COMMONWEALTH OMBUDSMAN

Inquiry into the use and governance of artificial intelligence systems by public sector entities

Joint Committee of Public Accounts and Audit

Submission by the Commonwealth Ombudsman, Iain Anderson

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Introduction and summary

I welcome the opportunity to make a submission to the Joint Committee of Public Accounts and Audit on its *Inquiry into the use and governance of artificial intelligence systems by public sector entities* (the **Inquiry**).

The safe, ethical and responsible use of artificial intelligence (**AI**) by public sector entities has an enormous potential to improve social and economic wellbeing. In government, AI is likely to underpin a substantive transformation of digital services. Many areas of the Australian Public Service (**APS**) already use AI in a variety of ways. My Office, for instance, is currently evaluating a trial of the use of machine learning to support the allocation of complaints. At the same time, if the APS is to maximise the utility of AI, agencies must have the capabilities to ensure AI properly applies legislation and that its operations are not inconsistent with the agencies' obligations under administrative law, as well as the willingness to remediate large-scale errors should they occur.

Background

The purpose of 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.

Agencies, and AI, must properly apply legislation

Public servants are required to comply with the law. My Office has however observed a number of cases where agencies have failed to understand and correctly apply the legislation they administer, on a large scale, for multiple years.

I am not referring here to instances of the law being knowingly applied incorrectly.

Some cases appear to have arisen where an agency has adopted an interpretation of a provision that is administratively more convenient for the agency - for example, if a provision would otherwise be difficult to administer as a matter of practicality. Over time, the incorrect interpretation of the law can become entrenched and incontestable - "we've always done it this way".

On at least one occasion, an agency has implemented an interpretation that they believed reflected the policy intent behind an amendment (as opposed to the actual wording of the amendment enacted by Parliament). When asked about how this had happened, the agency staff advised that the law was wrong.

If an agency lacks the ability to itself correctly apply its legislation, it will not be able to instruct or train AI correctly to apply the legislation.

If an agency lacks the ability to assure itself over time that it is continuing to correctly apply its legislation, it will not be able to assure itself that AI is continuing to correctly apply its legislation.

Public entities must be ready to remediate errors

AI has the potential to significantly increase the pace of administrative decision-making. If there are errors in these decisions, for example because the AI has been trained with an incorrect understanding of the law, there could be a very high volume of incorrect decisions made - with consequential detrimental, unfair and/or unlawful impacts upon people. Those decisions would need to be reversed, and those impacts would need to be remediated.

Remediation can be extremely resource - and time - consuming for agencies, but agencies that use AI will need to be willing and able to embrace the need to remediate.

It would not be fair or just to instead simply place reliance upon those impacted by these errors having a right to challenge the incorrect and/or unlawful decision, either where the agency knows of the error or in lieu of the agency carrying out ongoing assurance of the decision-making.

Before adopting AI, public entities should establish plans for identifying and assessing the scale and impact of large-scale administrative errors, and for timely remediation. There may be options for large-scale remediation that would simplify and greatly expedite the process - for example, large-scale waiver of debts. It is desirable that these options are considered as part of the decision-making about adopting a particular use of AI, so that remediation can then readily be embarked upon should a scenario of large-scale errors arise.

Case study: Risks of complex laws and difficulty of mass remediation

In July 2023, I finalised an investigation into Services Australia and DSS concerning the lawfulness of 'income apportionment' when calculating Centrelink payment rates.[1] My investigation found Services Australia had been calculating payment rates using a method that was not permitted by social security law, resulting in the inaccurate calculation of social security entitlements. The social security law concerning this method of income apportionment was complex and significant time was taken to confirm a final legal position on lawfulness.

Some 108,000 debts were Identified as being impacted by the inaccurate calculations. Given the issue impacted payment calculations from at least 2003, I believe the total amount of debts (and people) affected may be greater.

In a follow-up investigation in December 2023, I found that DSS decided to only address decisions impacted by income apportionment if a customer requested a review. I formed the opinion that this approach was unfair and unreasonable, as many persons affected by historic decisions may not be aware that their entitlements had been

[1] *Lessons in lawfulness* - Own motion investigation into Services Australia's and Department of Social Services' response to the question of the lawfulness of income apportionment before 7 December 2020.

inaccurately calculated.[2] I therefore made the following recommendations that would be applicable to all entities who have identified systemic errors in decision-making:

1) take timely action to assess the scale and impact of an error

2) develop a timely, fair and reasonable remediation strategy which considers all potential options to fix historic decision-making errors, and prevent future ones

3) support staff to communicate with people affected by the errors, and clearly explain any delays caused by resolving the errors, and

4) support staff to identify and capture complaints about the implementation of remediation strategies, and report on complaint trends and outcomes to the entity's executive.[3]

Impacts of AI on review rights and government accountability

Responsibility attribution

The ability for a person to seek review of an administrative action or decision is reliant on the law recognising that a decision has been made (or action taken). I am aware of recent cases internationally and within Australia that show the limits of jurisprudence on this issue in relation to both AI and other advanced computer programs.

In 2018, the Federal Court of Australia upheld that a letter purporting to waive a taxpayer's General Interest Change (**GIC**) on their tax liabilities did not constitute a decision.[4] The letter was prepared by a software program that allowed the decision maker to input information to generate the letter sent to the taxpayer. This letter was not reviewed by a public servant before it was sent. An officer of the agency subsequently made a different and inconsistent decision, to impose GIC. The court determined that, given the first letter did not involve a person considering whether to

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[2] *Accountability in Action: Identifying, owing and fixing errors* - Services Australia and the Department of Social Services' response to addressing the impacts of unlawful income apportionment.

[3] Ibid.

[4] *Pintarich v Deputy Commissioner of Taxation [2018] FCAFC 79*

waive the GIC, no decision had been made. As the first decision did not constitute a 'decision', the appeal to have the second decision reviewed was dismissed. However, Justice Kerr disagreed with how the majority defined a decision, observing:

> The legal conception of what constitutes a decision cannot be static; it must comprehend that technology has altered how decisions are in fact made and that aspect of, or the entirety of, decision-making, can occur independently of human mental input.[5]

In contrast to the Federal Court decision, the Court of Justice of the European Union (**CJEU**) recently found a similarly preliminary automated decision about the creditworthiness of an individual to be a decision. [6] The matter concerned a person who was not granted a loan because of a negative credit worthiness evaluation prepared by a third-party using automated systems, which was relied upon by the credit institution to deny the loan.

The CJEU was asked to consider whether article 22(1) of the General Data Protection Regulation (**GDPR**) which operates to protect individuals from automated decisions was applicable to the case. Article 22(1) provides that:

> The data subject shall have the right not to be subjected to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.

At issue was whether the decision to deny credit was made by the third-party or the credit institution. The CJEU found that while the term 'decision' was not explicitly defined by Article 22(1), a decision captures acts which produce legal affects or acts that affect a person in a similarly significantly way.[7] While a person was notionally the decision-maker upon the loan and did so drawing upon the credit worthiness evaluation, the CJEU found that in fact the decision was made by the system producing the evaluation, not by the person rubber stamping the AI's evaluation.

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[5] Ibid [49]
[6] OQ v Land Hesse (C-634/21) [2023] ECLI:EU:C:2023:957
[7] Ibid [44]

Access to information and reasons

The ability for a person to seek review of an administrative action or decision is also reliant on access to information to support review including the reasons for the decision or action. Two recent Freedom of Information (FOI) matters involving the use by public entities of computer systems provided by third party contractors demonstrate the potential impact of the use of AI on review rights.

In the first case, the Victorian Information Commissioner upheld a decision to deny a person access to a report generated by a behavioural interview tool used by a Victorian department because the department did not have possession of the document on account of the report being produced by a third party.[8] In the second case, the NSW Civil and Administrative Tribunal upheld a decision to deny a person access to the algorithm, software specifications and source code of a program designed by a third party to calculate private rental subsidies. It was held the department did not have access to documents concerning the program and therefore could not disclose this information to the applicant.[9]

These cases involved advanced computer programs rather than AI; however, AI used by public entities could involve similar contractual arrangements.

If AI is used by agencies, it should be used in a way that is not inconsistent with the administrative law obligations of the agencies. People are entitled to be given reasons for decisions and to seek access to information and documents about them or taken into account in making decisions that affect them. A right to challenge a decision may be meaningless if the grounds for the decision or the matters taken into account are not able to be produced by the agency.

[8] *EC3 and Department of Jobs, Precincts and Regions [2022] VICmr 47*
[9] *O'Brien v Secretary, Department Communities and Justice* [2022] *NSWCARAD 100*

Further guidance

My Office maintains the *Automated Decision-Making Better Practice Guide* (the **Guide**).[10] The Guide provides practical guidance for agencies aimed at ensuring compliance with administrative law and privacy principles, and best practice administration. My Office is currently updating the Guide to reflect the latest Australian Government policies.

I am an ex-officio member of the Administrative Review Council. In my view the membership and purpose of the ARC place it in a unique position to consider and advise on the issues I have raised in this submission, and I suggest that it is highly desirable that it be stood up as a matter of urgency.

[10] Last updated in 2019 by the Commonwealth Ombudsman, the Office of the Australian Information Commissioner and the Attorney-General's Department. Available at: OMB1188-Automated-Decision-Making-Report_Final-A1898885.pdf