COMMONWEALTH OMBUDSMAN

Use of automated decision-making by government – consultation paper

Attorney-General's Department

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Introduction and summary

I welcome the opportunity to make a submission to the Attorney-General's Department (**the Department**) in relation to its consultation paper on the use of automated decision-making (ADM) by government (the **consultation paper**).

If appropriately designed, ADM systems have the potential to improve the quality and efficiency of government service delivery for the benefit of users of government services. This would assist to build and maintain community confidence in the integrity of public administration. However, the pursuit of efficiency in statutory decision-making can present substantial risks of poor outcomes for the community which agencies must carefully consider.

My submission sets out my views on safeguards for the proposed ADM framework, including transparency, which should be put in place to ensure individuals are treated fairly and lawfully.

Background

The purpose of the Office of the Commonwealth Ombudsman (**the Office**) is to:

- provide assurance that the agencies and entities we oversee act with integrity and treat people fairly; and
- influence systemic improvement in government administration.

We aim to achieve our purpose by:

- independent and impartial consideration of complaints and disclosures about government administrative action
- influencing government agencies to be accountable, lawful, fair, transparent, and responsive, and
- providing a level of assurance that law enforcement, integrity and regulatory agencies are complying with legal requirements when using covert, intrusive and coercive powers.

Reform principles

My Office maintains the Automated Decision-Making Better Practice Guide (the Guide), which built on the Administrative Review Council's (ARC) Report No.46 to the

Attorney-General *Automated Assistance in Administrative Decision-making*. These documents set out principles for the use of automated systems in administrative decision-making.

Automation is not appropriate if it would contravene administrative law principles of legality, fairness, rationality and transparency, or statutory obligations concerning privacy or human rights. In my view, this should be the starting point for the Australian Government's ADM reform. This approach would provide a framework that mitigates key risks in automation, such as algorithmic bias, inaccurate (or less accurate) decisions being produced by an automated system and unclear reasons for decisions.

Options for safeguards

ADM systems should not be used for discretionary decisions

In my view, the ADM reform should not permit agencies to use ADM systems to make decisions which require the exercise of discretion.

This position reflects that of the Administrative Review Council (ARC) which, in its 2004 report, *Automated assistance in administrative decision making*, advised that 'where discretion is exercisable…the process should not be fully automated' (page vii). In these circumstances, the ARC advised that expert systems are best used as tools to support decision-making, as opposed to making decisions. The difficulty in developing and overseeing ADM tools that can accurately reflect complex ideas such as discretion means that use of ADM to make discretionary decisions could very easily escalate into the improper and invalid exercise of power through the fettering of discretion, production of unreasonable or irrational outcomes and the incorrect treatment of relevant and irrelevant considerations.

As recently as 2024, the Standing Committee for the Scrutiny of Delegated Legislation expressed concerns about the use of ADM proposed in a legislative instrument. Specifically, the Committee was concerned the proposed use of ADM systems could fetter discretionary power by inflexibly applying predetermined criteria to decisions that

should be made on the merits of each individual case.[1] Consistent with the ARC's 2004 report, the Senate Delegated Legislation Committee advised that legislative instruments should not provide for the complete automation of discretionary decisions themselves.[2]

In my view, the ADM reform should prohibit uses of ADM systems in such contexts. I have considered whether there could be an exception to this for situations where an agency can guarantee compliance with administrative law principles, but I am not currently persuaded that an agency can give such a guarantee in a meaningful and binding manner - nor that such a guarantee would also mean prompt full remediation in the event of a failure of the system to comply with administrative law principles.

Safeguards need to apply broadly

The paper talks about whether the new framework should cover administrative actions as well as decisions. One consideration mentioned is whether applying the framework to administrative actions that do not have a direct effect on the rights of an individual might be unduly onerous for agencies. In my view there is a risk that, if the question of whether an action has a direct effect upon the rights of an individual was construed narrowly or was inaccurately answered, the application of safeguards would be inappropriately circumvented. I note also that agencies can sometimes struggle to understand or identify all of the potential impacts or dimensions of an administrative action beyond those that are immediately familiar to them in their own area of operation and responsibility.

There is an additional risk, noted in the paper, that the use of ADM as a part of a process may have such a significant impact on the final decision that it is in fact determinative of the final decision.

While I agree with the paper that human intervention is one of the most effective safeguards against the failure of ADM, I also note that the theoretical safeguard of having "a human in the loop" has the potential to be deceptive: the human charged with reviewing the ADM output and making their own independent decision may in

[1] Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Delegated Legislation Monitor 4 of 2024* (Report 28 March 2024) 24.
[2] Ibid

practice simply be signing off on what is put to them by the ADM, given the practical difficulty of reviewing the operation of the ADM and the cognitive bias that can come with trust in systems.

To seek to counter both risks, in my view it is preferable to require the application of safeguards broadly to the use of ADM.

Transparency safeguards

Transparency is a key value of administrative law and critical for government accountability. The ADM reforms should ensure transparency including:

- preserving individuals' rights to access the reasons for a decision
- preserving individuals' rights to access information held by government bodies to facilitate review
- ensuring people know when ADM is being used to make decisions that materially impact on their legal or similarly significant rights.

The need to ensure decisions can be explained

The consultation paper suggests that full transparency may not always be possible or useful to provide, as it may be difficult to explain technical concepts in a meaningful way to general members of the public.

Agencies can already struggle to provide meaningful explanations of processes and decisions in terms that the public can readily understand, but the fault is not with the public. Public servants often need to place more emphasis on, and to take more responsibility for, clear and meaningful communications with citizens and users of government services: this is part of having citizen-centric government services.

In my view, with respect to transparency around ADM, the emphasis needs to be on the provision of an explanation that is in fact meaningful – which is unlikely to be a detailed description of the full technical operation of a machine learning process (providing this might in fact be opaque rather than transparent), but may rather be a concise but accurate description of the inputs and a simplified but accurate description of the nature of rules applied by the process.

The paper also highlights, in relation to machine learning processes, that even programmers may not be able to explain the reasons for a specific machine learning

outcome due to their self-learning properties. In my view, 'complexity' does not relieve government agencies of their fundamental responsibility to provide reasons for their decisions. The rule of law requires that the law is applied equally to all and that government decisions can be contested – both of which require the provision of reasons so that the rationale for a decision can be understood.

To guarantee transparency, the use of ADM systems could be prohibited where transparency cannot be materially provided or maintained. This approach could be modelled on Article 22(1) of the European Union General Data Protection Regulation (**GDPR**)[3] which provides a general prohibition on fully automated decision-making that can have a legal or similarly significant effect on an individual.[4] Underpinning this rule is the fact that a fully automated decision-making process could materially prevent a person from seeking reasons and thus exercising their rights to administrative review. This prohibition was applied by the Court of Justice of the European Union (**CJEU**) in the case of C-634/21.[5] Here the CJEU held that a system that automatically determined the credit worthiness of a loan applicant violated Article 22(1), even if the ultimate decision was notionally made by a human.

Information access

The consultation paper notes that existing obligations such as under the *Freedom of Information Act 1982* (**FOI Act**) facilitate transparency concerning the use of ADM systems. However, there have been some examples which have pointed to potential limitations with the FOI regime in the context of decisions involving automation. There have been some examples in relation to state and territory FOI schemes where individuals' access to information about third party computer systems used by government have been frustrated. In these cases, the arguments centred on whether the agency in question 'held' the particular document, which the respective review body determined they did not. For example, in *EC3 and Department of Jobs, Precincts and Regions* [2022] VICmr 47 and *O'Brien v Secretary, Department Communities and Justice [2022] NSWCARD 100*, it was held that the agency did not 'hold' the information explaining the operation of the third party system, which was in the possession of a

[3] *Regulation (EU) 2016/679 of the European Parliament and of the Council* [2016] OJ C L 119/1.
[4] European Commission, Are there restrictions on the use of automated decision-making? (Web Page).
[5] OQ v Land Hesse (C-634/21) [2023] ECLI:EU:C:2023:957

third party not subject to FOI. Both these cases involved the use of third-party computer systems to help make decisions, with *EC3* concerning the use of a behavioural interview program and *O'Brien* concerning the use of a program to calculate private rental subsidies. When people wanted to understand and potentially challenge decisions made with the use of these programs, FOI was not able to assist them.

Other transparency safeguards

The public wants to know if government agencies are using ADM systems to make decisions that affect them. To that end, agencies should at a minimum be required to publish information about their use of ADM including the legislative authority for the use of ADM.

I also support a requirement for agencies to notify individuals affected by a decision about the use of ADM to make that decision. Notifications could be provided along with relevant decision notifications. The key risk raised in the paper that individuals may receive too many notifications is not substantive enough to justify the omission of notification requirements from the ADM framework.

The paper also considers the publication of business rules and algorithms to allow for independent expert scrutiny but note the risks of releasing commercially sensitive and national security information. Given that most ADM systems will be procured from commercial providers, the risk for the framework is that transparency is trumped by commercial interests. If business rules and algorithms are not published, the framework would need to accommodate independent scrutiny of business rules and algorithms, be it through internal audits or independent oversight. I note for example other mechanisms to enable national security information and decision-making to be challenged and scrutinised while still being protected – such as in the Administrative Review Tribunal's review of adverse or qualified security assessment decisions made by ASIO. It may be appropriate to consider whether there are similar or other mechanisms in the context of ADM that can provide protection if appropriate to national security or commercially sensitive information while still enabling contestation of decisions made using ADM and scrutiny of the operation of the ADM.

Pre-decision safeguards

The consultation paper argues that appropriate action should be taken before the implementation of an ADM system. The paper identifies risk assessments as one

possible pre-implementation safeguard and suggests three considerations in which risk assessments could be modified for the use of ADM systems:

- explicitly providing that risk assessments apply prior to implementing an ADM system
- considering how risk assessments could be adapted for assessments prior to implementing an ADM system, and
- avoiding duplication with existing risk assessments.

There is merit in considering how to incorporate risk assessments procedurally into a project lifecycle. It is important for agencies to consider and minimise the risk of an ADM system having an unlawful or unfair impact on individuals at the time that the system is being designed. It is better to build a system that prevent injustices occurring to individuals in the first instance. However, mandating a particular approach to risk assessments provides no guarantee of meaningful safeguards. This proposal might be better understood as a useful supplementary measure to legislation that makes it very clear when ADM should or should not be used.

Noting the capacity for ADM systems to make errors upon a large scale, remediation strategies must also be prepared to remediate at an equal scale. Such measures may include the large-scale waiver of debts, or the payment of entitlements. Agencies should meaningfully and readily engage with the assessment of such risks when considering the adoption of an ADM system.

Independent oversight

The consultation paper states that proper oversight of the use of ADM in the delivery of government services will be a critical design feature to support trust in government but does not explore the role of independent oversight beyond a requirement for agencies to undertake regular external audits of ADM systems. Recommendation 17.2 of the RRC is mentioned in passing, as something the ADM framework reform would inform government consideration of.

External oversight bodies are a safeguard that should be addressed in the ADM framework, rather than at a future point of time. It is worth considering now how independent scrutiny and oversight would support the ADM reform.