



THE LAW SOCIETY
OF NEW SOUTH WALES

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Dear Dr Popple

USE OF AUTOMATED DECISION-MAKING BY GOVERNMENT

The Law Society of NSW is grateful for the opportunity to inform the Law Council's submission to the Attorney-General's Department in response to its Consultation Paper, *Use of automated decision-making by government*. The Law Society's Public Law, Privacy and Data Law, and Government Solicitors Committees have contributed to this submission.

One of the recommendations set out in the final report of the Royal Commission into the Robodebt scheme (**Robodebt Final Report**) emphasised the need for a consistent legal framework governing the use of automated decision making (**ADM**) in service delivery by public sector agencies.¹ This is increasingly important in light of the rapid advances in automated technologies and their application to administrative decision-making across diverse areas directly impacting the lives of individuals, for example in relation to social security, housing, health and criminal justice.

In addition to the existing Commonwealth resources noted at page 4 of the Consultation Paper, the Law Society draws the Law Council's attention to the valuable work in NSW which is directly related to the issues raised in the Consultation Paper and should be leveraged to inform the approach of the Commonwealth Government. We note, for example, the extensive work undertaken by the NSW Ombudsman, in conjunction with the ARC Centre of Excellence on Automated Decision-Making and Society, including:

- A report, published in November 2021, *The new machinery of government: using machine technology in administrative decision-making (New Machinery Report)*, which was prompted by concerns around the legality of Revenue NSW's system of garnishee automation. That report recognised the importance of assessing the use of ADM from an 'administrative law perspective' by reference to the principles of good decision-making that underpin that body of jurisprudence.²
- A follow-up report, published in March 2024, *A map of automated decision-making in the NSW Public Sector (ADM Mapping Report)* which was designed to understand and increase visibility and transparency around the use of ADM in the NSW public sector. The aims of that study included

¹ Recommendation 17.1, *Royal Commission into the Robodebt Scheme* (Report, July 2023) vol 1, xvi.

² NSW Ombudsman, *The New Machinery of Government: Using Machine Technology in Administrative Decision-Making* (Report, 29 November 2021), see: <https://www.ombo.nsw.gov.au/reports/report-to-parliament/the-new-machinery-of-government-using-machine-technology-in-administrative-decision-making>.

identification of the functions performed by ADM; analysis of the risk-management strategies employed by government agencies in relation to the use of ADM; and increased public awareness of automated decision-making.³

While the point-in-time overview of ADM use in the NSW public sector will not correspond precisely to the use of ADM by the Commonwealth, the research is nevertheless valuable in enhancing visibility of ways in which ADM systems are being integrated into administrative decision-making, as well as highlighting options for increased transparency and risk management. Such work also provides valuable context for evaluating policy approaches within the states and territories, including for example the recently updated NSW AI Assessment Framework⁴ aligned with the NSW AI Ethics Policy.⁵

Similarly, the Government should be encouraged to look to overseas jurisdictions to ensure that Australia's legislative framework is comprehensive. We refer, in particular, to the research conducted by the European Law Institute, *Innovation Paper on Guiding Principles for Automated Decision-Making in the EU*⁶, which discusses principles to inform a consistent legal framework for ADM in the European Union (**EU**), building on existing regulatory mechanisms such as Article 22 of the General Data Protection Regulation⁷ and provisions in the now approved and in-force EU AI Act.⁸ The Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law aligns with the EU AI Act and reinforces a human-centric approach to AI development.⁹

The Attorney General's department has indicated that it intends to develop a whole-of-government legal framework for the use of ADM. We agree that consistency of approach is important to ensure that all government agencies are held to an equally high standard around the design/selection and implementation of ADM systems. This approach should respond to the fact that government decision-making represents a distinct exercise of public power over individual rights and interests, and respond to other whole-of-government frameworks, for example ethical standards and expectations around data and privacy.

³ NSW Ombudsman, *A map of automated decision-making in the NSW Public Sector: A special report under section 31 of the Ombudsman Act 1974* (Report, 8 March 2024), see: <https://www.ombo.nsw.gov.au/about-us/news-events/media-releases/a-map-of-automated-decision-making-in-the-nsw-public-sector-a-special-report-under-section-31-of-the-ombudsman-act-1974-tabled-in-parliament>.

⁴ Digital NSW, *The NSW AI Assessment Framework* (Report, 2024), see: <https://arp.nsw.gov.au/assets/ars/attachments/Updated-AI-Assessment-Framework-V3.pdf>.

⁵ Digital NSW, *Artificial Intelligence Ethics Policy*, see: <https://www.digital.nsw.gov.au/policy/artificial-intelligence/artificial-intelligence-ethics-policy>.

⁶ European Law Institute, *Guiding Principles for Automated Decision-Making in the EU* (Report, 2022), see: <https://www.europeanlawinstitute.eu/projects-publications/publications/eli-innovation-paper-on-guiding-principles-for-automated-decision-making-in-the-eu/#:~:text=In%20May%202022%2C%20ELI%20published,as%20well%20as%20unharmonised%20EU>.

⁷ Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1 art 22.

⁸ *Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 Laying Down the Harmonised Rules of Artificial Intelligence and Amending Regulation [2024] OJ L 2024/1689.*

⁹ Council of Europe, *Framework Convention on Artificial Intelligence and Human Rights*, opened for signature 5 September 2024, CETS 225: <https://www.coe.int/en/web/artificial-intelligence/the-framework-convention-on-artificial-intelligence>. We note that Australia participated as an observer state in the drafting of the Convention.

Balancing of transparency with the protection of commercial-in-confidence information

The challenge of balancing transparency about the use of ADM with the need to protect sensitive information about business processes and systems was addressed in the ADM Mapping Report, which noted the following:

... Important ADM systems may be considered sensitive by vendors, public servants, government departments and agencies, or all of them: perhaps leading to non-reporting, or vague, even meaningless descriptions of systems (we saw the latter in some survey responses). The process of writing up this research has involved discussions with a range of portfolios over what to report, how, and at what level of detail. Commercial-in-confidence provisions are standard in contracting arrangements in provision of computing services, where governments widely and heavily rely on such external services in addition to their own internal capacities. It is, however, important to ensure that overreaching claims to commercial sensitivity do not interfere with good administrative practice. Sensitivity can also be because of security concerns (particularly in policing and intelligence), and in ensuring that the transparency provided does not enable members of the public to game, alter or hack the system.¹⁰

The Law Society shares the view that claims regarding commercial-in-confidence source code/data sets should not impinge on transparency and accountability and supports a presumption in favour of disclosure. The system of democratic accountability demands a higher standard of transparency, particularly in cases where the ADM system will be applied as part of a decision impacting the legal status, security or wellbeing of the affected individual.

If the Government is to rely on external ADM providers, the relevant contractual arrangement should, without exception, allow for appropriate disclosure to Government as well as to affected individuals of the use of ADM and the system processes employed, including for the purpose of administrative and/or judicial review of a relevant decision by a court, tribunal or other body.¹¹ We also suggest mandatory contractual provisions to allow for government auditors to access detailed information, including sensitive data, on an as-needs basis.

In our view, Government agencies involved in the procurement of ADM systems should be directed to assess the appropriateness of any trade-secrecy or confidentiality claims. The UK's Data Ethics Framework provides the following useful guidance to public servants:

4.8 How to ensure transparency of sensitive models (transparency)

- How are you planning to inform the public about the model?
- Even if the model cannot be released publicly, you may be able to release metadata about the model on a continual basis, like its performance on certain datasets.
- If your data science application is very sensitive, you could arrange for selected external bodies, approved by your organisation, to examine the model itself in a controlled context to provide feedback. This could be expertise from another government department, academia or public body.¹²

¹⁰ ADM Mapping Report (see above n 3), 109.

¹¹ See discussion of transparency in Paul Miller, 'A New 'Machinery of Government'? The Automation of Administrative Decision-Making' (Book chapter, online) in Zofia Bednarz and Monika Zalnieriute, *Money, Power and AI: From Automated Banks to Automated States* (Cambridge University Press 2023), online: <https://www.cambridge.org/core/books/money-power-and-ai/new-machinery-of-government/19159C1F35EEF85EBABFD1FE374451C5>.

¹² Government of the UK, Data Ethics Framework (Updated 16 September 2020), online: <https://www.gov.uk/government/publications/data-ethics-framework>.

It will be important to ensure that these questions are addressed as part of the procurement process, before the Government enters into a commercial arrangement.

Review of decisions involving ADM, including for vulnerable citizens

The Law Society supports implementation of Recommendation 17.1 of the Robodebt Royal Commission, which was set out in the following terms:

Recommendation 17.1: Reform of legislation and implementation of regulation

The Commonwealth should consider legislative reform to introduce a consistent legal framework in which automation in government services can operate. Where automated decision-making is implemented:

- there should be a clear path for those affected by decisions to seek review
- departmental websites should contain information advising that automated decision making is used and explaining in plain language how the process works
- business rules and algorithms should be made available, to enable independent expert scrutiny¹³

We agree with the need for a clear path for those affected by decisions to seek review and, if appropriate, rectification of a decision in a timely manner. We suggest that internal and external review should be available by right in respect of all automated decisions. All reviews should involve a human decision maker with power to override the automated decision having regard to the intended purpose of the regulatory authority under which the decision is made, its impact on the affected person's rights and legitimate interests, as well as on the overall socio-economic context in which the ADM is used.

Commentators have pointed out that ADM may in fact facilitate the review process, for example through the existence of a 'good audit trail'¹⁴. However, in the first instance, access to administrative law remedies requires that a person is aware that ADM has been used in a decision that affects them and has the capability, financial or otherwise, to challenge that decision. We note the following in relation to the notification and review of decisions made by or with the assistance of ADM:

Proactive notification

We support proactive notification on a number of levels, including:

- If relevant, when a person applies to be part of a government program or receive a service where it is anticipated that ADM will be used to process the application; and
- When the outcome of a decision that involves the use of ADM is communicated to the affected individual, including where it is fully or partially relied upon in the decision-making process.

It should not be incumbent upon the affected individual to apply (through Freedom of Information provisions or otherwise) to the relevant agency for an explanation of how the ADM system was used. Rather, this should be proactively supplied by the Government department.

¹³ Robodebt Final Report, see above n 1.

¹⁴ Commonwealth Ombudsman, 'Automated Decision-making Better Practice Guide' (Guidance Document) see: https://www.ombudsman.gov.au/_data/assets/pdf_file/0029/288236/OMB1188-Automated-Decision-Making-Report_Final-A1898885.pdf.

Publication of ADM decision-making on government websites

The recommendation that departmental websites contain information advising the use of ADM, together with a plain language explanation, is important and in the interests of transparency. However, the increasing sophistication of ADM tools means that it may be difficult to communicate this information in a thorough and intelligible way. Consideration should be given to streamlining the way agencies publish such information, as is occurring in the United Kingdom through the mandatory Algorithmic Transparency Recording Standard.¹⁵

Vulnerable cohorts

ADM tools are often used in decision-making that affects vulnerable cohorts of society, including those who live with physical or cognitive disability, or may not have sufficient literacy or English language skills to understand the information presented, or who may experience barriers to accessing information such as limited access to computers and the internet. Further, as a general observation, it is unrealistic to expect individuals subject to government decisions, regardless of their level of education, to read and digest information around the operation of an ADM system, particularly if it is hidden in fine print.

There should be bespoke approaches for specific vulnerable cohorts to assist them in understanding the decision-making process and their rights in relation to it. It may not be appropriate, and can be particularly overwhelming for vulnerable people, to be referred to an online portal for such information. Therefore, the Government should look to upskilling staff and supporting provision of appropriately tailored human services to support individuals who may face compounded difficulties in understanding a decision-making process which engages ADM. We consider it particularly important that there is a readily available human contact point for individuals to discuss time sensitive decisions (for example, those which impact housing or social security payments), which have a significant impact on a person's security and wellbeing.

The need for systemic oversight

On a systemic level, independent expert scrutiny of ADM, where it is applied for a purpose with significant legal or social ramifications, is essential. It should not be left to journalists, academics or other civil society actors to identify problems and potential problems, but rather oversight should be 'in built' to the system. Government should be required to ensure that independent expert review of systems involving ADM occur at regular intervals, as well as at any point where they undergo significant development and change.

As emphasised in the ADM Mapping Report, the gradient of transparency and accountability should respond to the purpose to which a particular ADM system is applied, as opposed to the type of technology engaged. This is the approach taken in Canada, for example, where decisions with a high impact level trigger the requirement for the publication of more detailed data, for example results from reviews/audits and descriptions

¹⁵ Government of the UK, Algorithmic Transparency Recording Standard Hub, see: <https://www.gov.uk/government/collections/algorithmic-transparency-recording-standard-hub>.



of the training data.¹⁶ Similarly, the transparency requirements of the EU AI Act incorporate more onerous requirements in the deployment of high-risk systems.¹⁷

Further, we suggest that the Commonwealth Government should consider the benefits of centralisation of the oversight of the use of ADM. It is important for there to be an independent regulator, such as the Commonwealth Ombudsman, who is resourced to undertake this task. Consideration should also be given to the way in which Cabinet is alerted to the use of ADM across government. It could be that the legal advice that attaches to new policy proposals, for example, is required to address the legality of any ADM system.

Privacy

Recent changes to the *Privacy Act 1988* (Cth) have responded in some way to the privacy risks posed by ADM by requiring APP entities to expressly include as part of their privacy policies where personal information will be used by computer programs in circumstances where it 'could reasonably be expected to significantly affect the rights or interests of an individual'. We note, however, that this is unlikely to be adequate to ensure individuals are sufficiently informed.

As set out in our submission to the Law Council on the Privacy and Other Legislation Amendment Bill 2024,¹⁸ there is currently no right for individuals to request meaningful information about how substantially automated decisions with legal or other significant effect are made. In our view, this right is critical to ensuring integrity and fostering public trust in government decision making.

Thank you for the opportunity to comment. Questions at first instance may be directed to Sophie Bathurst, Senior Policy Lawyer, at (02) 9926 0285 or Sophie.Bathurst@lawsociety.com.au.

Yours sincerely

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President

¹⁶ Public Law Project, Securing meaningful transparency of public sector use of AI Comparative approaches across five jurisdictions (Report, March 2024), online: <https://publiclawproject.org.uk/content/uploads/2024/10/Securing-meaningful-transparency-of-public-sector-AI.pdf>.

¹⁷ EU AI Act, Article 71.

¹⁸ Letter from the Law Society of NSW to the Law Council, "Privacy and Other Legislation Amendment Bill 2024" (4 October 2024), see: <https://www.lawsociety.com.au/sites/default/files/2024-11/Letter%20to%20Law%20Council%20of%20Australia%20-%20Privacy%20and%20Other%20Legislation%20Amendment%20Bill%202024%20-%204%20October%202024.pdf>.