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13 December 2024

**Joint Committee of Public Accounts and Audits**

PO Box 6021  
Parliament House  
Canberra ACT 2600

Dear Committee

**Response to questions on notice – Inquiry into the use and governance of artificial intelligence systems by public sector entities**

On 29 November 2024 the Committee sent my Office some questions on notice in relation to the inquiry into the use of AI systems by public sector entities.

I welcome the opportunity to further assist the Committee with its inquiry.

**Q.1: What do you see as the major risks and benefits of AI?**

I recognise the great potential of AI to improve social and economic wellbeing. In the Australian Public Service, AI could for example improve the efficiency of government service delivery, for the benefit of the recipients of government services.

However, agencies must not lose sight of their obligations to comply with the law: efficiency must not come at the cost of illegality or harm.

A major risk is that a quicker and more efficient process which is applying the law incorrectly could have significant detrimental impacts on the lives of large sections of the community. Having seen in the last two years a number of instances where public sector entities have been inadvertently incorrectly applying the legislation they administer, sometimes for many years, it is imperative that agencies ensure that any use of AI does correctly apply the law. It is also imperative that consideration of potential uses of AI is accompanied by consideration of how to remediate large-scale incorrect application of the law should this occur. For AI to be beneficial in government administration, agencies must get the law right and must be accountable for remedying mistakes.

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**Q.2: What whole-of-government guidance is required to ensure that artificial intelligence and automated decision-making are used responsibly, and that there is an adequate line of sight to the output of AI and decisions? Which entity should be providing this guidance?**

Multiple agencies already provide whole of government guidance on the responsible use of AI and ADM, including my Office, the Digital Transformation Agency and the Department of Industry, Science and Resources. I believe having distinct pieces of guidance from different areas of expertise on distinct aspects of AI and ADM design, use and assurance can be effective and beneficial.

For my part, my Office maintains the *Automated Decision-Making Better Practice Guide* which provides practical guidance for agencies who wish to use automated decision-making. We are currently updating this guide and intend to publish our changes this calendar year. We will continue to update the guide as technology and legislative frameworks evolve, for example revisiting the guide after the Attorney-General's Department completes its current project on a legal framework for automated decision-making in government services.

As I indicated in my submission and reiterate in my response to question 6 below, I believe that the recently re-established Administrative Review Council would also be well-placed to make important contributions to public sector guidance on AI and ADM.

However, responsibility for the use of AI and ADM ultimately lies with agencies themselves. Guidance can provide practical advice on what responsible design, use and assurance involves, but agencies must embed this advice into their governance and culture for the guidance to be effective.

**Q.3: Are there areas where existing legislation or policies need to be changed? For example, do current laws provide sufficient clarity on automated decision making?**

The rule of law requires, among other things, that everyone is subject to the law, that the application of the law is not arbitrary and that administrative decisions can be challenged. As my submission notes, however, the outcomes of the intersection between the administrative law system and AI or automated decision making are not necessarily predictable.

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I used the case of *Pintarich v Deputy Commission of Taxation*<sup>1</sup> as an example of such an intersection. *Pintarich* demonstrated that an apparent decision made by a computer and communicated to a taxpayer to confer a benefit on that taxpayer can be held not to constitute a "decision" and therefore not to provide review rights if a government agency wishes to unilaterally depart from that decision. I can equally envisage situations where an agency may want to argue that a decision made by a computer should be upheld if it was advantageous to the agency. Agencies should not be able to choose whether a decision made using ADM binds them or does not.

I also pointed out how the provision of AI and ADM computer tools by third-party providers have meant in some cases that people seeking to understand government decisions about them – and potentially then to challenge those decisions – could not obtain key information about how the decision had been made, in that the core components of particular government decisions based upon AI were held in proprietary AI systems outside government agencies and were therefore not subject to FOI. If you are not able to understand the basis of a decision, it is difficult to know whether the decision is fair or arbitrary and to effectively challenge the decision.

These laws may require changes to ensure they remain fit for purpose with respect to AI and ADM and that the use of AI and ADM does not result in departures from the rule of law. The Attorney-General's Department currently has a consultation paper out for consideration concerning their ADM reform project. The ADM reform presents an opportunity for the Government to clarify the operation of administrative law in relation to the use of AI and ADM.

**Q.4: Your submission to this inquiry notes that AI has the potential to increase the pace of administrative decisions, and if AI has been trained incorrectly this could result in a higher volume of incorrect decisions than there would otherwise be.**

**(a) Which areas of public service administration are particularly exposed to risks caused by an increased pace of administrative decisions?**

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<sup>1</sup> [2018] FCAFC 79 (*Pintarich*).



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Frontline services such as social services, aged care and immigration are particularly exposed to risks. These services engage with a large number of individuals daily and have a heightened risk of causing harm at scale should AI incorrectly apply the law.

**(b) How can this risk be best controlled?**

Controlling the risk of AI should largely occur before its adoption. The first step is for agencies to ensure they understand and are accurately applying the law before instructing AI in that law's application.

Once agencies begin to use AI, they must identify deficiencies promptly through robust assurance. Agencies must also be proactive: agencies should not wait for affected individuals to make complaints before they rectify an identified error.

Agencies must also be ready to remediate their errors in a timely manner. While remediation does not necessarily control the risk of AI, it does help mitigate harm. Consideration of what effective remediation would involve can also help the proper recognition and weighting of risks. Agencies should develop remediation strategies before adopting AI. Remediation plans should determine how an agency intends to identify and assess the cause and scale of administrative errors, and especially how to provide remediation in a timely manner.

**Q.5: Should requirements be established to enhance transparency around automated decisions or decisions made using AI? For example, should it be required that entities inform people when a decision relating to them has been made automatically or using AI?**

Transparency will be critical to ensuring public sector entities are accountable in relation to their use of AI. I would strongly support a requirement for agencies to notify people when AI has been used to make a decision.

However, what is more important than knowing whether a decision was made using AI is how it was made. Notification requirements cannot be a 'tick and flick' exercise but must provide the necessary insight so that individuals can identify, understand and challenge deficient decisions. The use of AI must not derogate from individuals' ability to understand how a decision affecting them was made, what was taken into account and how it was taken into account.

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**Q.6: Your submission includes a suggestion that the Administrative Review Council be stood up 'as a matter of urgency'.**

**(a) What role would the Administrative Review Council have in the matters raised in your submission?**

I note the Attorney-General's announcement on 6 December 2024, subsequent to my submission, of the appointment of a chair and new members to re-establish the Administrative Review Council (ARC). I welcome these appointments and note the expertise of the members, and I look forward to the ARC re-convening.

The ARC has multiple functions under the *Administrative Review Tribunal Act 2024*, many of which are applicable to the oversight and monitoring of government use of AI. For example, subject to the views of its members, the ARC could:

- inquire into the availability, accessibility and effectiveness of review of administrative decisions made by AI
- support education and training of government officials in relation to the making of administrative decisions using AI.

The ARC's 2004 report, *Automated Assistance in Administrative Decision Making*, was fundamental to the creation of my Office's *Automated Decision-Making Better Practice Guide*.

Yours faithfully



**Iain Anderson**

**Commonwealth Ombudsman**