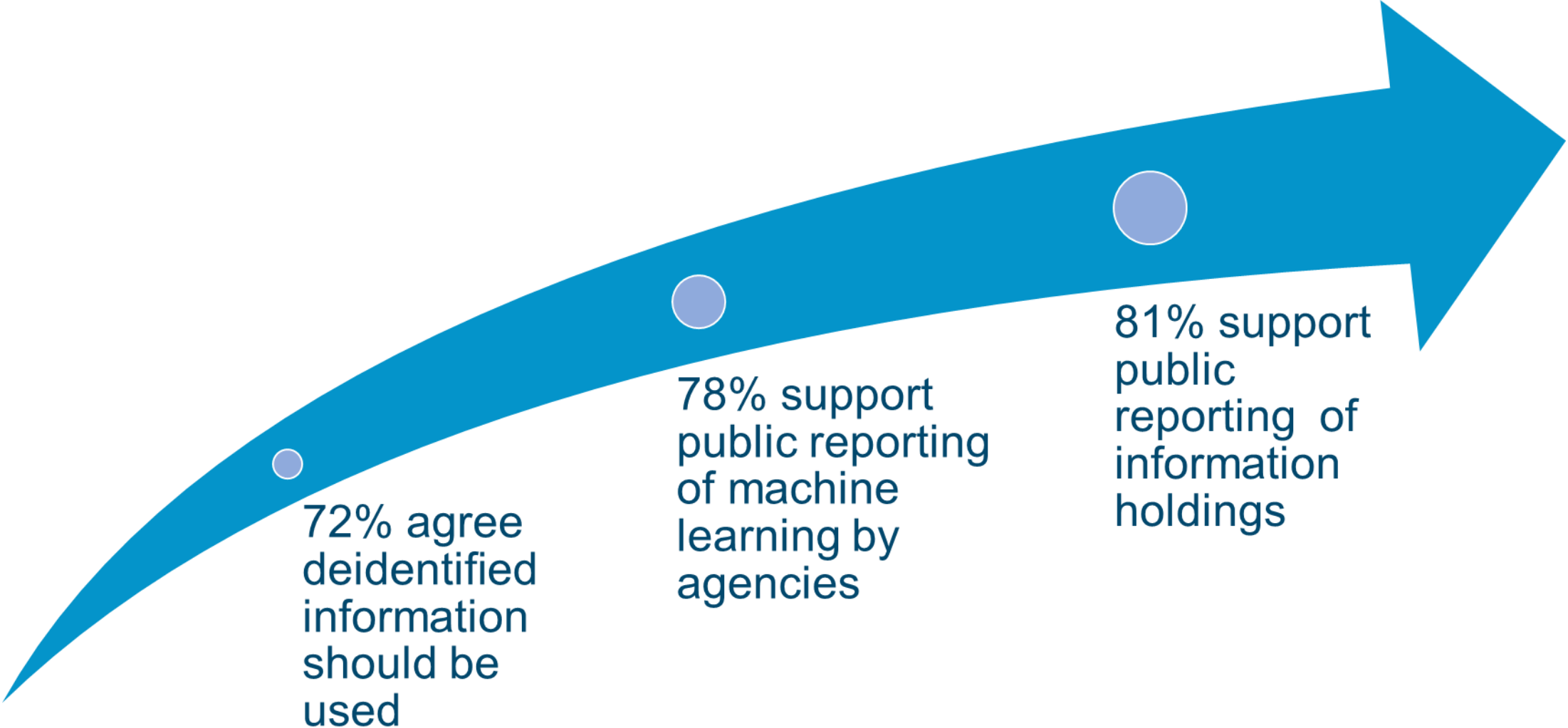
29 November 2021

ipc

information and privacy commission

new south wales

The 2021 government information landscape

Characterised by three immutable features:

1. Digital government and data application

2. Increasing partnerships and outsourcing arrangements

3. Novel models of government that transcend traditional sectoral arrangements.

Information holdings – community attitude survey

72% agree deidentified information should be used

78% support public reporting of machine learning by agencies

81% support public reporting of information holdings

Securing the right to access information and the public interest – legal developments & adequacy

- *O'Brien v Dept Communities and Justice*

- *Calderwood v Department of Planning, Industry and Environment; Calderwood v Campbelltown City Council; Department of Planning, Industry & Environment v City of Ryde* [2020] NSWCATAD 200

- *Redfern Legal Centre v Commissioner of Police* [2021] NSWCATAD 288

- Digital Restart Fund – Offender Digital Services

O'Brien v Dept Communities and Justice

- **Right of access to enable assertion of rights**
- Outsources algorithm
- Third party contractor – Intellectual Property
- Diminution of rights under section 121 of the *Government Information (Public Access) Act 2009* (GIPA Act):

  (a) information that relates directly to the performance of the services by the contractor,

  (b) information collected by the contractor from members of the public to whom it provides, or offers to provide, the services,

  (c) information received by the contractor from the agency to enable it to provide the services

- **Is AI decision making or service provision or both, how do we audit?**

Calderwood v Department of Planning, Industry and Environment; Calderwood v Campbelltown City Council; Department of Planning, Industry & Environment v City of Ryde [2020] NSWCATAD 200

- **A dynamic data set under a federated model of access to data**
- Government Departments and Local Councils shared portal for purposes of register of combustible cladding
- Council access limited to specific information
- Inputs from a number of sources e.g. Fair Trading Home Building
- GIPA requests made to Councils (4) and to Departments – joined by Departments of Customer Service and Fire and Rescue NSW
- Outcomes varied:
  - not held
  - access provided
  - access withheld – Items: 1(d); 1 (f); 2(d); 2(e); 2(f); 4(d) for Table to section 14 made out
- Multiple AI options and how is information access provided?

Redfern Legal Centre v Commissioner of Police [2021] NSWCATAD 288

- **What is Government information?**
- Results of strip searches drug related charges over distinct periods
- Separate data bases within NSW Police holding subsets of information
- SQL required by agency – substantial and unreasonable diversion of resources
- "Government information" is limited to information which exists at the time of the access application
- The Tribunal had regard to the context of the GIPA Act:
  - section 53(1) – information held by the agency when the application is received
  - section 75 – an agency is not obliged to create a new record in response to an access application
- The Tribunal held that the information sought was not "government information"
- **Consider data as the core ingredient to AI.**

The three fundamental questions to preserve information and secure access

1. Who holds the information?

2. How access is provided?

3. In what form can access be provided?

Digital Restart Fund

Offender Digital Services (ODS) program

Premier's Priority of reducing adult reoffending following release from prison for high-risk offenders committing serious crimes by 5% by 2023 (with associated reduction in crime benefits):

- improve the custodial experience for inmates by using technology to enhance NSW Government processes for the delivery of rehabilitative supports and services – voice recognition for treatment purposes

- allow prisoners to take more responsibility for their own rehabilitation

- improve the custodial experience for inmates by creating efficiencies in the delivery of services

- build on the success of the pilot project and scale implementation

- **How does government remain accountable?**

Procurement contracts – essentials

Purchaser must have access to:

- data sets and any input to training; configuration, quality testing, potential bias and proposed methodologies
- test version of system and performance analysis
- training and technical manuals.

Vendor agrees to:

- undertake algorithmic impact assessment and revalidation
- waive legal rights in respect of purchaser's testing/auditing
- provide ongoing advice of any legal claims, systems failures/unintended consequences
- ensure system operates within law/compliance requirements and subcontractors compliance
- ensure security and access by purchaser.

Proposals for Regulation of AI

- Office of the Privacy Commissioner Canada – recommendations for a regulatory framework for artificial intelligence (November 2020)

- EU "Proposal for Regulation of Artificial Intelligence" (May 2021)

- AHRC Report on Human Rights and Technology (May 2021)

- Commonwealth Privacy Act Review - Discussion Paper (October 2021)

- China – draft Algorithm Regulations (October 2021)

AI in NSW
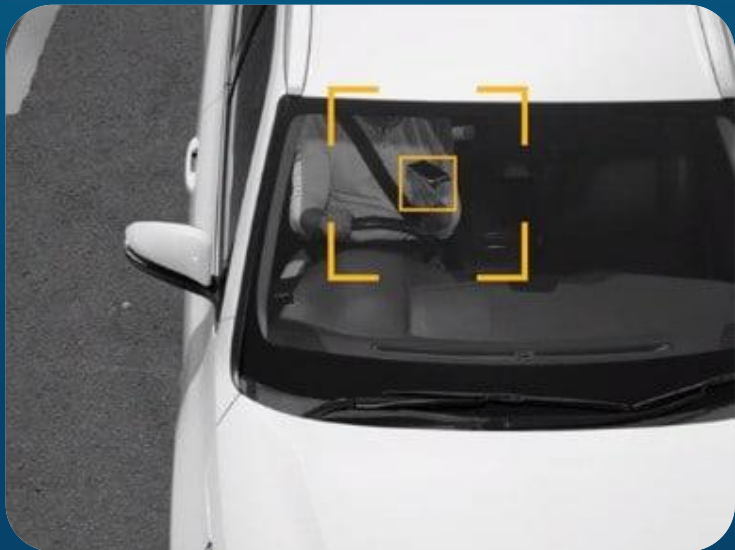
TrainDNA

Analytics Platform – moving towards predictive maintenance for trains

https://www.downergroup.com/moving-towards-predictive-maintenance-with-tr

Mobile Phone Detection Cameras

https://roadsafety.transport.nsw.gov.au/stayingsafe/mobilephones/technology.html

Revenue NSW – Use of AI to Identify and Support Vulnerable Customers

https://www.digital.nsw.gov.au/article/using-artificial-intelligence-identify-and-support-customers-facing-hardship

Digital Restart Fund

- Types of projects funded under DRF include:
  - portals as centralised information and transaction platforms
  - drones and smart technology, including smart cities
  - single notification services
  - data analytics projects and cyber security projects.
- May 2021, the NSW Information Commissioner and NSW Privacy Commissioner jointly issued advice titled Digital Restart Fund: assessing information access and privacy impacts.
- Commissioners have provided advice on some 160 projects to date.

NSW Government Approach to AI

The NSW Government AI Strategy
Sets out a way forward for AI adoption by Government, to help deliver services for the people of NSW.

The NSW Government AI User Guide
Sets out guidance that agencies are required to use for AI project design and implementation.

The NSW Government AI Ethics Policy
Requires all public servants to implement AI in a way that is consistent with key ethical principles and the AI User Guide.

AI Review Committee
Chaired by the NSW Government Chief Data Scientist.

AI Strategy Outcomes

- **Building Public Trust**

- **Digital Uplift**

- **Building Data Capability**

- **Procurement**

- **Innovation and Collaboration**

https://www.digital.nsw.gov.au/policy/artificial-intelligence-ai/ai-strategy

AI Ethics Policy

- **Community benefit** – AI should deliver the best outcome for the citizen, and key insights into decision-making

- **Fairness** – use of AI will include safeguards to manage data bias or data quality risks

- **Privacy and security** – AI will include the highest levels of assurance

- **Transparency** – review mechanisms will ensure citizens can question and challenge AI-based outcomes

- **Accountability** – decision-making remains the responsibility of organisations and individuals

Resources

Human Rights and Technology Report:

https://humanrights.gov.au/our-work/rights-and-freedoms/projects/human-rights-and-technology

Mobile Phone Detection Cameras:

https://roadsafety.transport.nsw.gov.au/stayingsafe/mobilephones/technology.html

NSW AI Strategy:

https://www.digital.nsw.gov.au/policy/artificial-intelligence-ai/ai-strategy

IPC Guidance:

Digital Restart Fund: assessing information access and privacy impacts

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