



Law Council
OF AUSTRALIA

Use of automated decision-making by government: Consultation Paper

Attorney-General's Department

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 107,000 Australian lawyers.

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The Chief Executive Officer of the Law Council is Dr James Pople. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

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- the Queensland Law Society;
- the Law Society of New South Wales;
- the Law Society of South Australia; and
- the Victorian Bar Incorporated.

The Law Council also gratefully acknowledges the assistance of its Federal Dispute Resolution Section's Administrative Law Committee.

Introduction

1. The Law Council of Australia appreciates the opportunity to contribute to the Attorney-General's **Department's** November 2024 Consultation Paper on the use of automated decision-making (**ADM**) by government.
2. We commend the Department on its robust and thoughtful Consultation Paper. We note that, following the Royal Commission into the Robodebt Scheme (**Robodebt Royal Commission**), the Australian Government has committed to considering opportunities for legislative reform to introduce a consistent framework for ADM in service delivery by public sector agencies.¹
3. The development of such a framework is imperative, given that there is an increased reliance at the Commonwealth level on the use of computer programs to exercise statutory powers and functions—including to make, and assist in making, administrative decisions—instead of human officials. These decisions can directly impact the lives of individuals, such as in respect of social security, health, criminal justice, and housing.
4. The Robodebt scandal particularly highlighted the importance of transparency and creator/user accountability to civil society with the increased adoption of automated systems, and the training and use of artificial intelligence (**AI**) technologies. These considerations are not specific to the Australian context—the Post Office Horizon IT scandal in the United Kingdom has clearly demonstrated that government institutions can have unwarranted confidence in technology which, in the case of the British Post Office, has taken more than two decades to correct.²
5. In Australia, the principles governing automated systems are the Australian **AI Ethics Principles** that form part of Australia's AI Ethics Framework.³ The AI Ethics Principles were published in 2019 and dictate the ways in which AI systems (encompassing ADM) should operate to meet ethical standards, on a macro level only.⁴
6. Nonetheless, there is a current lack of guidance as to the contexts in which ADM should be permitted for use, and there is an additional concern that ADM processes currently operate largely without transparency. We acknowledge the 'desktop review' conducted by the Department that identified 46 instances of primary legislation containing provisions that authorise the use of ADM.⁵ We are concerned that some of these provisions only provide authority for ADM use, without legislative safeguards with respect to their use.
7. Consistency of approach is critical to ensure that all government agencies are held to an equally high standard with respect to 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 responds to other whole-of-government

¹ Attorney-General's Department, *Use of automated decision-making by government* ([Consultation Paper](#), November 2024) 6; Australian Government, *Government Response: Royal Commission into the Robodebt Scheme* ([November 2023](#)) 21.

² Post Office Horizon IT Inquiry ([Web Page](#), 2024); BBC, *Post Office Horizon scandal: Why hundreds were wrongly prosecuted* ([Online](#), 31 July 2024).

³ Department of Industry, Sciences and Resources (Cth), *Australia's Artificial Intelligence Ethics Principles* ([Web Page](#), 11 October 2024).

⁴ Catherine Holmes AC SC, *Royal Commission into the Robodebt Scheme* ([Report](#), July 2023) 479.

⁵ Attorney-General's Department, *Use of automated decision-making by government* ([Consultation Paper](#), November 2024) 5.

frameworks (for example, ethical standards, and expectations around data and privacy).

8. As ADM is an area where the law needs to be able to keep pace with developments, flexibility and adaptability will be important features of any legislative framework addressing those matters. In addition, there is a significant conceptual difference between the use of ADM to make a final decision or take administrative action, and the use of ADM to assist a human decision-maker in the task of reaching a final decision. Any framework for the use of ADM should be capable of applying—and be appropriate—to either use.
9. We accept that ADM can be beneficial to administrative law outcomes. There are types of decisions based on objective criteria where automated processes can enhance administrative outcomes by permitting a large number of decisions to be consistently decided in a short period of time, creating overall efficiency across the system. However, it has generally been accepted that there may be certain kinds of decisions that may be less amenable to being made by using a computer program—in particular, decisions which involve a weighing up of evidence to reach factual conclusions and the exercise of human discretion and judgement.
10. The Law Council, therefore, considers that the threshold objective of regulation in relation to public sector use of ADM must be to ensure that it is employed consistently with administrative law principles that underpin lawful decision-making: lawfulness, fairness, rationality, and transparency.
11. In addition, we suggest that the Organisation for Economic Cooperation and Development's *Principles for responsible stewardship of trustworthy AI (OECD Principles)*⁶ could be used as a model for a principles-based and technologically-neutral overarching guideline for AI and ADM processes in Australia.
12. Finally, any regulation or guidance for the use of ADM should also account for the risk of a cyber security incident that aims not to access and publish data, but to either insert data or alter algorithms or rules to affect decisions or administrative actions.
13. The Law Council thanks the Department for its work to date on these important and timely matters. We look forward to continuing to engage with the Department—and the Commonwealth more broadly—as this work progresses.

General comments

Previous consultations

14. Significant work has already been undertaken by various government departments and Parliamentary Committees to identify and consider areas for reform with respect to ADM and AI, which we expect will inform this new phase of consultation.
15. Of particular relevance is the consultation undertaken in mid-2022 by the Digital Technology Taskforce of the Department of the Prime Minister and Cabinet by way of the release of an Issues Paper titled *Positioning Australia as a leader in digital economy regulation—Automated decision making and AI regulation*.⁷ The Law

⁶ Organisation for Economic Cooperation and Development, *Recommendation of the Council on Artificial Intelligence* (OECD/LEGAL/0449) ([Report](#), May 2019).

⁷ Department of Industry, Science and Resources, *Positioning Australia as a leader in digital economy regulation (automated decision making and AI regulation): issues paper* ([Web Page](#), 2022).

Council provided a detailed submission in response to this consultation in June 2022, advocating for comprehensive regulatory reform to ensure that Commonwealth legislation that authorises the use of ADM and AI to exercise statutory powers is consistent with administrative law principles.⁸ We encourage the Department to have regard to all of the matters raised in our previous submission.

16. For ease of reference, in our June 2022 submission, we recommended that:⁹
- (a) the Australian Government commission an audit of all current or proposed use of AI and automation to make or assist in making administrative decisions by or on behalf of Government agencies;
 - (b) legislative amendments be made to ensure that where it is intended that a statutory power be exercised by using ADM or AI, the statute expressly authorises the use of ADM or AI;
 - (c) all legislation which authorises the use of ADM and AI to exercise, or assist in the exercise, of statutory powers should:
 - (i) be consistent with regard to the types of powers which may be exercised by ADM or AI, and employ standard statutory language for expressing the power to use ADM or AI;
 - (ii) require an assessment be undertaken of the suitability of the proposed automated system to exercise the statutory power, as a precondition to making arrangements for use of AI or ADM;
 - (iii) require that all arrangements for the use of ADM be subject to ongoing governance requirements by a multidisciplinary team to ensure they remain lawful and up to date, including auditing, testing and reporting obligations;
 - (iv) require that officials publish all arrangements for the use of ADM and any suitability assessment which underpins it, including sufficient information to enable a broad understanding of how AI or ADM operates to produce lawful administrative decisions;
 - (v) require that any affected individual must be notified where there is significant use of automation, including AI, in making an administrative decision;
 - (vi) require that an automated decision must be capable of being reduced to a statement of reasons explicable by a human, produced by a full audit trail of the decision-making path, for the purpose of enabling it to be reviewed by a tribunal or court, and the person affected by the decision should have a right to request such reasons; and
 - (vii) provide for the automated decision to be subject to review, preferably review by a human internal to the agency, and the person affected by the decision must be informed of that review avenue.

⁸ Law Council of Australia, *Positioning Australia as a leader in digital economy regulation—Automated decision making and AI regulation* ([Submission](#), 3 June 2022).

⁹ *Ibid* 6-7.

17. We consider that these principles remain highly relevant. It is especially challenging to make practical recommendations in the absence of a reasonable audit of the use of ADM in Australia, and without effective coordination with current initiatives and ongoing work in relation to AI.
18. In this respect, the Consultation Paper notes that ‘the ADM reform project is intended to complement related AI reforms’.¹⁰ As such, we encourage the Department to consider our:
 - August 2023 submission to the Department of Industry, Science and Resources, in response to its Discussion Paper on *Safe and Responsible AI in Australia*;¹¹
 - May 2024 submission to the Senate Select Committee on Adopting AI, in response to its inquiry into the opportunities and impacts of the uptake of AI technologies in Australia;¹² and
 - October 2024 submission to the Department of Industry, Science and Resources, in response to its Proposals Paper on *Introducing mandatory guardrails for AI in high-risk settings*.¹³

Relevant resources

19. As noted in the Consultation Paper,¹⁴ the development of the new ADM framework will be informed by existing reports and best practice guidelines about government implementation of ADM, including:
 - the Administrative Review Council’s (**ARC**) 2004 report on *Automated Assistance in Administrative Decision Making*;
 - the Office of the Australian Information Commissioner’s 2014 *Guidelines for data matching in Australian Government administration*; and
 - the Commonwealth Ombudsman’s 2024 *Automated Decision-making Better Practice Guide*.

We support this approach. To the extent that they remain relevant, these existing resources should be leveraged, wherever possible, to inform the new Commonwealth approach to ADM. The above-proposed audit of all current or proposed use of AI and automation in government services will provide a starting point for these standards and processes.

20. However, new and stronger standards are needed, along with an independent means of reviewing and evaluating whether existing practice meets the standards set. For example, the newly-constituted ARC should be asked to revise its 2004 report as a matter of priority.

¹⁰ Attorney-General’s Department, *Use of automated decision-making by government* ([Consultation Paper](#), November 2024) 11.

¹¹ Law Council of Australia, *Safe and Responsible AI in Australia* ([Submission](#), 17 August 2023) 24-28.

¹² Law Council of Australia, *Inquiry into the opportunities and impacts of artificial intelligence technologies in Australia* ([Submission](#), 20 May 2024).

¹³ Law Council of Australia, *Introducing mandatory guardrails for AI in high-risk settings: Proposals Paper* ([Submission](#), 9 October 2024).

¹⁴ Attorney-General’s Department, *Use of automated decision-making by government* ([Consultation Paper](#), November 2024) 6.

21. We also encourage the Department to have regard to the resources and reports that have been produced in other jurisdictions—both domestically and internationally—to the extent that they are directly related to the issues raised in the Consultation Paper.
22. We note, for example, the extensive work undertaken by the New South Wales (NSW) Ombudsman, in conjunction with the Australian Research Council Centre of Excellence on ADM and Society. This work includes a November 2021 report, *The new machinery of government: using machine technology in administrative decision-making (NSW New Machinery Report)*,¹⁵ prompted by concerns about the legality of Revenue NSW's system of garnishee automation. The NSW New Machinery 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.
23. A follow-up report, published in March 2024, titled *A map of automated decision-making in the NSW Public Sector (NSW ADM Mapping Report)*,¹⁶ 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:
 - identification of the functions performed by ADM;
 - analysis of the risk-management strategies employed by government agencies in respect of the use of ADM; and
 - an increased public awareness of ADM.
24. The NSW ADM Mapping Report's point-in-time overview of ADM use in the NSW public sector will not correspond precisely to the use of ADM by the Commonwealth. Nevertheless, the research is valuable in enhancing visibility of the ways in which ADM systems are being integrated into administrative decision-making in Australia, as well as highlighting options for increased transparency and risk management. Such work also provides useful context for evaluating policy approaches within the states and territories.
25. Similarly, we encourage the Department to look to overseas jurisdictions, such as the European Union (EU), to ensure that the development of Australia's legislative framework—once developed—is robust. We refer, in particular, to the research recently conducted by the European Law Institute, culminating in the *Guiding Principles for ADM in the EU* Innovation Paper, published in May 2022.¹⁷

Privacy reforms

26. Changes made in late 2024 to the *Privacy Act 1988* (Cth) have sought to respond to the privacy risks posed by ADM. From 10 December 2026,¹⁸ the *Privacy and Other Legislation Amendment Act 2024* (Cth) will require entities that are subject to the Australian Privacy Principles to expressly include, as part of their privacy policies, where personal information will be used by computer programs in circumstances

¹⁵ NSW Ombudsman, *The new machinery of government: using machine technology in administrative decision-making* ([Report](#), 29 November 2021).

¹⁶ 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).

¹⁷ European Law Institute, *Guiding Principles for Automated Decision-Making in the EU* ([Innovation Paper](#), May 2022).

¹⁸ *Privacy and Other Legislation Amendment Act 2024* (Cth) s 2.

where it 'could reasonably be expected to significantly affect the rights or interests of an individual'.¹⁹

27. These impending changes are consistent with Proposals 19.1 and 19.2 of the 2023 Privacy Act Review Report,²⁰ and they represent a positive development to enhance transparency about the use of automated decisions. However, on their own, they are unlikely to be adequate to ensure that individuals are sufficiently informed.
28. Moreover, the recent changes to the Privacy Act have stopped short of introducing a right for individuals to request meaningful information about how substantially automated decisions with 'legal or similarly significant effect are made, in line with Proposal 19.3 of the Privacy Act Review Report.²¹ It is unclear why this measure was not introduced in the first tranche of privacy reforms, given that the Government has formally agreed to this proposal.²²
29. In our October 2024 submission to the Senate Legal and Constitutional Affairs Legislation Committee in response to its inquiry into the Privacy and Other Legislation Amendment Bill 2024, we recommended that the Bill be amended to provide for this right.²³ It is regrettable that this recommendation was not adopted.
30. In respect to Proposal 19.3, the Consultation Paper advises that:²⁴

This proposal will be further considered as part of broader privacy reforms, and in the context of this project, to ensure consistency in approaches.
31. We are pleased that work is progressing in respect of implementing Proposal 19.3 of the Privacy Act Review. A right for individuals to request meaningful information about how substantially automated decisions with legal or similarly significant effect are made should be provided for in the next tranche of changes to the Privacy Act, as this will be critical to ensuring integrity and fostering public trust in government decision-making.
32. Without the introduction of this right, it is unclear how—in practice—individuals may understand how automated decisions are made through disclosure in a privacy policy alone, as this is likely to be a generic and broad statement.

¹⁹ Ibid sch 1, pt 15.

²⁰ Attorney-General's Department, *Privacy Act Review Report 2022* ([Online](#), February 2023) 12, 188-191.

²¹ Ibid 12, 192-193.

²² Commonwealth of Australia, *Government Response: Privacy Act Review Report* ([Online](#), September 2023) 11, 32.

²³ Law Council of Australia, *Privacy and Other Legislation Amendment Bill 2024* ([Submission](#), 22 October 2024) 28-32 [Recommendation 14].

²⁴ Attorney-General's Department, *Use of automated decision-making by government* ([Consultation Paper](#), November 2024) 11.

Responses to consultation questions

Question 1

How should the need for transparency about the use of ADM be balanced with the need to protect sensitive information about business processes and systems?

33. 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 NSW ADM Mapping Report, which noted as follows:²⁵

*... 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. [Emphasis added]*

34. Recommendation 17.1 of the Robodebt Royal Commission Report included the recommendation that, where ADM is implemented, business rules and algorithms should be made available, to enable independent expert scrutiny.²⁶ We strongly support this recommendation.
35. Transparency is critical for the responsible use of ADM by Australian organisations (both in the public and private sectors). Individuals should know when and how ADM is being used in any way that significantly affects:
- their human rights and legal interests;
 - their being informed of how and why they may be subjected to differential treatment; and
 - the reasonableness of an automated decision, having regard to the circumstances in which it is made, and the impact that this automated decision might reasonably be expected to have on affected humans and the environment.
36. Whilst acknowledging the need to balance transparency with the protection of sensitive information, we support a presumption in favour of disclosure. The system of democratic accountability demands a high standard of transparency, especially 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.

²⁵ 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) 109.

²⁶ Catherine Holmes AC SC, *Royal Commission into the Robodebt Scheme* ([Report](#), July 2023) xvi, 488 [Recommendation 17.1].

37. A potential approach could be to require particular transparency mechanisms and safeguards to be imposed, with exemptions to be applied where certain criteria are satisfied, such as if publication would genuinely affect national security, reveal trade secrets, or reveal commercially sensitive information.
38. An approach of this kind would mean that the starting point is transparency, and that the agency must be able to establish that the relevant exemption criteria have been met, in order for safeguards to be imposed. It may be necessary to establish processes whereby an expert panel (or similar body) reviews exemption challenges.

Question 2

What transparency rules would be appropriate to build into the framework?

39. Consistent with the administrative law principle of transparency, we recommend that the new framework should require that officials publish all arrangements for the use of ADM and any suitability assessment which underpins it.
40. We consider that a proactive approach to sharing information on how a decision to use algorithmic processes is made, the algorithm itself, and the business case behind the development and implementation of ADM processes, are critical to ensuring accountability of government, as well as scrutiny of the system.
41. Such an approach ensures competing interests are appropriately balanced between efficiency gains and the interests of the community, in particular those impacted by automated decisions. These considerations should be at the forefront of decision-making regarding the use and implementation of ADM processes.
42. It is important that technical information (to enable expert scrutiny) and plain language reporting (for laypersons) be routinely and transparently disclosed. We refer to—and endorse—Paul Miller’s commentary in the 2023 book, *Money, Power and AI: From Automated Banks to Automated States*, as follows:²⁷

*Agencies need to ensure appropriate transparency of their ADM tools, including by deciding what can and should be disclosed about their use to those whose interests may be affected. **An explanation of an automated decision might include information about the ADM tool’s objectives, data used, its accuracy or success rate, and a meaningful and intelligible explanation of how the technology works to an ordinary person ... explaining how an ADM tool works in a technical way, even if that explanation is fully comprehensive and accurate, will not necessarily satisfy the requirement to provide ‘reasons’ for its outputs. Reasons must be more than merely accurate—they should provide a meaningful and intelligible ‘explanation’ to the person who is to receive them. Generally, this means they should be in plain English, and provide information that would be intelligible to a person with no legal or technical training.** [Emphasis added]*

43. We have received feedback that technical information would most appropriately be disclosed by way of regular reporting to a central, independent, registry or oversight body, while plain language reporting must be readily accessible—for example,

²⁷ Paul Miller, ‘A New “Machinery of Government”? The Automation of Administrative Decision-Making’ in Z Bednarz and M Zalnieriute, *Money, Power and AI: From Automated Banks to Automated States* (Cambridge University Press, 2023, [Online](#)) 130.

published on an agency's website, rather than in legislative instruments or the Public Service Gazette.

44. 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. This includes for the purpose of administrative and/or judicial review of a relevant decision by a court, tribunal, or other body.²⁸
45. We consider that government agencies involved in the procurement of ADM systems should be directed to assess the appropriateness of any trade-secrecy or confidentiality claims. Of note, the United Kingdom (UK) Data Ethics Framework provides the following useful guidance to public servants:²⁹

How to ensure transparency of sensitive models

- *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.*
46. It will be important to ensure that these questions are addressed as part of the procurement process, prior to the Government entering into any commercial arrangements. There must also be clarity surrounding freedom of information (FOI) applications and transparency of the ADM process by government agencies.

Question 3

What pre-implementation safeguards should apply where ADM is intended to be used?

Suitability assessment

47. It is necessary to ensure that an ADM system is capable of reliably making, or assisting in making, lawful decisions. However, most legislation does not currently require the official to make any kind of assessment before arranging for the use of ADM to exercise a statutory function or power.
48. We recommend that legislation that authorises an official to make an arrangement for the use of ADM and AI require the official to perform an assessment of suitability of the proposed automated system to perform the statutory function or power in question. The essential purpose of a suitability assessment is to ensure that the

²⁸ See discussion of transparency in Paul Miller, 'A New "Machinery of Government"? The Automation of Administrative Decision-Making' in Z Bednarz and M Zalnieriute, *Money, Power and AI: From Automated Banks to Automated States* (Cambridge University Press, 2023, [Online](#)) 130-131.

²⁹ UK Government Digital Service, *Data Ethics Framework* ([Online](#), 2020) 33.

automated system is capable of exercising the official's statutory functions or powers lawfully.

49. The power to make the arrangement should be subject to the official being satisfied that, based on the suitability assessment, the automated system will produce lawful decisions. This includes compliance with legislative requirements and applicable common law principles that are not excluded by the Act, such as procedural fairness. The arranger should ensure, for example, that the system has the capacity to appraise and assess input provided by the subject of the decision (or to refer that material to a human decision-maker).
50. There are various ways in which the suitability assessment may be imposed, such as:³⁰
 - a **statutory checklist** that could take the form of a set of statutory criteria which the public official must consider before reaching the state of satisfaction that use of an automated system is appropriate;
 - a **human rights impact assessment**, to assess whether the proposed system:
 - complies with Australia's international human rights law obligations;
 - will involve automating any discretionary element of administrative decisions;
 - provides for appropriate review of decisions by human decision-makers; and
 - is authorised and governed by legislation;
 - an **algorithmic risk assessment** that assesses risk factors and mitigation strategies to produce an overall impact score, equivalent to the Algorithmic Impact Assessment required under the Canadian Directive on ADM.³¹

Algorithmic Impact Assessment

51. The Canadian Algorithmic Impact Assessment is a questionnaire designed to inform an assessment of the risk of the impact of an Automated Design System on the following affected interest areas:³²
 - the rights of individuals or communities;
 - the health or well-being of individuals or communities;
 - the economic interests of individuals, entities, or communities; and
 - the ongoing sustainability of an ecosystem.
52. The Algorithmic Impact Assessment assesses risk factors and mitigation strategies to produce an overall impact score. The risk factors include:
 - project related risks;
 - system capabilities;
 - transparency of the algorithm;
 - kind of decision which is being automated;
 - duration, reversibility and area impacted; and

³⁰ See Law Council of Australia, *Positioning Australia as a leader in digital economy regulation—Automated decision making and AI regulation* ([Submission](#), 3 June 2022) 23-30.

³¹ *Canadian Directive on Automated Decision-Making* ([Online](#), 2019) cl 2.1; Government of Canada, *Algorithmic Impact Assessment Tool* ([Web Page](#), 2024).

³² Government of Canada, *Algorithmic Impact Assessment Tool* ([Web Page](#), 2024).

- nature, provenance and security classification of data used to automate decision.
53. The mitigation factors include:
- consultation with experts (e.g. privacy and legal experts);
 - processes to ensure that data is representative and unbiased, as well as transparency measures related to those processes;
 - procedural fairness matters, such as procedures to audit the system and its decisions, as well as the recourse process; and
 - privacy safeguards.
54. The Algorithmic Impact Assessment ultimately produces an impact assessment level of the Automated Decision System on the affected interest areas—from little to no impact (with impacts which are ‘reversible and brief’) to very high impact (with impacts which are irreversible and are perpetual).
55. Critically, the impact assessment level attributed to an Automated Decision System will determine the Impact Level Requirements imposed to regulate the system. For example, the greater the impact assessment the more onerous should be the requirements relating to:
- peer review;
 - the obligation to give notice to affected person and the content of such notices, with higher impact systems requiring plain language notices as well as publicly available documentation about how the automated decision system works;
 - human involvement, with higher impact systems requiring human intervention points and a final decision made by a human;
 - explanation for a decision;
 - training; and
 - contingency planning.
56. For example, a discretionary decision is more likely to be classified as high impact, thus tightening the regulatory controls to ensure it produces transparent and explicable decisions. Such an approach allows agencies to form a view as to the benefits of expending costs to produce a complex system which meets those controls against the benefits of automation.
57. However, discretionary decisions are also important features of administrative decision-making. It is critical that decisions that genuinely require a weighing up on multiple considerations are not reduced to simplistic factors to better suit technological processes.
58. A key benefit of the Algorithmic Impact Assessment approach is consistency—each automated system is assessed in the same way by an independently-produced framework, which may ensure rigour, and safeguard against poor or erroneous executive decision-making. Further, if something akin to the Canadian Directive model is adapted, the graduated scale of regulation should mean that the administrative and regulatory impost on the official responsible for the automated system is commensurate to risk.
59. The Algorithmic Impact Assessment could be made by a legislative instrument in accordance with certain criteria. It may be subject to regular review to ensure it remains fit for purpose.

60. Should an equivalent assessment tool be adopted in Australia, consideration would need to be given to whether each assessment would be published and, if not, whether they would be disclosable in any challenge to an administrative decision that involved ADM. As a starting point, we suggest that all arrangements for the use of ADM—and any suitability assessment that underpins it—be required to be published.

Question 4

What system-level safeguards should be required to ensure that ADM operates appropriately?

61. The Consultation Paper outlines a series of possible system-level safeguards that would seek to ensure that the automation systems used in the framework are governed and operate appropriately, namely:
- audit and compliance mechanisms;
 - taking reasonable steps to ensure automated decisions are consistent with the objects of the relevant Act, meet administrative law standards, and are governed appropriately; and
 - the requirement to update the system throughout its lifecycle.³³
62. We support these safeguards, and specifically recommend that the regulatory framework require that all arrangements for the use of ADM be subject to ongoing governance requirements, including:
- monitoring their performance on a continual basis, including for developing bias and to ensure ongoing accuracy, with the results to be published; and
 - ongoing testing by a multidisciplinary team to ensure they remain fit for purpose.³⁴
63. On a systemic level, independent expert scrutiny of ADM processes that directly affect individual rights and freedoms is essential. It should not be left to journalists, academics, or other civil society actors to identify real and potential problems. Rather, oversight should be ‘in-built’ to the system.
64. AI and related emerging technologies are evolving extremely rapidly. The ADM framework, even if it is drafted on a principled (rather than descriptive) basis, should be assessed against current technology to ensure that the underlying objectives of the framework are achieved.
65. The Government should be required to ensure that independent expert review of systems involving ADM occur at regular intervals (more frequently than might be the norm for other audits), as well as at any point where the systems undergo significant change. In addition, ADM processes should be subject to regular random audits conducted by a human, to ensure any legal errors or potential for bias are identified.

³³ Attorney-General’s Department, *Use of automated decision-making by government* ([Consultation Paper](#), November 2024) 21-24.

³⁴ See Law Council of Australia, *Positioning Australia as a leader in digital economy regulation—Automated decision making and AI regulation* ([Submission](#), 3 June 2022) 30-31.

66. As emphasised in the NSW 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.³⁵ This is the approach taken in Canada, where decisions with a high impact level trigger the requirement for the publication of more detailed data, such as results from reviews/audits and descriptions of the training data.³⁶ Similarly, the transparency requirements of the *EU Artificial Intelligence Act 2024* incorporate more onerous requirements in the deployment of high-risk systems.³⁷
67. Consideration should also be given to the way in which the Cabinet is alerted to the use of ADM across government services. It could be that new policy proposals must include advice that addresses the legality of any ADM system.
68. The Law Council supports the establishment of an oversight body as proposed in Recommendation 17.2 of the Robodebt Royal Commission Report.³⁸ The Royal Commissioner recommended that the Government should consider establishing a central regulator, or expanding an existing body, with the power to monitor and audit ADM processes with regard to their technical aspects and their impact in respect of fairness, the avoidance of bias, and client usability.³⁹
69. Such a role could be part of an overarching body with responsibility for the supervision of AI more broadly, including ADM. A new regulatory body of this nature would require adequate, ongoing resourcing to be effective.

Question 5

What decision-level safeguards should there be for persons affected by decisions made using ADM?

70. The Consultation Paper explores options for safeguards to ensure that individual decisions are made fairly, lawfully, and transparently, and that errors can be corrected, including:
 - pathways for human referral;
 - enabling human decision-makers to substitute their own decision in place of computer-made decisions;
 - notifying persons affected by decisions involving ADM; and
 - that individuals subject to decisions made by an automated process should know or understand the reasons behind those decisions.⁴⁰
71. We support each of the above safeguards. Where decisions affecting individuals are permitted to be made through ADM processes, proper scrutiny by humans must be applied to ensure conclusions reached amount to 'decisions' for the purposes of the relevant legislation, and to encourage public confidence in Government agencies and their decisions. The circumstances surrounding the Robodebt

³⁵ 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).

³⁶ Public Law Project, *Securing meaningful transparency of public sector use of AI: Comparative approaches across five jurisdictions* ([Report](#), March 2024).

³⁷ *European Union Artificial Intelligence Act 2024*, art 71.

³⁸ Catherine Holmes AC SC, *Royal Commission into the Robodebt Scheme* ([Report](#), July 2023) xvi, 488 [Recommendation 17.2].

³⁹ *Ibid.*

⁴⁰ Attorney-General's Department, *Use of automated decision-making by government* ([Consultation Paper](#), November 2024) 24-29.

Scheme, and the decision in *Pintarich v Deputy Commissioner of Taxation* (2018) 262 FCR 41, identify a need for better regulation and oversight of automated decisions.

72. It will be especially critical that the framework incorporates in-built human referral and empowers human decision-makers to substitute their own decisions in place of computer-generated decisions. This would, ideally, take the form of a broad discretion to intervene and make the correct or preferable decision, and be accompanied by a procedural fairness process in cases where the substituted decision is unfavourable to the affected person.
73. We note concerns about the 'black box' issue of advanced AI using machine learning where the reasoning behind decisions cannot be traced or adequately explained. Decisions being made by opaque algorithms without explanation is 'analogous to evidence offered by an anonymous expert, whom one cannot cross-examine'.⁴¹
74. To address these concerns, the automated decision must be able to be reduced to a statement of reasons explicable by a human, for the purpose of enabling it to be reviewed by a tribunal or court, and the subject of the decision should have a right to request such reasons. This statement should explain how the decision was made, in addition to the information and reasoning used.
75. The statement of reasons should enable an affected citizen to interrogate the results and identify errors (rather than, for example, incomprehensible 'raw data' that would require expert knowledge to interpret).

Question 6

What post-decision safeguards should there be to allow a decision to be challenged after it has been made?

76. We agree that there should be a clear path for those affected by ADM to seek review—consistent with Recommendation 17.1 of the Robodebt Royal Commission Final Report⁴²—and, if appropriate, rectification of a decision in a timely manner.
77. We maintain the view that people affected by fully or partially automated decisions by Australian Government agencies should not be precluded from accessing administrative law review and accountability mechanisms, such as the Commonwealth Ombudsman, merits review, and the FOI scheme.⁴³ The costs associated with implementing accountability will ultimately result in better systems and processes with more obvious integrity. This may be a matter that the newly-instituted ARC is asked to examine, as part of its revised guidance on automated assistance in ADM.
78. The Consultation Paper queries the extent to whether internal and external merits review should be available, by right, in respect of all automated decisions.⁴⁴ This is not a matter that the Law Council has a settled view on, but we would likely be

⁴¹ Michael Brooks, Artificial Ignorance (2017) 238 (3146) *New Scientist*, 28–33; Frank A. Pasquale Glyn Cashwell, Four Futures of Legal Automation (2015) 63 *UCLA Law Review Discourse*, 26–48.

⁴² Catherine Holmes AC SC, *Royal Commission into the Robodebt Scheme* ([Report](#), July 2023) xvi, 488 [Recommendation 17.1].

⁴³ Law Council of Australia, *Safe and Responsible AI in Australia* ([Submission](#), 17 August 2023) 30.

⁴⁴ Attorney-General's Department, *Use of automated decision-making by government* ([Consultation Paper](#), November 2024) 29.

cautious about supporting a blanket general rule that any decision made by ADM must be reviewable by the Administrative Review Tribunal and by judicial review. Nonetheless, as a starting point, where a decision is ordinarily subject to merits review and/or judicial review, but is made using ADM, the use of ADM should not prevent or impede its review (noting that this may require deeming provisions to be made).

79. Where merits review is applicable, internal human review is preferred, and the subject of the decision must be informed of that review avenue. Additionally, 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; and
 - the overall socio-economic context in which the ADM is used.
80. We acknowledge that commentators have pointed out that ADM may, in fact, facilitate the review process through, for example, the existence of an 'audit trail' that clearly sets out each of the decision points involving discretion or judgement.⁴⁵
81. However, in the first instance, access to administrative law remedies requires a person to be aware that ADM has been used in a decision that affects them, and has the capacity (financial, technological or otherwise) to challenge that decision. Matters relating to notification are discussed further below, in response to Question 7.

Question 7

Should individuals be notified of the use of ADM? If so, should notification be required at a specific point in the decision-making process, or should flexibility be provided to agencies about the appropriate time to make a notification?

82. The Consultation Paper states that, as a general principle, individuals affected by a decision made using an ADM system should be notified about the role of the system in making specific decision.⁴⁶
83. We agree with this general principle and 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.

⁴⁵ Commonwealth Ombudsman, *Automated Decision-making Better Practice Guide* ([Online](#), 2019).

⁴⁶ Attorney-General's Department, *Use of automated decision-making by government* ([Consultation Paper](#), November 2024) 28.

84. It should not be incumbent upon the affected individual to apply—through FOI processes or otherwise—to the relevant agency for an explanation of how the ADM system was used to make the decision. This information should, instead, be proactively supplied by the applicable government department.
85. The notification should occur when the outcome of a decision is communicated (i.e., in the statement of reasons) and, if there is a procedural fairness process prior to the ultimate decision being made, then at that time as well. The notification rules should not be complex or legalistic—instead, they should be clear and concise.
86. In addition to proactive individual notification, we agree that departmental websites should contain information advising that ADM is used and explaining in plain language how the process works, consistent with Recommendation 17.1 of the Robodebt Royal Commission Final Report.⁴⁷
87. We acknowledge, however, that the increasing sophistication of ADM tools means that it may be difficult to communicate this information in a thorough—yet intelligible—way. Consideration should be given to streamlining the way that departments publish such information, as is occurring in the United Kingdom through the mandatory Algorithmic Transparency Recording Standard.⁴⁸
88. As a general observation, it is unrealistic to expect individuals subject to government decisions—regardless of their level of English literacy or education—to read and digest information about the operation of an ADM system, particularly if it is concealed within fine print.

Vulnerable cohorts

89. ADM tools are often used in decision-making that affects marginalised and vulnerable cohorts of society, including individuals who:
 - are low-income earners;
 - are elderly;
 - live with physical and/or cognitive disability;
 - may not have sufficient literacy or English language skills to understand the information presented; and/or
 - may experience barriers to accessing information, such as limited access to the internet or limited technological literacy, noting that 9.3 per cent of Australians were classified as ‘highly digitally excluded’ in 2023.⁴⁹
90. It may not, therefore, be appropriate for certain vulnerable cohorts to be referred to an online portal or webpage to receive information about the ADM process and their rights in relation to it. In such circumstances, bespoke approaches should be employed to assist these persons to access the relevant information.
91. The Government should consider upskilling public servants and supporting the provision of appropriately tailored human services to support individuals who may face compounded difficulties in accessing information about—and understanding—a decision-making process that engages ADM.

⁴⁷ Catherine Holmes AC SC, *Royal Commission into the Robodebt Scheme* ([Report](#), July 2023) xvi, 488 [Recommendation 17.1].

⁴⁸ United Kingdom Government, *Algorithmic Transparency Recording Standard Hub* ([Web Page](#), 2024).

⁴⁹ Australian Digital Inclusion Index, *Digital inclusion: The Australian Context in 2023* ([Web Page](#), 2024).

92. It is particularly important that there be a readily available human contact point for individuals to discuss time-sensitive decisions that have a significant impact on a person's security and wellbeing (e.g., decisions that impact housing or social security payments).

Legal assistance funding

93. As a final observation, there also remains a severe gap in legal assistance funding for civil matters, including in respect of administrative decision-making. This was a core recommendation of Dr Warren Mundy's Independent Review of the National Legal Assistance Partnership Final Report in March 2024.⁵⁰
94. It is highly relevant in this context that Victoria Legal Aid brought legal challenges to administrative decision-making that ultimately led to the Robodebt Scheme being dismantled.⁵¹ As stated in the Robodebt Royal Commission Final Report:⁵²

The litigation in Masterton and Amato, in both cases conducted by Victoria Legal Aid, played a crucial role in the demise of the Scheme. It succeeded in exposing the illegality of Robodebt where other possible forms of check on the Scheme—the AAT, the Commonwealth Ombudsman, the sound advice of some lawyers—did not or could not.

95. Whilst acknowledging that the National Access to Justice Partnership (commencing on 1 July 2025) represents a positive step forward in the resourcing of Australia's legal assistance sector, further funding is required to ensure that this safeguard is built into the system. This includes funding the upskilling of the legal assistance services on the use of ADM.

⁵⁰ Dr Warren Mundy, *Independent Review of the National Legal Assistance Partnership* ([Final Report](#), March 2024) [Recommendation 5].

⁵¹ Catherine Holmes AC SC, *Royal Commission into the Robodebt Scheme* ([Report](#), July 2023) 317.

⁵² *Ibid.*